No. S246669
Court of Appeal No. B283606

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS LEAK CASES

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* SOUTHERN CALIFORNIA EDISON COMPANY, PACIFIC GAS & ELECTRIC COMPANY, SOUTHWEST GAS CORPORATION, EDISON ELECTRIC INSTITUTE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF RESPONDENT

John C. Hueston
Moez M. Kaba
Douglas J. Dixon
Hueston Hennigan LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
T: (213) 788-4340
F: (888) 775-0898
jhueston@hueston.com
mkaba@hueston.com
ddixon@hueston.com

Attorneys for Amici Curiae

No. S246669
Court of Appeal No. B283606

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS LEAK CASES

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* SOUTHERN CALIFORNIA EDISON COMPANY, PACIFIC GAS & ELECTRIC COMPANY, SOUTHWEST GAS CORPORATION, EDISON ELECTRIC INSTITUTE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF RESPONDENT

John C. Hueston
Moez M. Kaba
Douglas J. Dixon
Hueston Hennigan LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
T: (213) 788-4340
F: (888) 775-0898
jhueston@hueston.com
mkaba@hueston.com
ddixon@hueston.com

Attorneys for Amici Curiae

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rule of Court 8.520(f), privately-owned utilities Southern California Edison Company ("SCE"), Pacific Gas & Electric Company ("PG&E"), and Southwest Gas Corporation ("Southwest") and utility associations Edison Electric Institute ("EEI") and American Gas Association ("AGA") (collectively, "*Amici*") respectfully request leave to file the attached *amicus* brief in support of Respondent Southern California Gas Company ("SoCalGas"). This brief is timely, as it is filed within 30 days after the last reply brief was filed.

STATEMENT OF INTEREST

Amici SCE, PG&E and Southwest are among California's oldest and largest utilities. SCE delivers power to 15 million customers across nearly 55,000 square miles in California. PG&E provides natural gas and electricity to more than 16 million people and businesses across 70,000 square miles in California. Southwest provides natural gas to nearly 200,000 customers in parts of El Dorado, Nevada, Placer, and San Bernardino Counties. *Amicus* EEI is the national association of U.S. shareholder-owned electric companies. Its members provide electricity in all fifty states and the District of Columbia and provide electric service to about seventy percent of all retail customers in the nation. *Amicus* AGA represents more than 200 state-regulated and municipal natural gas utility companies that deliver clean natural gas throughout the United States. Its members provide gas service to about 95% of all residential, commercial, and industrial customers in the nation.

Amici have a strong interest in this case because the continued application of the economic loss doctrine in its time-tested, current form is of particular importance to them or their members due to the public and geographically-broad nature of the critical services they provide.

Amici's proposed brief presents arguments that materially add to and complement the initial briefing following appeal from the Court of Appeal by Respondent SoCalGas, without repeating those arguments. *Amici* have significant experience with respect to the utility businesses in California.

Amici's brief will provide focused assistance to the Court in understanding: (1) the historical context for the long-standing economic loss doctrine, as it has developed in the United States and other common law jurisdictions, (2) certain public policy considerations that confirm the wisdom of this Court's prior rulings, which long ago firmly established the economic loss doctrine in the bedrock of California's tort law, and (3) the negative consequences that would befall California if Plaintiffs' proposed revision of the economic loss doctrine were adopted.

For the foregoing reasons, *Amici* respectfully request that the Court grant *Amici*'s application and accept the enclosed brief for filing and consideration.

No party or counsel for any party, other than counsel for *Amici*, has authored the proposed brief in whole or in part or funded the preparation of the brief.

