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In the Supreme Court of the State of California

In re
Southern California Gas Leak Cases

First American Wholesale Lending Corporation, et al.,
Real Parties in Interest and Petitioners,

vs.

Los Angeles County Superior Court,
Respondent.

Southern California Gas Company,
Real Parties in Interest and Respondent.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CALIFORNIA TORT LAW SCHOLARS IN SUPPORT OF AFFIRMANCE

After a Decision of the Second Appellate District, Division Five, No. B283606

From a Judgment of the Los Angeles County Superior Court,
Judicial Council Coordination Proceeding No. 4861
Hon. John Shepard Wiley, Jr.

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APPLICATION OF AMICUS CURIAE TORT LAW SCHOLARS FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The California Tort Law Scholars identified in the Appendix to the attached amicus curiae brief hereby apply to the Chief Justice of California for leave to file that brief in support of affirmance.

I. ISSUE PRESENTED

The issue presented for review is this:

> Can a plaintiff who is harmed by a manmade environmental disaster state a claim for negligence against the gas company that allegedly caused the disaster if the damages sustained are purely economic?

II. INTEREST OF AMICUS CURIAE AND HOW THE PROPOSED BRIEF WILL ASSIST THE COURT

Amici are law professors at the University of California Berkeley School of Law and at the University of Southern California Gould School of Law. Amici study tort law and have served as Advisers or on the Members Consultative Group for Restatement (Third) of Torts: Liability for Economic Harm. As California tort law scholars, amici have a keen interest in the development of the law within their area of scholarship, and as such, they have a considered view of the appropriate rule of tort law that should be applied in the circumstances presented in this case.

The proposed brief analyzes the issue before the Court based on the newly adopted and carefully considered Restatement, which we will also show is consistent with current California law with respect to the issue before the Court. The brief will assist the Court by illuminating the rule of tort law that would follow under the principles set forth in the Restatement, and by demonstrating that such rule also would be consistent with and proper under California law.

Adoption of the rule of law that amici propose in the attached brief would, under the circumstances of this case, support the court of appeal's determination to issue a writ of mandate directing the trial court to sustain the demurrer to the economic loss claims at issue.

III. DISCLOSURE

No party, and no counsel for a party, in the matter pending before this Court has authored the proposed amicus curiae brief in whole or in part. Neither has any party, or any counsel for a party, in the pending matter made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity has made a monetary contribution intended to fund the preparation or submission of the brief, other than the amici or their counsel in the pending matter.

IV. CONCLUSION

For these reasons, amici respectfully request permission to file the attached proposed brief.

Dated: September 5, 2018.

Respectfully submitted,

REED SMITH LLP

By Raymond A. Cardozo / BAS
Raymond A. Cardozo

Attorneys for Amicus Curiae
California Tort Law Scholars

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AMICUS CURIAE BRIEF OF TORT LAW SCHOLARS

I. SUMMARY OF ARGUMENT

The new Restatement contains three main themes:

First, economic loss is ordinarily not recoverable in tort unless a duty is found between the defendant and the plaintiff, this is Section 1.

Second, some Sections explicitly rule out tort recovery (automatic no duty rules). Section 3 is the economic loss rule. It rules out recovery "for economic loss caused by the negligence in the performance or negotiation of a contract between the parties." Section 7 rules out recovery for economic loss caused by injury to the person or property of another person. Section 3 simply is not pertinent to this case. Section 7 is pertinent but does not address the claims here.

Third, other sections provide for possible recovery. Section 8 (the public nuisance rule) is the rule that best fits the circumstances of this case. Otherwise general principles established in Section 1 for left over or special cases would apply. Sections 4, 5, and 6 do not apply. These rules would apply if the claims were based on the defendant undertaking a duty of care to the plaintiffs.

