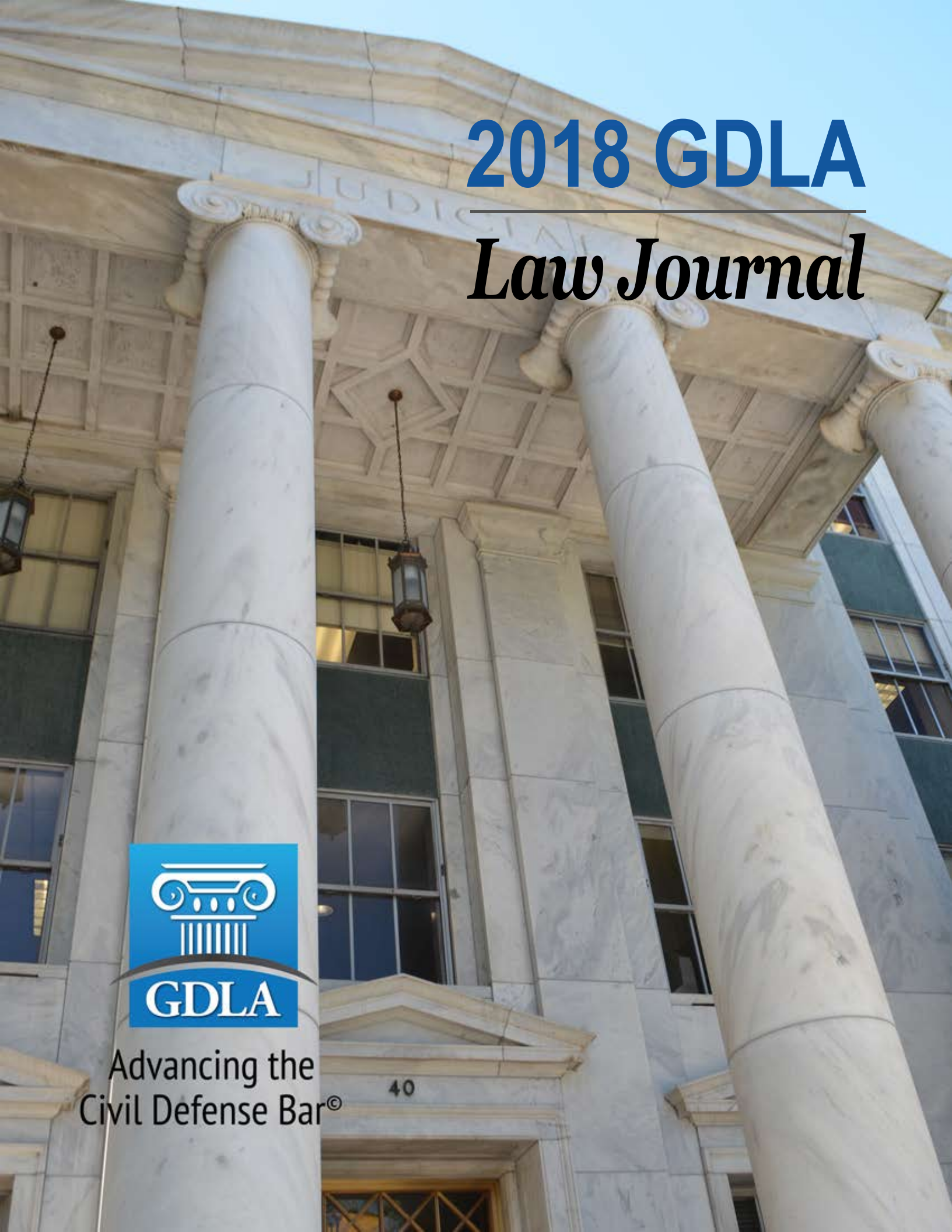

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PUBLIC NUISANCE: THE MONSTER IN THE CLOSET IS REAL AND IS ON THE LOOSE IN CALIFORNIA

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Public nuisance has been characterized as the "monster that would devour in one gulp the entire law of tort."[1] And commentators have long warned that the unchecked use of public nuisance law in the area of products would result in the erosion of tort law.[2] Until recently, it seemed that courts were keeping the "monster" safely locked away. However, in late 2017 the California Court of Appeal for the Sixth District ("Sixth District") upheld a bench decision applying the law of public nuisance to a consumer product.[3] In December 2017, the Sixth District summarily denied rehearing[4] and in February 2018, the California Supreme Court declined review.[5]

This decision is cause for concern for every CEO and General Counsel of any company that is currently selling or advertising, or has at any time in the past sold or advertised, consumer products in the state of California. Why? Because unchecked judicial activism in California has run roughshod over decades of established product liability doctrine, public nuisance law, and constitutional protections.

I. Background

In *People v. Atlantic Richfield*, No. 1-00-CV-788657, plaintiffs, who were 10 cities and counties in California, claimed that the defendants' sale and promotion of two lead pigments used in interior residential paints caused a public nuisance

that exists today. The sale and alleged promotion of the two pigments dated back to the late 1800s and ended by 1950, by when white lead pigments were largely removed from interior residential paints. Some of the defendants had removed the pigments from interior paints much earlier and some scarcely used the pigments for interior paints at all. The alleged nuisance consisted of subclinical harms at very low blood lead levels ("BLLs") (less than 10 µg/dl) from microscopic lead dust. It was undisputed that the pathway of alleged harm (household dust) was not recognized until the mid-1970s and the types of harm (subclinical harms from BLLs under 10 µg/dl) were not reported until after 2000.