Dated: September 5, 2018

Respectfully submitted,

HUESTON HENNIGAN LLP

By: _____

John C. Hueston
Moez M. Kaba
Douglas J. Dixon
523 West 6th Street, Suite 400
Los Angeles, CA 90014
T: (213) 788-4340
F: (888) 775-0898

Attorneys for *Amici Curiae*

No. S246669
Court of Appeal No. B283606

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS LEAK CASES

BRIEF OF *AMICI CURIAE* SOUTHERN CALIFORNIA EDISON COMPANY, PACIFIC GAS & ELECTRIC COMPANY, SOUTHWEST GAS CORPORATION, EDISON ELECTRIC INSTITUTE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF RESPONDENT

John C. Hueston
Moez M. Kaba
Douglas J. Dixon
Hueston Hennigan LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
T: (213) 788-4340
F: (888) 775-0898
jhueston@hueston.com
mkaba@hueston.com
ddixon@hueston.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 2

TABLE OF AUTHORITIES 2

INTRODUCTION 6

RELEVANT BACKGROUND 7

ARGUMENT 9

I. A Brief History of the Long-Standing Economic Loss Doctrine 9

II. California's Well-Settled Economic Loss Doctrine 11

III. California's Economic Loss Doctrine Is Based on Sound Legal Principles and Recognized Public Policy Considerations 13

A. California's Economic Loss Doctrine Strikes the Right Balance Between Competing Principles of Tort Law: Compensation, Deterrence, and Certainty 13

B. Plaintiffs' Proposed Revision Would Be Unworkable 16

C. Plaintiffs' Proposed Revision Threatens to Make California Businesses, Including Privately-Owned Utilities, Unsustainable 17

D. Plaintiffs' Proposed Revision Endangers California's Economy and Environment 19

IV. Plaintiffs' Policy Arguments Are Unpersuasive 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.
(N.Y. 2001) 96 N.Y.2d 280 9

Adams v. City of Fremont
(1998) 68 Cal. App. 4th 243 22

Adams v. S. Pac. Transp. Co.
(1975) 50 Cal. App. 3d 37 12

Aikens v. Debow
(W. Va. 2000) 208 W. Va. 486 9

Biakanja v. Irving
(1958) 49 Cal. 2d 647 ..... 11, 12

Bily v. Arthur Young & Co.
(1992) 3 Cal. 4th 370 ..... 11, 12, 16

Cattle v. Stockton Waterworks Co.
(1875) L.R. 10 Q.B. 453 9

E. River S.S. Corp. v. Transamerica Delaval, Inc.
(1986) 476 U.S. 858 9

East River S.S. Corp. v. Transamerica Delaval, Inc.
(1986) 476 U.S. 858 14

Fifield Manor v. Finston
(1960) 54 Cal. 2d 632 11

Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc.
(Ariz. 2010) 223 Ariz. 320 (en banc) 6

Garweth Corp. v. Boston Edison Co.
(Mass. 1993) 415 Mass. 303 9

TABLE OF AUTHORITIES (cont.)

Page(s)

Gunkel v. Renovations Inc.
(Ind. Ct. App. 2003) 797 N.E.2d 841 18

Hininger v. Case Corp.
(5th Cir. 1994) 23 F.3d 124 14

J'Aire Corp. v. Gregory
(1979) 24 Cal. 3d 799 ..... 11, 12

Jimenez v. Superior Court
(2002) 29 Cal. 4th 473 12

Kahl v. Love
(1874) 37 N.J.L. 5 9

Lawrence v. O & G Indus., Inc.
(Conn. 2015) 126 A.3d 569 18

MacPherson v. Buick Motor Co.
(N.Y. 1916) 217 N.Y. 382 10

Murphy v. Brentwood DC
(H.L. 1990) 1 A.C. 398 9

People Exp. Airlines, Inc. v. Consol. Rail Corp.
(N.J. 1985) 100 N.J. 246 9

Quelimane Co. v. Stewart Title Guaranty Co.
(1998) 19 Cal. 4th 26 11

Robins Dry Dock & Repair Co. v. Flint
(1927) 275 U.S. 303 9

S. Cal. Gas Leak Cases
(2017) 18 Cal. App. 5th 581 12

Ultramares Corp. v. Touche
(N.Y. 1931) 255 N.Y. 170 10

TABLE OF AUTHORITIES (cont.)