While an enormous natural gas leak may qualify as a public nuisance under Section 8 that is only the first step in the analysis, as Section 8 requires a balancing of several considerations in deciding whether the business plaintiffs suffered an "injury distinct in kind from those suffered by the members of the affected community in general." The Third Restatement instructs a court to balance the need for liability to "provide appropriate compensation for [the plaintiff's] losses and usefully deter repetition of the wrong," against the concern not to impose on the defendant "liabilities. . . out of proportion to [its] culpability;" the concern not to subject defendants to "potentially massive and unpredictable liabilities"; and the concern to avoid "lawsuits large and unwieldy in number and in character." A court should also consider "whether plaintiffs who are allowed to sue can be separated in a principled fashion from those who are not."

American courts have rejected tort claims by businesses seeking lost profits when an accident adversely affects a large region because of the accident's impact on the region's environment or on its transportation network. In these cases the defendant generally faces substantial legal liability already so the additional liability adds little to future deterrence. The additional liability may impose liability out of proportion to the defendant's culpability. Lawsuits to establish lost profits by their nature involve difficult factual issues. Much of these lost profits represent private losses but not social losses. And it is impossible to draw a principled line between businesses that may recover and businesses and other categories of plaintiffs (such as a business's employees and suppliers) that may not.

We agree that, applying the balancing test of Section 8 of the Restatement to this case, the defendant should not be liable for the economic loss claimed by the business plaintiffs in this case.

II. ARGUMENT

A. Restatement Rules Pertinent To This Case: The General Principle Of No Duty To Avoid The Unintentional Infliction Of Economic Loss

The new Restatement establishes the principle that economic loss is ordinarily not recoverable in tort unless a duty is found between the defendant and the plaintiff. Section 1(a) provides "An actor has no general duty to avoid the unintentional infliction of economic loss on another." Section 1(b) provides "Duties to avoid the unintentional infliction of economic loss are recognized in the circumstances set forth in §§ 2-8. Restatement (Third) of Torts: Liability for Economic Harm, Tentative Draft No. 1 (April 4, 2012), at 1.[1]

The general principle of no duty when an actor causes pure economic loss is in contrast with the general principle of duty when an actor causes physical harm.[2] The latter principle appears in

[1] The membership of the ALI gave final approval of the project in the May 2018 meeting. The Reporter Ward Farnsworth is turning the approved tentative drafts into the official version, which is subject to the approval of the Director. Until the official version is approved the tentative drafts represent the position of the ALI.

[2] The principles in the Restatement that apply to claims for pure economic loss are similar to the principles that apply to claims for pure or stand-alone emotional harm. The general principle is one of

Restatement (Third) Torts: Liability for Physical and Emotional Harm, in Section 6 and Section 7. Section 7(a) provides "An actor ordinarily has a duty to exercise reasonable case when the actor's conduct creates a risk of physical harm." Section 7(b) provides "In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." Section 6 is similar but addresses an actor's liability rather than an actor's duty.[3]

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no-liability. This is subject to exceptions under what are known as the zone-of-danger rule, the by-stander rule, and a catch-all rule for "specified categories of activities, undertakings, or relationships, in which negligent conduct is especially like to cause serious emotional harm." Restatement (Third) Torts: Liability for Physical and Emotional Harm §§ 47 and 48. As with economic harm, liability for emotional harm must be founded on a specific rule. And, as with economic harm, the mere fact that serious emotional harm is foreseeable is insufficient to justify liability. Restatement (Third) Torts: Liability for Physical and Emotional Harm § 47, comment *f* and *i*.

[3] Sections 7 and 8 of the Restatement on Economic Harm could better be described as no-liability or limited-liability rules than as no-duty or limited-duty rules. In the cases covered by these rules the defendant's conduct creates a risk of physical harm, and so the defendant would be under a duty of care under the general duty rule in Section 7 of the Restatement on Physical Harm. However, the defendant is not subject to liability to the plaintiff under Section 6 of the Restatement on Physical Harm because liability under that rule requires a plaintiff to suffer physical harm. Section 7 of the Restatement on Economic Harm is a categorical rule that the defendant is not subject to liability to a plaintiff who suffers economic harm as a result of physical harm to the body or property of another person. Section 8 replaces this no liability rule with a limited liability rule when the defendant's negligence harms or impairs a public resource. Section 8 allows plaintiffs to recover for pure economic loss when a court finds the liability warranted under the balancing test, but only if a court is able to define the class of