II. Early Procedural History

In March 2000, Santa Clara County brought a class action suit against five companies (or their successors) who were alleged to have manufactured white lead carbonate or white lead sulfate pigments[6] for use in paints.[7] The case originally alleged claims of violation of the California Business and Professions Code, products liability, negligence, fraud, unjust enrichment, and indemnity.[8] In September 2000, Santa Clara County amended its complaint to add more plaintiff counties and a cause of action for nuisance.[9]

The nuisance claim originally alleged that the presence of paint containing white lead carbonate and white lead sulfate pigments in both publicly and *privately* owned properties constituted a public nuisance. Facing statute of limitation problems and the prospect of adverse evidence against the public entities who had sued, plaintiffs voluntarily removed public properties from the suit. Thus, only *privately* owned properties remained as the alleged public nuisance. The People claimed that the presence of those pigments was "an obstruction to the free use of property" and "interfere[d] with the

comfortable enjoyment of property."[10] The plaintiff counties brought their lawsuit despite the fact that California has in place a comprehensive legislative and regulatory scheme[11] and set of programs run by the Childhood Lead Poisoning Prevention Branch ("CLPPB") directed at the prevention of childhood lead poisoning.

The owners of the private properties in which the pigments (and thus the nuisance) were allegedly present were not parties to the lawsuit. Indeed, the plaintiff counties were not required to identify a single location that actually contained the pigments at issue.

In 2001, the trial court granted defendants' demurrer to the public nuisance cause of action.[12] Defendants then moved for summary judgment on the remaining claims. In 2003, the trial court granted summary judgment in favor of defendants finding that the statute of limitations barred all remaining claims.[13]

In 2006, the Sixth District, in *Santa Clara I*, reversed the dismissal of the representative public nuisance claim finding that a cause of action for public nuisance could be maintained in a representative capacity (*i.e.*, on behalf of "the People"). [14] *Santa Clara I* cautioned, however, that the People would have to prove both actual knowledge –

> liability is premised on defendants' promotion of lead paint for interior use with knowledge of the hazard that such use would create

– and a heightened level of wrongful conduct –

> [t]his conduct is distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product.[15]

It described the necessary level of culpability as akin to that found in *City of Modesto Redev. Agency v. Super. Ct.*, 119 Cal.App.4th 28 (Cal. Super. Ct. 2004), *i.e.*, "instructing the purchaser to use the product in a hazardous manner" in violation of an environmental statute.[16]

The number of public entities prosecuting the suit increased to ten, and the representative public nuisance was recast, in the Fourth Amended Complaint, as "a public welfare problem" that is "injurious to the health of the public so as to substantially and unreasonably interfere with the comfortable enjoyment of life and/or property."[17] In addition, plaintiffs withdrew their demand for a jury trial and moved to strike the jury demands of the defendants.[18] The trial court granted the motion, the court of appeal summarily denied writ relief, and the California Supreme Court denied review.[19]

III. The Bench Trial –The Monster Peeks Out of the Closet

In the summer of 2013, the case proceeded to a time-limited bench trial.[20] The People's case at trial was built around harm purportedly caused by very small amounts of lead dust from friction surfaces and deteriorating surfaces resulting in blood lead levels below 10 µg/dl. The People claimed that the five company defendants were responsible for the harms described above because they sold and promoted paints containing white lead pigments in the ten plaintiff cities and counties.

Their case, however, failed to show any evidence of the type described in *Santa Clara I*. There was no showing of actual knowledge at the time of sale of the alleged public nuisance hazards or harm. Nor was there a showing of promotion of the products at issue for interior residential use. In a discordant decision riddled with internal inconsistencies, the trial court held three of the five defendant companies liable for creating a public nuisance. The public nuisance was held to exist in the plaintiff counties wherever lead paint is found on windows and doors, on floors and walls at certain levels (as confirmed by certain testing methods) or in a deteriorated condition in private residences built before 1981. The trial judge entered a judgment of $1.15 billion to be paid into a fund to inspect

for and abate the purported public nuisance in private residences. The judgment encompassed more than a century's worth of housing.

A. No Showing of Knowledge

It was undisputed at trial that the idea that lead in house dust might be a hazard was a "new theory" that had not even been "hypothesi[zed]" until 1974.[21] Before the late 1970s, "no evidence to support th[e] idea" existed.[22] Nor was it disputed that medical science did not begin to contemplate harms at blood lead levels below 10 µg/dl until after 2000.[23] Indeed, the CDC's "level of concern" for blood lead measurements was 60 µg/dl until 1975 when it dropped to 30 µg/dl.[24] In 1985, CDC lowered the level of concern to 25 µg/dl where it remained until 1991 when it dropped to 10 µg/dl.[25] It remained at 10 µg/dl until 2012 when CDC implemented a "reference value" approach.[26] And plaintiffs' expert testified that defendants knew nothing more than what was published in the contemporaneous medical literature.[27] Thus, not only was the harm unknown in the decades when defendants were alleged to have sold and promoted the products, but it was unknowable.

B. No Showing of Promotion

As with knowledge, there was no showing for several of the defendants, including some who were held liable, that they promoted the lead pigments at issue for interior residential use. For example, one defendant, The Sherwin-Williams Company had only used the pigments at issue in a handful of interior paint formulas (principally for a couple colors of floor paint between 1910 and 1913).[28] There were no advertisements for that product. Instead, the People presented two items as evidence of Sherwin-Williams' wrongful conduct. First, they identified a single brand advertisement promoting a line of paints. Second, they identified small contributions by Sherwin-

Williams to a trade association that ran a "better paint" promotion campaign. Plaintiffs' own historian expert witness admitted that he "can't tell" whether any of the pigments at issue are present in any of the ten cities or counties as a result of the advertising.[29]

C. An Ill-founded Judgment With Expansive Liability Beyond the Products at Issue

In rendering its judgment, the court found defendants jointly and severally liable despite voluminous evidence supporting apportionment. The court also never heard evidence of harm at any particular place, nor did it determine which homes even contain defendants' products, let alone how much was present or its condition. Rather it ordered defendants to go find the homes that contain *any interior lead paint* – not just paint containing the pigments that were at issue in the lawsuit—and abate *any lead paint* found on a friction surface or in a deteriorated condition.[30] Thus, the court's judgment required three defendants to abate not just the white lead pigments that they manufactured, but all of the lead paint manufactured by other companies over the course of 100 years or more. And while the defendants have the opportunity under the court's judgment to go into a specific house and prove that the lead pigments in paint in the house are not theirs, this completely flips the burden of proof.