Page(s)

Ultramares Corp. v. Touche, Niven & Co. (N.Y. 1931) 174 N.E. 441 14

Other Authorities

5 WITKIN, SUMMARY 11TH TORTS (2018) § 867 7

Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss* (2006) 48 ARIZ. L. REV. 773 8

Fleming James Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal* (1972) 25 VAND. L. REV. 43 8

James Fleming, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal* (1972) 25 VAND. L. REV. 43 11

John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson* (1998) 146 U. PA. L. REV. 1733 16

Kevin J. Breer & Justin D. Pulikkan, *The Economic Loss Rule in Kansas and Its Impact on Construction Cases* (2005) 74 J. KAN. B.A. 30 16

Moody's Investors Service, *Rating Action: Moody's Changes Edison International and Southern California Edison's Rating Outlooks to Negative* (Apr. 11, 2018) 18

Moody's Investors Service, *Rating Action: Moody's Changes San Diego Gas & Electric's Rating Outlook to Negative from Stable* (Apr. 11, 2018) 18

Peter W. Huber & Robert E. Litan, THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter W. Huber & Robert E. Litan eds., 1991) 1 16

TABLE OF AUTHORITIES (cont.)

Page(s)

RESTATEMENT (SECOND) OF TORTS (Am. Law. Inst. 1979) § 766C 12

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 7 TD No 2 (Am. Law. Inst. 2014) 8

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977) §§ 4.1, 4.7 8

Robert L. Rabin, Respecting Boundaries and the Economic Loss Rule in Tort (2006) 48 Ariz. L. Rev. 857 7

Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability* (2005) 57 S.C. L. REV. 255 11

Ward Farnsworth, *The Economic Loss Rule* (2016) 50 VAL. U. L. REV. 545 12

INTRODUCTION

It has long been the rule in California that a plaintiff cannot recover pure economic losses resulting from negligent injury to other parties or their property. This legal principle, known as the "economic loss doctrine,"[1] guards against liability for speculative, excessive, or potentially unforeseeable losses, or losses outside the scope of risks that makes one's conduct negligent. The doctrine expresses this Court's judgment that pure economic losses are generally not recoverable.

Undeterred by over a century of precedent and sound reasoning, Plaintiffs seek to gut the economic loss doctrine. Plaintiffs' proposed revision would unleash cascading consequences on *Amici*, their customers, and all Californians. Plaintiffs' novel expansion of the economic loss doctrine would subject individuals and businesses to near limitless exposure, impacting commercial and other socially beneficial activity. Other states have dealt with precisely the sort of boundless exposure Plaintiffs seek to impose on California; like California, those states have properly drawn the line to impose reasonable and appropriate limits on liability. The effects of Plaintiffs' ill-advised doctrinal redo would be far-reaching, but most

---

[1] "Courts and commentators have defined the economic loss doctrine in varying ways, which itself has created some confusion in the law. . . . [These formulations] conflate[] two distinct issues: (1) whether a contracting party should be limited to its contract remedies for purely economic loss; and (2) whether a plaintiff may assert tort claims for economic damages against a defendant absent any contract between the parties." *Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc.* (Ariz. 2010) 223 Ariz. 320, 323 (en banc). This case concerns the second issue: the judicially imposed limits on tort liability.

keenly felt by businesses that provide services to the public, such as utilities, who would face unprecedented and unpredictable liability.

In Part I, *Amici* provide historical context for the long-standing economic loss doctrine, as it has developed in the United States and other common law jurisdictions. Part II provides a plain statement of California's long-standing blackletter law as to the economic loss doctrine. Finally, Part III discusses certain public policy considerations that confirm the wisdom of this Court's prior rulings, which long ago firmly established the economic loss doctrine in the bedrock of California's tort law. It also illustrates the negative consequences that would befall California if Plaintiffs' proposed revision is adopted. For these reasons, *Amici* respectfully urge this Court to agree with the sound judgment exercised by the Court of Appeal and order the trial court to sustain Southern California Gas Company's ("SoCalGas's") demurrer without leave to amend.