The different background principles (duty vs. no duty) for claims involving physical harm and claims involving pure economic loss are, in part, a reflection of American law. American courts have recognized duties of care with respect to pure economic loss incrementally through torts that establish situation specific duties, like negligent misrepresentation. Prudential concerns require a court to adopt one or the other background principles. Duty rules perform a gate-keeping function. They enable trial courts to decide on the pleadings what negligence claims are actionable. The background principle of duty for claims involving physical harm instructs a trial court to allow a claim to proceed in the absence of a specific no-duty rule. And the principle requires an appellate court that chooses to suppress a claim to establish a rule that covers a class of claims. Conversely, the background principle of no duty for claims involving pure economic harm instructs a trial court to reject a claim in the absence of a specific duty rule. And the principle requires an appellate court that chooses to allow a claim to establish a rule that covers a class of claims.

This Court's case law is consistent with the Third Restatement. It makes the background principle for negligence claims involving pure economic loss one of no duty. Thus *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 57

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plaintiffs who may recover in a principled way. The rules in Section 7 and 8 of the Restatement of Economic Harm are described as no-duty or limited-duty rules because of the general principle that duty is an issue for the court while scope of liability (or legal cause) is an issue for the jury. But this is just a way of speaking.

(1998), states that "[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss is the exception, not the rule in negligence law." *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.*, 1 Cal. 5th 994, 1013 (2016), states this proposition as the starting point and adds "[t]he test for determining the existence of such an exceptional duty to third parties is set forth in the seminal case of *Biakanja*."

When this Court has imposed a duty on an actor to protect another from pure economic loss it has defined the duty narrowly. For example, the duty of care established by this Court in *Centinela Freeman* is quite specific. The case imposes "a duty on health care service plans to act reasonably, by choosing a financially solvent [individual practice association] . . . if they opt to delegate their reimbursement obligation" to "noncontracting emergency service providers." 1 Cal.5th at 1017.

Restatement Sections 3 through 8 are not intended to exhaust cases in which a negligence action lies for pure economic loss. Comment *e* to Section 1 explains "The rules . . . elaborated in the Sections that follow, cover the most commonly recurring types of claims for the unintentional infliction of economic loss."

Comment *e* explains how courts should handle other types of claims:

> On occasion, claims arise outside the scope of those general rules. Such residual claims are decided by application of the principles stated in Comment *b*. Courts consider, first, whether recognizing a duty of

> care would expose the defendant to indeterminate or disproportionate liability. They consider as well whether parties in the plaintiff's position can reasonably be expected to protect themselves against the loss by contract. An affirmative answer to either question results in no liability, which is the typical result when a plaintiff seeks to recover for economic loss in tort outside the recognized headings of this Chapter. Restatement (Third) of Torts: Liability for Economic Harm, Tentative Draft No. 1 (April 4, 2012), at 6-7.

Comment *b* to Section 1 establishes the general principle "that duties of care with respect to economic loss are not general in character; they are recognized in specific circumstances according to the principles stated in Comment *c*." *Id.* at 2. Comment *c* establishes two general reasons why "courts impose tort liability less selectively than liability for other types of harms." They are the concern for "indeterminate and disproportionate liability" and the concern for "deference to contract." The business plaintiffs' claims implicate the first concern, and not the second. *Id.* at 3.

The business plaintiffs' claims need not be analyzed as a residual claim under the principles in Section 1 because they are covered by Section 8 (the public nuisance rule). But little turns on whether the claim is analyzed under Section 1 or Section 8 for the principles in Section 8 implement the principles in Section 1. The major advantage of referring to Section 8 is that it focuses on the relevant principles and addresses the relevant precedent.