The judgment also inexplicably requires abatement of housing components other than paint, such as roofs, that were not part of the lawsuit in any way. And it looks to dust lead levels to determine certain components of remediation. However, at least some, if not a significant portion, of the lead in dust comes from resuspension of lead in soil that contains decades of lead deposits from leaded gasoline and industrial emissions. Thus, defendants are ordered to abate products that were not even part of the

lawsuit and products that they did not manufacture.

Additionally, the court brushed aside the comprehensive scheme of federal, state, and local laws, regulations, and programs that exists in California to prevent childhood lead exposure.[31] In the trial judge's opinion, the existing regulatory framework lacks adequate resources to prevent all childhood lead exposure, so he then expanded current programs and resources with a judicially crafted remedy, despite conceding that the Legislative programs have successfully reduced children's BLLs:

> "The Court is not persuaded that since the various lead control programs have been successes no further efforts are appropriate. . . . the numbers have gone down; no one can dispute that. What is at issue is whether we should close the door on this issue and do no more than what we are doing now."[32]

Perhaps, most egregiously, the trial judge entered its order, all the while acknowledging that the defendants did not have knowledge of the alleged harms found today at the time they sold and advertised their products. In a section titled "Hindsight," the court stated:

> The related issue is whether the Defendants can be *held retroactively liable* when the *state of knowledge was admittedly in its nascent stage*. The Court takes judicial notice of the fact that drugs, facilities, foods, and products of all kinds that were at one time viewed as harmless are later shown to be anything but. . . . All this says is medicine has advanced; *shouldn't we take advantage of this more contemporary knowledge to protect thousands of lives*?[33]

The three defendants found liable by the perfect 20/20 hindsight of the trial judge appealed.

IV. The Sixth District Court of Appeal Ruling ("Santa Clara II") --The Monster On the Loose

On appeal, the Sixth Appellate District upheld the trial judge's decision declaring all deteriorated interior lead paint, all interior lead paint on doors and windows, and lead paint or dust on floors and windows (if tested at certain levels far below EPA requirements) in private homes to be an

indivisible public nuisance.[34] It limited the trial court's ruling, however, to houses constructed prior to 1951, rather than all houses constructed prior to 1981.[35]

Santa Clara II corrected none of inconsistencies contained within the trial judge's ruling, and added more of its own. For example, *Santa Clara II* perpetuated the trial judge's irreconcilable findings of disparate liability based on the trade association activity. Specifically, the trial judge found, and *Santa Clara II* affirmed, that one defendant ("Defendant A") was not liable for creation of the public nuisance, but defendant the Sherwin-Williams Company was. *Santa Clara II* identified two facts supporting Sherwin-Williams' liability for advertising: (1) the single ad from 1904 run in Los Angeles and San Diego and (2) contributions to the Forest Products Better Paint advertising campaign run by trade group the Lead Industries Association ("LIA"). It found that the People had failed to prove promotion on the part of Defendant A. However, Defendant A was far more involved with LIA and its advertising campaigns than was Sherwin-Williams.

For example, Defendant A was a member of LIA from 1928 until 1971.[36] The Sherwin-Williams Company was a member for a much shorter time -- 1928 to 1947.

Defendant A contributed to two of LIA's advertising campaigns --the Forest Products Better Paint campaign and the White Lead Promotion program. Sherwin-Williams never contributed to the White Lead Promotion program. Defendant A participated on the Advisory Committee of the White Lead Promotion program; Sherwin-Williams did not.[37] Defendant A contributed to the Forest Products Better Paint campaign during the entirety of its existence (1934-1941). Sherwin-Williams contributed from 1937-1941 only.[38] Moreover, during the time that Sherwin-

Williams contributed to the Forest Products Better Paint campaign, it did not even make any interior residential paints with the white lead pigments at issue.

On these facts, the trial court found that Defendant A's more substantial contributions to and participation in the campaigns did not provide a basis for liability: "The People's own experts were unable to make the case that [Defendant A] promoted lead paint in the jurisdictions."[39] That finding by the trial court should have precluded the contradictory finding that contributions in a lesser amount over a lesser period by Sherwin-Williams constituted substantial evidence of promotion.

Similarly, *Santa Clara II* held that brand promotion of paint for interior use without explicit suggestion that "lead paint be used for interiors" was insufficient to support a finding of liability:[40]

> "Here the alleged basis for defendants' liability for the public nuisance created by lead paint is their *affirmative promotion of lead paint for interior use . . . .*"[41]

This was the basis for limiting the judgment to pre-1951 houses. However, that precise evidence – promotion of a line of paints under the company brand that did not contain any explicit suggestion that lead paint be used for interiors – was used to hold Sherwin-Williams liable for pre-1950s houses.

The *Santa Clara II* court identified as the substantial evidence supporting the liability of Sherwin-Williams a single advertisement that was run once in San Diego and once in Los Angeles; both in 1904.

The advertisement, reproduced above, promoted a line of paints with its brand name for "painting buildings inside and out." The paint line contained exterior paints and interior paints, and plaintiffs stipulated that the labels on the paint cans indicated which paints were for which purpose.[42] *None* of the interior paints in the line contained the lead pigments that purportedly caused the nuisance. Nor does the advertisement instruct consumers to use lead paints on interiors. In fact, the ad does not mention the word lead at all. Why such promotion was not evidence sufficient to support liability after 1950, but constituted substantial evidence to support liability before 1950 is a mystery.