RELEVANT BACKGROUND

Amici Southern California Edison Company ("SCE"), Pacific Gas & Electric Company ("PG&E"), and Southwest Gas Corporation ("Southwest") are among California's oldest and largest utilities. SCE delivers power to 15 million customers across nearly 55,000 square miles in California. PG&E provides natural gas and electricity to more than 16 million people and businesses across 70,000 square miles in California. Southwest provides natural gas to nearly 200,000 customers in parts of El Dorado, Nevada, Placer, and San Bernardino Counties. *Amicus* Edison Electric Institute ("EEI") is the national association of U.S.

shareholder-owned electric companies. Its members provide electricity in all fifty states and the District of Columbia and provide electric service to about seventy percent of all retail customers in the nation. *Amicus* American Gas Association ("AGA") represents more than 200 state-regulated and municipal natural gas utility companies that deliver clean natural gas throughout the United States. Its members provide gas service to about 95% of all residential, commercial, and industrial customers in the nation. *Amici* have a strong interest in this case because the continued application of the economic loss doctrine in its time-tested, current form is of particular importance to them or their members due to the public and geographically-broad nature of the critical services they provide. And class actions like this case are not rare or uncommon: SCE and PG&E are currently facing similar class actions.

If adopted by the Court, Plaintiffs' proposed revision of the economic loss doctrine would expose all businesses in California, and in particular the businesses engaged in by *Amici* or their members, to unforeseeable, speculative, excessive, and unjustified liability. In addition to being unworkable and inequitable, Plaintiffs' revision of the doctrine would dampen economic and other socially beneficial activity in California, with widespread negative impacts on utility customers, residents, businesses, workers, and vulnerable communities served by these businesses. *Amici* respectfully request that this Court reject Plaintiffs' proposed erosion of the economic loss doctrine.

ARGUMENT

I. A Brief History of the Long-Standing Economic Loss Doctrine

The economic loss doctrine has been black letter law in the United States for well over a century.[2] By 1927, the doctrine was so well established that the United States Supreme Court stated: "[N]o authority need be cited to show that . . . a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong."[3] This doctrine has been repeatedly reaffirmed by the California Supreme Court, by the United States Supreme Court,[4] and the overwhelming majority of other State Supreme Courts.[5] It is also the law in England.[6] This doctrine has been restated without ambiguity in treatises[7] and

---

[2] *See, e.g., Kahl v. Love* (1874) 37 N.J.L. 5, 8.

[3] *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303, 309.

[4] *See, e.g., E. River S.S. Corp. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858, 874.

[5] *See, e.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.* (N.Y. 2001) 96 N.Y.2d 280, 292; *Garweth Corp. v. Boston Edison Co.* (Mass. 1993) 415 Mass. 303, 305; *Aikens v. Debow* (W. Va. 2000) 208 W. Va. 486, 490. New Jersey rejected the economic loss doctrine in *People Exp. Airlines, Inc. v. Consol. Rail Corp.* (N.J. 1985) 100 N.J. 246, but "[w]ith a striking degree of unanimity, the highest courts in other states have failed to follow *People Express*; it stands as a lonely outpost." Robert L. Rabin, Respecting Boundaries and the Economic Loss Rule in Tort (2006) 48 Ariz. L. Rev. 857, 858.

[6] *See Murphy v. Brentwood DC* (H.L. 1990) 1 A.C. 398, 468. This doctrine dates back over a century in England as well. *See Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453.

[7] *See, e.g.*, 5 WITKIN, SUMMARY 11TH TORTS (2018) § 867.

works of legal scholarship.[8] As explained in the draft of the upcoming Third Restatement of Torts, "Except as provided elsewhere in this Restatement, a claimant cannot recover for economic loss caused by (a) unintentional injury to another person; or (b) unintentional injury to property in which the claimant has no proprietary interest."[9]

The economic loss doctrine has endured with little change. Even as the law of negligence—and particularly products liability—expanded in the twentieth century, there was no change to the economic loss doctrine.[10] Judge Cardozo, who was instrumental in expanding tort liability in *MacPherson v. Buick Motor Co.*,[11] explicitly reaffirmed the economic loss doctrine in *Ultramares Corp. v. Touche*, warning that absent this doctrine, there would be "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[12]

---

[8] *See, e.g.*, Fleming James Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal* (1972) 25 VAND. L. REV. 43: RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977) §§ 4.1, 4.7, at 65; Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss* (2006) 48 ARIZ. L. REV. 773.

[9] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM (Am. Law. Inst. 2014) § 7 TD No 2.