B. Section 8 (The Public Nuisance Rule)

1. The Claims Are Covered By The Rule

The business plaintiffs' tort claims are covered by the public nuisance rule in Restatement (Third) of Torts: Liability for Economic Harm § 8, unless the claims are barred by no duty rule in Section 7. The rule is as follows:

> § 8. Public Nuisance Resulting in Economic Loss
>
> An actor whose wrongful conduct harms or obstructs a public resource or public property is subject to liability for resulting economic loss if the claimant's loss are distinct in kind from those suffered by members of the affected community in general. Restatement (Third) of Torts: Liability for Economic Harm, Tentative Draft No. 2 (April 7, 2014), at 27.

The rule applies to the claims in this case because the business plaintiffs seek economic losses that resulted from harm to a public resource, the air quality in the area of Aliso Canyon and Porter Ranch.

It is well established that air pollution is actionable as a public nuisance, if the claim is brought by a public prosecutor authorized to bring claims for public nuisance, or if the plaintiff is able to plead an individual harm that will satisfy the special injury requirement. *See, e.g.*, *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App. 3d 116 (1971)(holding air pollution is actionable as a public nuisance while finding plaintiffs did not allege actionable harm); *Birke v. Oakwood Worldwide*, 196 Cal.App.4th 1540 (2009)(finding plaintiff did allege special injury from exposure to second-hand tobacco smoke in apartment complex where she alleged it aggravated her asthma and chronic allergies).

2. Considerations Balanced In Determining Whether The Business Plaintiffs Suffered An Actionable Injury Under The Rule

While an enormous natural gas leak qualifies as public nuisance under Section 8 that is only the first step in the analysis, as Section 8 further requires a balancing of several considerations. Under the public nuisance rule the business plaintiffs' claims would present a legally cognizable injury only if this Court determines the claimed loss is "distinct in kind from those suffered by members of the affected community in general." This is called the special injury rule. Comment *c* explains the rule:

> *c. Special injury*. Recovery in tort by everyone who is harmed by a public nuisance would raise the characteristic problems that give rise to the rules of this Section. Defendants would be subject to potentially massive and unpredictable liabilities, and courts would be faced with lawsuits large and unwieldy in number and in character. In response to these concerns, courts recognize liability for a public nuisance in tort only to a plaintiff who has suffered a "special injury" distinct in kind from the harm suffered by all members of the affected community.
>
> What injuries are "special," or "distinct in kind," is unavoidably a matter of judgment rather than rule. Courts have reduced some of those judgments to the patterns explained in Comments *d* and *e*. In cases arising outside those patterns, decisions about recovery are best made by asking if liability would cause the problems that the requirement of special injury is meant to address: whether permitting the plaintiff's claim

> would multiply the amount of litigation or the defendant's liabilities unduly, and whether plaintiffs who are allowed to sue can be separated in a principled fashion from those who are not. Restatement (Third) of Torts: Liability for Economic Harm, Tentative Draft No. 2 (April 7, 2014), at 29.

Comment *c* describes considerations that weigh against allowing a claim. On the other side of the balance is the interest in allowing the claim to "provide [plaintiffs] appropriate compensation for their losses and usefully deter repetition of the wrong." Comment *b*. Restatement (Third) of Torts: Liability for Economic Harm, Tentative Draft No. 2 (April 7, 2014), at 29.

The consideration not to impose "indeterminate and disproportionate liability" also appears in Section 1 as a general reason for why "courts impose tort liability for economic loss more selectively than liability for other types of harms." A specific concern is that when negligence causes widespread economic losses defendants "might face liabilities that are indeterminate and out of proportion to their culpability. Those liabilities may in turn create an exaggerated pressure to avoid an activity altogether." Section 1, Comment *c*. Restatement (Third) of Torts: Liability for Economic Harm, Tentative Draft No. 1 (April 4, 2012), at 2-3.

The Reporter's Note to Section 1 explains why over-deterrence is of special concern with respect to claims for pure economic loss.