Another irreconcilable incongruity in the opinion concerns the Sixth District's delineation of how long a promotion can be said to be influencing the use of the product. The Sixth District stated with respect to the post-1950 time frame, "[w]e can find no evidence in the record that supports an inference that the promotions of defendants prior to 1951 continued to cause the use of lead paint on residential interiors decades later."[43] It went on to say "we reject plaintiff's claim that it is a reasonable inference that the impact of those promotions may be assumed to have continued for the next 30 years." Yet, that is precisely what the court did to hold Sherwin-Williams liable prior to 1950.

Despite scouring decades of newspapers and thousands of advertisements, the People could not find and did not present a single ad

recommending the use of interior lead paint.[44] Had the *Santa Clara II* court applied the same standard to Sherwin-Williams, which had only the single brand ad in 1904, Sherwin-Williams would not have been liable for the vast majority of houses included within the nuisance. Indeed, it is inexplicable on what basis Sherwin-Williams is being held liable in the eight plaintiff jurisdictions where *no* advertising by it was identified at *any* time.

These examples show the dangers of result-driven judicial activism. Such activist rulings not only create irregular legal standards, but also inconsistent application of the selected standard. The result is dangerous precedent without evident boundaries.

V. The Status of Public Nuisance Law in California

Until the Sixth District's recent opinion in *Santa Clara II*, a public nuisance in California had to rise to the level of "offenses against, or interferences with, the exercise of rights common to the public."[45] In fact, the author is unaware of any precedent—from any state—supporting application of public nuisance law to ordinary promotion of products for lawful uses or to separate uses of a product in different private locations, at different times, by different people without evidence of harm to any.

In addition, the power to define what is and is not a public nuisance had been, as it should be, reserved to the legislature.[46] Courts did not have the authority to declare programs instituted by the Legislature, such as California's Childhood Lead Poisoning Prevention Program ("CLPPP"), or their funding inadequate.[47] Where the Legislature has decided the amount and method of funding, and has declared that funding to be exclusive and sufficient,[48] the courts cannot not create and fund their own supplemental and conflicting programs because they decide that more should be

done.[49] However, with the California Supreme Court declining review of *Santa Clara II*, there is now conflict in the California appellate courts on this issue as well.

A. The First District

The First District follows traditional public nuisance law and only allows a public nuisance claim for criminal misconduct that is distinct from product manufacture and promotion. In *City of Modesto Redev. Agency v. Super. Ct.*, 119 Cal.App.4th 28 (Cal. Super. Ct. 2004), the court allowed a public nuisance action against manufacturers of drying cleaning solvents who instructed dry cleaners to dump those solvents into the sewer in violation of the Porter-Cologne Water Quality Control Act. That instruction dealt with product disposal, not liability for a product defect, product advertising or failure to warn, and it told dry cleaners to commit a criminal violation. The result was contamination of public water resources, a public nuisance by statutory definition.[50] Causation in fact and legal causation were direct and unequivocal, and the existing water code provided undisputed knowledge of the hazard.

Notably, the First District in *Modesto* refused to apply public nuisance law to "manufacturing or selling solvents to dry cleaners, with knowledge of the hazards of those substances, without alerting the dry cleaners to proper methods of disposal."[51] It reasoned, "any failure to warn was not an activity connected with the disposal of solvents."[52] Therefore, that conduct "does not fall within the context of nuisance, but is better analyzed through the law of negligence or products liability, which have well-developed precedents to determine liability for failure to warn."[53] As in *City of San Diego*, *infra*, the court focused on the nature of the alleged conduct, not the nature of the alleged remedy, to determine whether

to apply product liability or public nuisance law.

B. The Second District

In *City of San Diego*, 30 Cal.App.4th 575, the Second District refused to allow the city to use a public nuisance theory to recover for property damage arising from deterioration of asbestos products.[54] In that case, the City alleged that the deterioration of asbestos-containing building materials in city-owned buildings created a continuing public nuisance.[55] The City argued, just as plaintiffs did in *Santa Clara I* and *II*, that the statutory definition of nuisance is broad, encompassing "[a]nything which is injurious to health, . . . or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."[56]

The Second District in *City of San Diego* concluded that product liability law, not public nuisance, governed the manufacture, sale, and promotion of products. It ruled that the city's claim was "a products liability action in the guise of a nuisance action."[57] It cited myriad cases from other jurisdictions that likewise have rejected the use of public nuisance to prosecute product liability claims for the reason that allowing such public nuisance claims "would convert almost every product liability action into a nuisance claim."[58]

C. The Sixth District

As of 2006, the Sixth District was still at least partially in line with its sister Districts. Its decision in *Santa Clara I* required actual knowledge of the harm and required plaintiffs to prove wrongful conduct that is "distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product."[59]

The Sixth District's recent decision in *Santa Clara II*, however, flies in the face of the holdings in *Santa Clara I*, *Modesto*, and *City of San Diego* and puts the Sixth

District directly at odds with other California Courts of Appeal and the rest of the country. The Court of Appeal lowered the bar for public nuisance liability in conflict with *Modesto* and *City of San Diego*, which treat claims concerning the manufacture and sale of products as product liability claims. Instead, the Sixth District allow public nuisance law to supplant product liability rules. As a result, there are no longer uniform standards for whether and, if so, when public nuisance can substitute for product liability rules governing the manufacture, sale, or promotion of lawful products in California.

Santa Clara II also conflicts with the First District's decision in *Modesto* not to apply a public nuisance theory against those who sold products with known hazards. It sows confusion by holding a defendant liable though it did not know *at the time of promotion* the "particular risk" identified as the public nuisance—in direct contravention of *Santa Clara I's* actual knowledge requirement. *Santa Clara II* attempts to circumvent the actual knowledge requirement by finding that defendants "must have" known some harm would result from their products.[60] This is a far cry from requiring that defendants have "knowledge of the hazard that such use would create."