[10] Fleming, *supra* note 8, at 47.

[11] (N.Y. 1916) 217 N.Y. 382.

[12] (N.Y. 1931) 255 N.Y. 170, 179.

II. California's Well-Settled Economic Loss Doctrine

In California, as in virtually every other state, a plaintiff generally cannot recover pure economic losses resulting from negligent conduct by a defendant.[13] This Court has consistently reaffirmed this doctrine to avoid the "potentially infinite liability" that would result from claims for pure economic losses.[14]

There is a narrow exception to this doctrine where there is (1) an underlying contract or transaction between the defendant and a third party, *and* (2) a "special relationship" between the plaintiff and the defendant.[15] The law in California dates back to this Court's 1960 decision in *Fifield Manor v. Finston*.[16] As both of these elements are required, this Court has never found an exception to the economic loss doctrine where there is no underlying contract or transaction. Where there is such a contract, California courts then analyze the so-called *Biakanja* factors to determine whether a special relationship exists: (1) "the extent to which the transaction was intended to affect the plaintiff," (2) "the foreseeability of harm to the plaintiff,"[17] (3) "the degree of certainty that the plaintiff suffered injury," (4)

---

[13] *See, e.g., Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal. 4th 26, 58 ("Recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law.").

[14] *Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 399.

[15] *J'Aire Corp. v. Gregory* (1979) 24 Cal. 3d 799, 804.

[16] (1960) 54 Cal. 2d 632, 636.

[17] While initial cases sometimes rationalized the economic loss doctrine on the

"the closeness of the connection between the defendant's conduct and the injury suffered," (5) "the moral blame attached to the defendant's conduct," and (6) "the policy of preventing future harm."[18]

Applying these factors, this Court has found special relationships when there was an underlying contract between the defendant and a third party intended to benefit the plaintiff: (1) the lessee of a commercial space and a contractor employed by the lessor,[19] (2) the heirs to a will and the will's drafter,[20] and (3) home purchasers and the manufacturer of the windows in their homes.[21] Here, Plaintiffs have abandoned any allegations of any contract between SoCalGas and Plaintiffs' lost customers and therefore do not raise the contract/transaction exception in their appeal.[22] Even if they did, any such contract would not have

---

"unforeseeability" of pure economic losses, *see Adams v. S. Pac. Transp. Co.* (1975) 50 Cal. App. 3d 37, 41 ("Conventional negligence analysis next turned to the question of foreseeability"), this Court has more recently made clear that the economic loss doctrine bars even *foreseeable* economic losses. *Bily*, 3 Cal. 4th at 399 ("In line with our recent decisions, we will not treat the mere presence of a foreseeable risk of injury to third persons as sufficient, standing alone, to impose liability for negligent conduct. We must consider other pertinent factors.").

[18] *Biakanja v. Irving* (1958) 49 Cal. 2d 647, 650.

[19] *J'Aire Corp.*, 24 Cal. 3d at 805.

[20] *Biakanja*, 49 Cal. 2d 647.

[21] *Jimenez v. Superior Court* (2002) 29 Cal. 4th 473, 484.

[22] *S. Cal. Gas Leak Cases* (2017) 18 Cal. App. 5th 581, 590 ("business plaintiffs abandoned their earlier allegations that SoCalGas was a party to a contract intended to affect them and now assert their 'loss did not arise out of any contract.'").

been intended to benefit Plaintiffs, so there would be no special relationship between Plaintiffs and SoCalGas.

III. California's Economic Loss Doctrine Is Based on Sound Legal Principles and Recognized Public Policy Considerations

Several considerations confirm the soundness of California's settled economic loss doctrine and illustrate the reasons why this Court should reject Plaintiffs' proposed revision to it.