> Concerns about disproportionate liability sometimes also arise from the observation that private economic losses do not necessarily amount to

> comparable social losses. Wealth misspent on account of a defendant's mistaken advice is not lost in the same way as the value of a house that burns down; after the bad advice the wealth is still enjoyed, though by the wrong person, whereas the house and the resources used to build it are lost to the world. Both outcomes are undesirable, but perhaps not to the same extent. The legal significance of this distinction is not settled, but it may help to further explain the more restrictive approach to liability that courts have taken in certain cases of economic loss. See *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982) (Posner, J.); Goldberg, Recovery for Economic Loss Following the Exxon Valdez Oil Spill, 23 J. Leg. Stud. 1 (1994); Bishop, Economic Loss in Tort, 2 Oxford J. Leg. Stud. 1 (1981).

In sum, in deciding whether a plaintiff suffered a special injury under the public nuisance rule a court should balance the need for liability to "provide appropriate compensation for [the plaintiff's] losses and usefully deter repetition of the wrong," against the concern not to impose on the defendant "liabilities. . . out of proportion to [its] culpability;" the concern not to subject defendants to "potentially massive and unpredictable liabilities"; and the concern to avoid "lawsuits large and unwieldy in number and in character." A court should also consider "whether plaintiffs who are allowed to sue can be separated in a principled fashion from those who are not."

This Court's decisions recognize the relevance of these concerns to the determination of the appropriate ambit of negligence liability when the defendant's negligence causes widespread harm. Some of these concerns are similar to factors established by *Biakanja v. Irving*, 49 Cal.2d 647 (1958), to guide duty analysis.

The need for the liability to deter repetition of the wrong is factor (6): "the policy of preventing future harm." The concern for the cost and risk of error in resolving liability claims bears on factor 3 ("the degree of certainty that the plaintiff suffered injury") and factor 4 ("the closeness of the connection between the defendant's conduct and the injury suffered").

Bily v. Arthur Young & Co., 3 Cal.4th 370 (1992), recognizes the central importance of the question of whether the liability is needed for reasons of deterrence. This Court held that an auditor should not be liable to third parties who relied on an audit because it predicted the liability would result in "an increase in the cost and a decrease in the availability of audits and audit reports with no compensating improvement in overall audit quality. 3 Cal. 4th at 404-405.

Bily also recognizes the concern not to impose "liability out of proportion to fault," 3 Cal.4th at 399, and the concern not to impose liability when it "raises the spectre of vast numbers of suits and limitless financial exposure." 3 Cal. 4th at 400. *Kesner v. Superior Court*, 1 Cal.5th 1132, 1155-1156 (2016), acknowledges the importance of being able to draw a principled line between plaintiffs who are allowed to sue and those who are not.

Four illustrations in the Restatement apply the special injury rule. Illustrations 1 and 2 involve water pollution. They are based on cases like *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), and *Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985).

Union Oil applies general negligence principles under California law to hold commercial fishermen who lost income when the 1969 Santa Barbara oil spill harmed their fishery could bring a negligence action for their economic loss. The opinion cautions:

> [O]ur holding in this case does not open the door to claims that may be asserted by those, other than commercial fisherman, whose economic or personal affairs were discommoded by the oil spill . . . Nothing in this opinion is intended to suggest, for example, that every decline in the general commercial activity of every business in the Santa Barbara area following the occurrences of 1969 constitutes a legally cognizable injury for which the defendants may be responsible. 501 F.2d at 570.

Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), addresses claims by area businesses for lost profits after a chemical spill on the Mississippi river closed the river for two weeks. The case holds that while commercial fishermen could recover other businesses that were dependent on the river could not. The claims that failed included claims by marina and boat rental operators and tackle and bait shops on the closed section of the river.

Illustrations 1 and 2 to Section 8 endorse the line drawn in these cases. In both illustrations a carrier negligently spills toxic chemicals into a bay. Illustration 1 provides a "[h]otel located on a nearby beach" could not "recover for economic losses it suffers when its customers, after hearing of the spill, cancel their reservations." Illustration 2 provides "fisherman and clam diggers" could recover. Comment *d* explains "claims by fishermen to recover for public nuisance are allowed [because and when] they are the class of victims most immediately and obviously affected by contamination of a waterway, and can be separated with tolerable clarity from other classes of affected plaintiffs." Restatement (Third) of Torts: Liability for Economic Harm, Tentative Draft No. 2 (April 7, 2014), at 30.