The trial court—in its own words—held defendants "retroactively liable" based on "nascent" knowledge.[61] The liability was retroactive because, even the People acknowledged, "[i]t was only in 1998 that scientific studies demonstrated . . . that even very low levels of exposure to lead paint could cause serious damage."[62]

By not requiring that a defendant know *at the time of promotion* of the potential public nuisance harm for which it is held liable (in this case over a century later), the court's opinion obliterates any culpability requirement and unreasonably subjects product manufacturers to liability

using 20/20 hindsight of changing scientific and regulatory norms.

Santa Clara II further muddies the waters of nuisance law by permitting product-based nuisance claims in an area already comprehensively addressed by the Legislature, thus trespassing into the Legislature's realm.[63] Instead of enforcing the public policy as already set forth by the Legislature and rejecting the trial court's improper declaration of nuisance and improper remedy, *Santa Clara II* sanctioned the trial court's decision that set new, dangerous, and conflicting public policy.[64]

The trial judge's and Sixth District's decisions not only break with every other appellate court nationwide to have considered whether the application of public nuisance law to lead paint in private homes is appropriate, but also all precedent rejecting public nuisance liability for the manufacture, promotion, and sale of products.[65]

VI. The Resulting Problems

A. Adverse Implications of Supplanting Product Liability Law with Nuisance

In contrast to the finely tuned product liability rules of law that have been crafted over decades, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'."[66] Public nuisance has been described, *inter alia*, as "lawless,"[67] "a wilderness of law,"[68] a "mongrel" tort "intractable to definition,"[69] and a "legal garbage can."[70]

The Sixth District's misapplication of *Santa Clara I* eradicates the line between public nuisance and products liability, and only serves to confuse further the legal landscape and jurisprudence of nuisance and the roles of the judiciary and legislature.

In failure-to-warn cases, the California Supreme Court has held that a plaintiff must prove that a risk was known or knowable "in light of the generally

recognized and prevailing best scientific and medical knowledge available at the time."[71] *Santa Clara I* held that the People would have to prove "affirmative promotion" of interior lead paint with "knowledge of the hazard that such use would create."[72] This was in line with its proclamation that to be liable for public nuisance a defendant would have to have engaged in conduct "distinct from and far more egregious than simply producing a defective product or failing to warn."[73]

Instead, however, the trial judge and *Santa Clara II* court ignored the clearly stated standards of *Santa Clara I*:

- They permitted a cause of action that requires no showing of actual, contemporaneous knowledge, while *Santa Clara I* required "knowledge of the hazard that such use would create."
- *Santa Clara I* held "liability is premised on defendants' promotion of lead paint for interior use," while they found liability premised on general brand advertising and contributions to a general trade association "better paint" campaign.
- *Santa Clara I* required conduct "distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product." Yet they permitted liability with no showing of culpability or causation. For example, plaintiffs provided no evidence that Sherwin-Williams' white lead pigment is actually present in their jurisdictions, let alone where it is, how much there is, or in what condition, and their expert could not say that any promotion caused any Sherwin-Williams white lead paint to be present. *See n.*26.

Beyond the evident conflicts with *Santa Clara I*, the decision is dangerous

because (1) it completely ignores substantial evidence from which a judgment could be apportioned, instead imposing joint and several liability; (2) it ignores the boundaries between the judiciary and the legislature; and (3) it infringes upon other constitutional rights that are beyond the scope of this article. [74]

As a result of ignoring apportionment evidence, the decision imposes severely disproportionate liability of the type eschewed by the United States Supreme Court and the California Supreme Court.[75] For example, Sherwin-Williams demonstrated that it manufactured almost no interior residential products containing the lead pigments at issue, a complete lack of promotion in eight of the 10 plaintiff jurisdictions, and a single advertisement in one year (1904) in the other two.[76] Yet it was saddled with joint and several liability for a $1.15 billion dollar judgment by the trial judge.

Next, by imposing a judicially crafted and mandated public health program that ignores existing legislative programs and funding, it sets a dangerous precedent. The trial judge's decision and *Santa Clara II* make the legislature superfluous any time a judge disagrees with the scope, priorities, or funding decisions of the legislators who the people actually elected to determine such matters. The decisions are the quintessential embodiment of the separation of powers concerns expressed by legal scholars.[77]

James A. Henderson, co-reporter of the American Law Institute's revision of the products liability portions of the Restatement of the Law of Torts from 1992-1998,[78] warned that aggregative torts including public nuisance, dispense with important delineations between the judiciary and the legislature:

> Instead, the lawlessness of aggregative torts inheres in the remarkable degree to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards

> for determining liability and measuring damages. In effect, these new torts empower judges and triers of fact to exercise discretionary regulatory power at the macro-economic level of such a magnitude that even the most ambitious administrative agencies could never hope to possess.

The end result, as recognized by commentators, is a virtually standard-less public nuisance cause of action that is far easier to meet than any product liability cause of action:

> Public nuisance is attractive as a grab bag last course of action because its focus is on current injury, making it more viable than a product liability claim.[79]

And this expansive "standard" is coupled with remedies that exponentially enlarge traditional tort remedies.

Using this unprincipled and drastically lowered standard, in the Sixth Appellate District, plaintiffs arguably can bring a cause of action, and liability apparently can be imposed, with:

- No proof of actual presence of any of the defendants' products.
- No proof of actual knowledge on the part of defendants. Rather, a *current* judicial desire to remedy a perceived problem based on the *current* state of knowledge suffices to impose liability for advertising a century earlier.
- No evidence of promotion of the products at issue. (Recall the court held one defendant liable for generic promotions in two plaintiff jurisdictions in 1904 only. There was no company advertising in eight of the 10 plaintiff jurisdictions and no company advertising in any year except 1904).
- No evidence of affirmative instruction for a then-unlawful disposal or use within the advertising.

The court has opened the door for every product seller to be subject to public nuisance liability if its product can, decades

later, be claimed to have caused injury. In such actions, manufacturers do not have access to important and well-established product liability defenses such as statutes of limitations and repose, useful life, and change in condition. Manufacturers become insurers of their products in perpetuity, however misused or ill maintained they may be.