A. California's Economic Loss Doctrine Strikes the Right Balance Between Competing Principles of Tort Law: Compensation, Deterrence, and Certainty

California's economic loss doctrine strikes a careful balance between compensating those affected by torts and creating predictability in the law and common-sense limits on liability. Although the physical consequences of an individual's negligence are limited in time and space, the indirect economic consequences of one's acts or omissions can be virtually unbounded.[23] And given the complexity and size of California's economy, it is nearly impossible to estimate the potential indirect, downstream economic consequences of tortious acts.[24] As explained by Professor Farnsworth, contributor to the American Law

---

[23] James Fleming, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal* (1972) 25 VAND. L. REV. 43 (arguing that the economic loss doctrine is grounded in a pragmatic "floodgates" concern with the specter of limitless liability—whereas the physical consequences of negligence are typically limited, the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended).

[24] *See* Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability* (2005) 57 S.C. L. REV. 255, 302–03 ("[L]ost economic opportunities are

Institute's Restatement Third, Torts: Liability for Economic Harm, the economic loss doctrine controls "the potential for economic losses to proliferate in ways that physical damage does not."[25] Permitting recovery of potential economic losses in the absence of an injury to person or property would expose individuals to unlimited and unforeseeable liability that is disproportionate to fault.[26]

California tort law encourages individuals to take account of all foreseeable costs or injuries that may be directly caused by their activities. When coupled with the regulatory framework that governs many industries in California, including the types of businesses engaged in by *Amici* or their members, businesses have strong incentives deterring them from inflicting harm on others and, relatedly, prompting them to invest in effective safety measures. If and when businesses run afoul of

---

often not readily susceptible to precise calculation . . . [and by] ruling out litigation in a huge range of cases (suits involving no personal injury or property damage), the economic-loss rule helps to ensure that compensation is not awarded for [speculative] amounts.").

[25] Ward Farnsworth, *The Economic Loss Rule* (2016) 50 VAL. U. L. REV. 545, 544.

[26] *Ultramares Corp. v. Touche, Niven & Co.* (N.Y. 1931) 174 N.E. 441 (Cardozo, C.J.) ("If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."); *see Hininger v. Case Corp.* (5th Cir. 1994) 23 F.3d 124 (holding that the economic loss doctrine cuts off "unlimited and unforeseeable liability"); *cf. East River S.S. Corp. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858 (doctrine needed to prevent warranty law from "drown[ing] in a sea of tort"); *see also* RESTATEMENT (SECOND) OF TORTS (Am. Law. Inst. 1979) § 766C cmt. a (noting that the economic loss doctrine is justified, in part, by "extremely variable nature of the relations, the fear of an undue burden upon the defendant's freedom of action, [and] the probable disproportion between the large damages that might be recovered and the extent of the defendant's fault").

applicable tort laws or regulations, regulatory agencies can fine the businesses. Parties whose properties are damaged or who suffer personal injuries have powerful remedies to make themselves whole. Further, if a tortfeasor's conduct is sufficiently egregious, injured parties may even recover punitive damages. These deterrents have properly incentivized and governed the conduct of business in this state and elsewhere for decades. But it is fundamentally unfair to ask businesses to operate in the face of unpredictable—and essentially unlimited—risk or exposure. For these reasons, revising the economic loss doctrine as Plaintiffs propose would be both unwise and unnecessary.

California's economic loss doctrine also promotes commercial activity and other socially beneficial conduct by providing a measure of legal certainty to tort law. Society benefits when the law is predictable and consistent. Predictability in the law allows individuals and businesses to provide services to the public, while ensuring that they take appropriate precautions. Predictability and certainty also provides direction to the courts and litigants so they know what is actionable and what is not. As explained below, Plaintiffs' proposed change to the economic loss doctrine would accomplish the exact opposite: it would expose economic participants in our society to unpredictable, indefinite, and potentially crippling liability, which could lead to overdeterrence or economic actors simply removing themselves from the market.

By allowing plaintiffs to recover for economic losses only when the tort causes damage to their person or property, the economic loss doctrine balances the

competing interests of individual plaintiffs who seek compensation and society at large that needs certainty, reasonable limits on liability, and the provision of essential services provided by utilities. In this way, the doctrine fully compensates a class of plaintiffs who are limited by time and place but prevents extending tort liability *ad infinitum.*

B. Plaintiffs' Proposed Revision Would Be Unworkable

Plaintiffs ask this Court to effectively abolish California's well-settled economic loss doctrine in favor of an indeterminate seven-factor test that would require parties and courts to assess foreseeability and public policy in a broad array of new cases. To fully compensate every single downstream economic consequence of allegedly tortious conduct, Plaintiffs ask the Court to sacrifice the societal benefits provided by the economic loss doctrine.