Other reasons support allowing fishermen to recover when the defendant harms a public fishery. The livelihood of fishermen is entirely dependent on the health of a fishery. Many fisheries are regulated and fishermen are subject to licensing and quota restrictions. The licensing and quota restrictions solve a "tragedy of the commons" problem that private property rights solve for other common resources, such as grazing on public land; tort liability to the fishermen ensures that a defendant who harms a public fishery bears some liability for the harm.

Comment *e* and Illustrations 3 and 4 focus on cases in which the defendant wrongfully obstructs a public way.

Comment *e* explains:

> Courts usually decline to impose liability for economic losses caused by obstruction of a public way because they see no end to it. Countless businesses might show that a given disruption to nearby traffic reduced the number of visits they received from customers. On the other hand, liability may be unobjectionable and useful if the plaintiff can show an injury that is sufficiently distinct to allow principled separation of the resulting claim from the claims that others might bring.

Illustration 3 is the general rule and Illustration 4 is the exception:

> 3. Builder negligently constructs a building for Client. The building collapses as a result, forcing the closure of adjacent streets for several weeks. Delicatessen, which operates next door to the collapsed building, suffers no physical damage but loses profits because customers cannot reach the entrance while the street is closed. Delicatessen sues Builder on a theory of public nuisance to recover the profits it lost during the closure. The court finds that Delicatessen's injuries are indistinguishable in kind from injuries suffered by large numbers of other businesses in the area. Builder is not liable in tort to Delicatessen.
>
> 4. Restaurant on the bank of a river provides a dock where customers can arrive by boat. Logger wrongfully floats logs down the river in a loose manner that allows them to become stuck near Restaurant and block access to its dock. Restaurant sues Logger on a theory of public nuisance to recover profits it lost as a result of the blockage. The court finds that Logger created a public nuisance and that Restaurant suffered special damage as a result. Logger is subject to liability to Restaurant in tort. Restatement (Third) of Torts: Liability for Economic Harm, Tentative Draft No. 2 (April 7, 2014), at 29.

A requirement that a private plaintiff seeking relief for a public nuisance plead an injury that is "distinct in kind" is well established in California law. *See, e.g., Koll-Irvine Center Property Owners Assn. v. County of Orange*, 24 Cal.App. 4th 1036, 1040 (1994). California law also requires that "[t]he damage suffered must be different in kind and not merely in degree from that suffered by other members of the public." *Id.* While Illustration 3 uses this terminology the statement that "Delicatessen's injuries are indistinguishable in kind from injuries suffered by large numbers of other businesses" should be understood as a way of expressing the court's conclusion that it is unable to draw a principled distinction between businesses harmed by the street closure.

3. The Business Plaintiffs Did Not Suffer An Actionable Injury Under The Rule

American courts have rejected tort claims by businesses seeking lost profits when an accident adversely affects a large region because of the accident's impact on the region's environment or on its transportation network. The principles in the Restatement support this result, which is consistent with Illustrations 1 and 3. The principles also support denying the business plaintiffs' claim in this case.

The defendant in this case faces substantial legal liability already so the additional liability for the business plaintiffs' lost profits may well be unnecessary to deter repetition of the wrong.

The business plaintiffs are not the "immediate and obvious" victims of the gas leak. The immediate and obvious victims are individuals who suffered bodily harm and owners of property that was physically harmed as a result of the gas leak. The next most immediate and obvious victims are individuals and private and public entities that were compelled to relocate.[4] Next in the queue

[4] This type of claim was allowed in *People Exp. Airlines, Inc. v. Consolidated Rail Corp.*, 100 N.J. 246, 495 A.2d 107 (1985). The case holds that an airline (*People Express*) suffered an actionable injury when an accident in handling a railway tank car led to a