Moreover, any judgment will be made without defendants' access to a jury.[80]

B. The Slippery Slope

The potential application of the trial judge's and Sixth District's ill-defined public nuisance law to varied industries and products is not the stuff of childhood fairy-tales or idle fears. California cities and counties have already begun to use the trial judge's blueprint to sue oil companies for global warming and drug manufacturers for production, sale, and advertisement of medications.[81] Indeed, in the few weeks after Sixth District's decision, plaintiff lawyers filed multiple product-based public nuisance lawsuits in California counties.[82] It does not take an overly creative imagination to envision suits against myriad other industries as well.

Plaintiff attorneys and environmental groups predict, "[w]e are at the dawn of what is a massive wave of litigation" resulting from lead paint litigation.[83] Public nuisance lawsuits have been identified as "the wave of the future."[84] Legal scholars recognize that a public nuisance theory allowing plaintiffs to focus on harm occurring today, from products manufactured long in the past, opens the door to public nuisance suits for "all sorts of products."[85]

How might plaintiff lawyers use this new, expansive, public nuisance cause of action?

- Under the trial judge's and *Santa Clara II's* application of the law, plaintiffs' attorneys may try to claim

that auto manufacturers who affirmatively promote cars, which account for tens of thousands of deaths yearly and hundreds of millions of dollars in government emergency services and health care, are creating a public nuisance.

- The manufacturers of asbestos, who were targeted unsuccessfully in the Court of Appeals for the Second District, face the prospect of renewed scrutiny in the Sixth District as their products were undoubtedly used in private housing components at some point in time since the 1800s.
- Manufacturers of fast food, sugary drinks, candy, gum, and other "junk" foods that contribute to obesity and dental problems could be targeted for causing increased healthcare and dental costs, as could manufacturers of fatty foods that may contribute to heart disease.
- Perhaps use of cell phones will eventually be linked to an adverse health effect in the future or to the costs of distracted driving (there are numerous cell phone advertisements touting low cost data plans and unlimited texting).

New product risks are continually coming to light based on emerging science with respect to products once thought to be safe. In the Sixth District, if a single judge hearing such a case wonders whether society as a whole ought be doing "more than what we are doing now" or thinks that it ought to "take advantage of this more contemporary [medical] knowledge to protect thousands of lives," your clients may find themselves on the wrong side of an expensive and expansive abatement judgment.

VII. Conclusion

Consumer product manufacturers of any product that has the potential to cause unintended harm years or decades into the

future should be concerned with the recent ruling in *Santa Clara II*. While an aberration, this decision is now California law, at least in the Sixth District. Companies and their counsel should be prepared for, and think through strategies to combat, what will be the inevitable attempts of the plaintiffs' bar to further expand public nuisance law into the realm of product liability.

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* This publication should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and are not intended to create an attorney-client relationship. The views set forth herein are the personal views of the author and do not necessarily reflect those of Jones Day.

[1] City of San Diego v. U.S. Gypsum Co., 30 Cal. App.4th 575, 586 (Cal. Ct. App. 1994).

[2] Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003); Richard O. Faulk and John S. Gray, *Alchemy In the Courtroom? The Transmutation of Public Nuisance*, MICH. ST. L. REV. 941 (2007); James A. Henderson Jr., *The Lawlessness of Aggregative Torts*, HOFSTRA L. REV. 34: Iss. 2, Article 2 (2005).

[3] People v. ConAgra Grocery Products Co., No. H040880, Decision (Cal. Ct. App. Nov. 14, 2017).

[4] People v. ConAgra Grocery Products Co., No. H040880, Order (Cal. Ct. App. Dec. 6, 2017).

[5] People v. ConAgra Grocery Products Co., No. S246102, Order (Cal. Feb. 14, 2018).

[6] Many other lead-containing pigments were used in residential paints dating back to the 1800s including lead chromates, leaded zinc oxide, molybdate orange, and lead oxide. None of these pigments, or their historical manufacturers, were included in the lawsuit.

[7] People v. Atlantic Richfield Co., No. 1-00-CV-788657, 4th Am. Compl. at 5 (Cal. Super Ct. Mar. 16, 2011); Responses to DuPont's Special Interrogatories Set One, dated July 3, 2012, at 8:16-20 7 (No. 13) (Aug. 15, 2012), ECF No. 2051.

[8] *Id.*

[9] People v. Atlantic Richfield Co., No. 1-00-CV-788657, 1st Am. Compl. (Cal. Super Ct. Sept. 1, 2000).

[10] *Id. at* 48.

[11] *See, e.g.*, Calif. Health & Safety Code §§17920, 17980-17997, 10526; Cal. Code Regs. Tit 17, §35022; Civil Code §§1941-1941.1.

[12] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Order (Cal. Super Ct. May 31, 2001).

[13] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Order (Cal. Super Ct. Aug. 27, 2003).

[14] Cty. of Santa Clara v. Atlantic Richfield Co., 137 Cal. App.4th 292, 309 (Cal. Ct. App. 2006) ("*Santa Clara I*").

[15] *Id.*

[16] *Id.*

[17] People v. Atlantic Richfield Co., No. 1-00-CV-788657, 4th Am. Compl. at 2, 19 (Cal. Super Ct. Mar. 16, 2011).

[18] People v. Atlantic Richfield Co., No. 1-00-CV-788657, People's Notice of Mot. and Mot. to Strike the Jury Demands and Have a Trial By The Court (Cal. Super. Ct. Dec. 2, 2011).

[19] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Order After Hearing at 12-16 (Cal. Super. Ct. Feb. 6, 2012); Atlantic Richfield Co. v. Superior Ct. of Santa Clara Cty., No. H038014, Order (Cal. Ct. App. June 22, 2012); Atlantic Richfield Co. v. Superior Ct. of Santa Clara Cty., No. S203735, Order (Cal. Aug. 8, 2012).