As this Court previously explained, "One frequently used illustration of the need to limit liability for economic loss assumes a defendant negligently causes an automobile accident that blocks a major traffic artery such as a bridge or tunnel. Although defendant would be liable for personal injuries and property damage suffered in such an accident, it is doubtful any court would allow recovery by the myriad of third parties who might claim economic losses because the bridge or tunnel was impassible."[27] More importantly, this illustration captures the futility of Plaintiffs' proposed test: it is likely that people would be delayed following a

---

[27] *Bily*, 3 Cal. 4th at 400 n.11.

crash that closes a bride or tunnel, and that hourly workers caught in traffic would lose wages, their employers would lose profits, and so on. Yet Plaintiffs argue that not only the delayed drivers—but also anyone who engages in business or contracts with these delayed drivers—should be allowed to collect. Precisely because of the absurdity of this result, California, like most of its sister states, has established clear rules that govern when economic losses are recoverable and when they are not.

C. Plaintiffs' Proposed Revision Threatens to Make California Businesses, Including Privately-Owned Utilities, Unsustainable

The dramatic expansion of tort exposure advocated by Plaintiffs would negatively impact the well-being of businesses, especially California's privately-owned utilities. By exposing them to untethered liability, Plaintiffs' proposed rule would jeopardize the financial health of investor-owned utilities. If utilities and other businesses in this state are weakened, then customers, their workers, and all Californians will feel the impacts.[28]

In response to Plaintiffs' proposed economic loss doctrine, California businesses would be forced to limit their activities and the scope of their services. This is because excessive, unpredictable, and disproportionate liability necessarily

---

[28] Though *Amici* primarily are and represent privately-owned utilities, municipal utilities would also face significant expansions of their liability under Plaintiffs' proposed revision of the economic loss doctrine, the cost of which would be passed onto ratepayers and the public.

results in overdeterrence of socially beneficial activity.[29] This would lead to an inefficient (and undesirable) reduction in commercial activity.[30] Excessive or indeterminate tort liability drives down and manipulates technological innovation.[31] It also unjustifiably transfers wealth between private actors, and it encourages individuals to exit markets or industries altogether where the benefits of economic activity are outweighed by the costs and risks of tort liability.[32] If Plaintiffs' revision to the economic loss doctrine were accepted, privately-owned utilities, among other critical economic actors in California, would likely be forced to reduce their level of investment in other socially beneficial activity in exchange for markedly increased expenditures on insurance and risk management.

---

[29] *See, e.g., Lawrence v. O & G Indus., Inc.* (Conn. 2015) 126 A.3d 569, 585 (concluding that defendants whose alleged negligence caused an explosion at power plant "did not owe a duty of care to the plaintiffs, who were employees that sustained only economic losses as a result of the explosion," and referring to the "vast majority of other jurisdictions precluding recovery in similar situations"); *Cf.* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson* (1998) 146 U. PA. L. REV. 1733, 1833 ("Our duties to take reasonable care not to cause physical injury or property damage to others are quite burdensome .... To add to these duties other general duties to take care to avoid causing emotional and economic injuries would be enormously burdensome. Indeed, it would arguably be so burdensome that it would undercut the capacity of the sense of duty to prioritize and to focus.").

[30] Kevin J. Breer & Justin D. Pulikkan, *The Economic Loss Rule in Kansas and Its Impact on Construction Cases* (2005) 74 J. KAN. B.A. 30, 31 ("The primary motivation behind the economic loss rule is the fear that allowing a party to proceed in tort would result in 'crushing useful activity by a liability.'") (quoting *Gunkel v. Renovations Inc.* (Ind. Ct. App. 2003) 797 N.E.2d 841, 844).

[31] *See* Peter W. Huber & Robert E. Litan, THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter W. Huber & Robert E. Litan eds., 1991) 1, 2, 372–81.

[32] *Id.* at 1, 2.