[20] The trial judge imposed severe time restrictions, giving each side just 40 hours in which to present their respective cases. This left each defendant with just eight hours to put on a defense to a case that resulted in a $1.15 billion judgment by the trial court (later reduced by the Sixth District). The trial judge also permitted re-direct, but no re-cross. Thus, over repeated objection by defendants, the People routinely saved their most important points for re-direct and defendants were not permitted to cross-examine witness on the new testimony.

[21] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 6267-69 (Cal. Super. Ct. July 17, 2013) (testimony of defense expert Dr. Peter English).

[22] James W. Sayre et al., *House and Hand Dust As a Potential Source of Childhood Lead Exposure*, AM. J. DISEASE OF CHILDREN (Feb. 1974).

[23] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 3962-63 (Cal. Super. Ct. July 17,

2013) (testimony of the People's expert Dr. Bruce Lanphear).

[24] CDC, *Preventing Lead Poisoning in Young Children*, p.8 (1991)

[25] *Id.*

[26] https://www.cdc.gov/nceh/lead/acclpp/lead_levels_in_children_fact_sheet.pdf

[27] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 5386 (Cal. Super Ct. July 17, 2013) (testimony of the People's expert Dr. Gerald Markowitz).

[28] Plaintiffs stipulated that almost none of Sherwin-Williams paints meant for interior residential use contained the white lead pigments issue. *People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Stipulation Regarding the Admissibility of the Contents of Certain Docs. In Lieu of Exs. And to Certain Facts at Stips. 28-29, 48, 53-54, 57-58, 72-73, 84-85 (Cal. Super Ct. July 1, 2013); Trial Ex. 1889.

[29] Plaintiffs' expert historian, Dr. Rosner, conceded that "we can't really tell" whether Sherwin-Williams had any effect on the presence of white lead in California. *See People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Dep. Tr. at 740:5-22 (Cal. Super Ct. Dec. 17, 2012).

[30] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 3 (Cal. Super Ct. Mar. 26, 2014).

[31] *See, e.g.*, Health & Safety Code §§ 17980, 105256; 23 Cal. Gov't Code §§ 25845, 38771; Cal. Civ. Code §§ 1941-1941.1.

[32] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 97 (Cal. Super. Ct. Mar. 26, 2014) (emphasis added).

[33] *Id.* at 96.

[34] People v. ConAgra Grocery Products Co., No. H040880, Opinion (Cal. Ct. App. Nov. 14, 2017) ("*Santa Clara II*").

[35] *Id.* at 2, 53-54.

[36] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 4160:15-17 (Cal. Super Ct. July 22, 2013) (testimony of the People's expert Dr. David Rosner).

[37] *Id.* at 4159:2-4, 14-20, 4169:13-15.

[38] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Stipulation Regarding the Admissibility of the Contents of Certain Docs. In Lieu of Exs. And to Certain Facts at Stip. 214 (Cal. Super Ct. July 1, 2013).

[39] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 22, 111 (Cal. Super. Ct. Mar. 26, 2014); *see also* People v. Atlantic Richfield Co., No. 1-00-CV-788657, Trial Tr. at 5287 (Cal. Super. Ct. Aug. 5, 2013) (testimony of the People's expert Dr. Gerald Markowitz).

[40] *Santa Clara II* at 53-54.

[41] *Id.* at 35.

[42] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Stipulation Regarding the Admissibility of the Contents of Certain Docs. In Lieu of Exs. And to Certain Facts at Stip. 263 (Cal. Super Ct. July 1, 2013).

[43] *Santa Clara II* at 55.

[44] *Id.* at 37-38.

[45] People ex rel. Gallo v. Acuna, 929 P.2d 596, 603 (Cal. 1997).

[46] *Id.* at 1107; Friends of H St. v. City of Sacramento, 20 Cal. App. 4th 152, 165 (1993) (issue was a "legislative function beyond our power to control"); Cty. of Butte v. Super. Ct., 176 Cal. App. 3d 693, 699 (1985) ("The budgetary process ... is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available."); Korens v. R. W Zukin Corp., 212 Cal.App.3d 1054, 1059 (1989) ("We decline the invitation to do that which the Legislature has left undone.").

[47] *See* People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 94, 111 (Cal. Super. Ct. Mar. 26, 2014) ("Existing programs at all government levels lack the resources to effectively deal with the problem."); Cal. Sch. Bds. Ass'n v. State, 192 Cal.App.4th 770, 798-799 (Cal. Ct. App. 2011); Cty. of Butte, 176 Cal. App. 3d at 699.

[48] Health & Safety Code § 105310 subd. (f).

[49] *See* Cal. Sch. Bds. Ass'n, 192 Cal. App. 4th at 797; Cty. of Los Angeles v. Comm'n of State Mandates, 32 Cal.App.4th 805, 820 (Cal. Ct. App. 1995).

[50] *Id.* at 33, 35.

[51] *Id.* at 42.

[52] *Id.*

[53] *Id*.

[54] City of San Diego, 30 Cal. App. 4th at 585-87.

[55] *Id*. at 584.

[56] *Id*.

[57] *Id*, at 587.

[58] *Id.* at 586 (quoting *Johnson Cty., Tenn. v. U.S. Gypsum*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984) (*partially rev'd on other grounds by Johnson Cty., Tenn. v. U.S. Gypsum*, 664 F.Supp. 1127 (E.D. Tenn. 1985)).

[59] *Santa Clara I*, at 309.

[60] *Santa Clara II*, at 27.

[61] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Am. Statement of Decision at 96 (Cal. Super. Ct. Mar. 26, 2014).
[62] *Santa Clara I*, at 330.
[63] *See* Friends of H Street v. City of Sacramento, 20 Cal.App.4th 152, 165 (Cal. Ct. App. 1993); People ex rel. Gallo v. Acuna, 929 P.2d 596, 606 (Cal. 1997); Wolfe v. State Farm Fire & Cas. Ins. Co., 46 Cal.App.4th 554, 568 (Cal. Ct. App. 1996) (abstention appropriate when the Legislature "has expressly decided to tackle the problem").
[64] *Santa Clara II*, at 64-69.
[65] State of Rhode Island v. Lead Industries Ass'n, Inc., 951 A.2d 428, 454 (R.I. 2008); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007); In re Lead Paint Litigation, 924 A.2d 484 (N.J. 2007); City of Chicago v. American Cyanamid Co., 823 N.E.2d 126 (Ill. Ct. App. 2005).
[66] Prosser & Keeton, *Torts* (5th ed. 1984) §86,616.
[67] James A. Henderson Jr., *The Lawlessness of Aggregative Torts*, HOFSTRA L. REV. 34: Iss. 2, Article 2 (2005).
[68] Horace Wood, *The Law of Nuisances iii* (3d ed. 1893).
[69] F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949).
[70] William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942)
[71] Carlin v. Superior Court, 920 P.2d 1347, 1351 (Cal. 1996).
[72] *Santa Clara I*, at 292, 309-10.
[73] *Id.* at 309.
[74] There are myriad constitutional problems presented by *Santa Clara II*, including infringement of 1st Amendment freedom of speech and freedom of association rights, due process rights and separation of powers. While some of these are touched upon briefly, they present problems that are beyond the scope of this article.
[75] *See* BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 581 (1996) (Due Process requires a "reasonable relationship between the ... award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.") (citation omitted); *see also* Hans Rees' Sons v. State of North Carolina ex rel. Maxwell, 283 U.S. 123, 135-136 (1931) (striking tax remedy that was "out of all appropriate proportion to the business transacted by the appellant in that State."); St. Louis, Iron Mountain & Southern Ry. v. Williams, 251 U.S. 63, 67 (1919) (statutory penalty violates due process where it "is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable"); Hale v. Morgan, 584 P.2d 512, 518 (Cal. 1978) (statutory remedy can be unconstitutional when the harsh result is wholly disproportionate to the legislative goal); Kaufman v. ACS Sys., Inc., 110 Cal. App. 4th 886, 922 (Cal. Ct. App. 2003) (recognizing due process challenge to a disproportionate statutory penalty); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.")
[76] Sherwin-Williams presented additional evidence that it was a *de minimus* contributor to the presence of white lead in California at all. *People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Stipulation Regarding the Admissibility of the Contents of Certain Docs. In Lieu of Exs. And to Certain Facts at Stip. 187 (Cal. Super Ct. July 1, 2013); *People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Trial Tr. at 3003:22-3004:3 (Cal. Super. Ct. July 17, 2013) (almost all of Sherwin-Williams' white lead carbonate pigment went to non-residential paints); *People v. Atlantic Richfield Co.*, No. 1-00-CV-788657, Trial Tr. at 2877:11-20 (Cal. Super. Ct. July 17, 2013) (testimony of defense expert Dr. Kent Van Liere) (undisputed evidence at trial indicated that Sherwin-Williams' WLC for all uses in California contributed a mere one-tenth of one percent (0.1 %) of the total lead consumed in the state from 1894 to 2009).
[77] James A. Henderson Jr., *The Lawlessness of Aggregative Torts*, HOFSTRA L. REV. 34: Iss. 2, Article 2 (2005); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, BOSTON COLLEGE L. REV. 49:913 (2008).
[78] http://www.lawschool.cornell.edu/faculty/bio.cfm?id=31
[79] *Is the Public Nuisance Universe Expanding?*, Bloomberg Environment, Jan. 31, 2017 (quoting Professor Albert C. Lin, U.C. Davis School of Law).
[80] People v. Atlantic Richfield Co., No. 1-00-CV-788657, Order After Hearing at 12-16 (Cal. Super. Ct. Feb. 6, 2012); Atlantic Richfield Co. v. Superior Ct. of Santa Clara Cty., No. H038014, Order (Cal. Ct. App. June 22, 2012); Atlantic Richfield Co. v. Superior Ct. of Santa Clara Cty., No. S203735, Order (Cal. Aug. 8, 2012).
[81] People v. BP P.L.C., No. 3:17-cv-06012-WHA (N.D. Cal.); People v. Purdue Pharma L.P., No. 30-2014-00725287-CU-BT-CXC (Orange Cty. Sup. Ct.); People ex rel. City of Oakland v. BP P.L.C., Case No. 3:17-cv-06011-WHA (N.D. Cal.); People

ex rel. City of San Francisco v. BP P.L.C., Case No. 3:17-cv-06012-WHA (N.D. Cal.); County of Marin v. Chevron Corp., Case No. 3:17-cv-4929-VC (N.D. Cal.); City of Imperial Beach v. Chevron Corp., Case No. 3:17-cv-4934-VC (N.D. Cal.); County of Marin v. Chevron Corp., Case No. 3:17-cv-4935-VC (N.D. Cal.).

[82] County of Santa Cruz v. Chevron, Case No. 17-CV-3242 (Cal. Super. Ct. Dec. 20, 2017); City of Santa Cruz v. Chevron, Case No. 17-CV-3243 (Cal. Super. Ct. Dec. 20, 2017); City of Richmond v. Chevron Corp., Case No. MSC18-00055 (Cal. Super. Ct. Jan. 22, 2018).

[83] Hayes, Exxon Mobil, BP, Others Face New Climate Change Suits, Bloomberg BNA Toxics Law Rptr. (Dec. 21, 2017), available at https://www.bna.com/exxon-mobilbp-n73014473249 (last visited Jan. 28, 2018).

[84] *Id.*

[85] *Is the Public Nuisance Universe Expanding?*, Bloomberg Environment, Jan. 31, 2017 (quoting Professor Albert C. Lin, U.C. Davis School of Law).