Case No. S246669

SUPREME COURT
FILED

OCT 03 2018

Jorge Navarrete Clerk

Deputy

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S246669

SOUTHERN CALIFORNIA GAS LEAK CASES

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE, CASE NO. B283606; LOS ANGELES COUNTY SUPERIOR COURT, JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4861, THE HONORABLE JOHN SHEPARD WILEY, JR., JUDGE.

AMICUS BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENT SOUTHERN CALIFORNIA GAS COMPANY

FRED J. HIESTAND
COUNSELOR AT LAW
SBN 44241
fred@fjh-law.com
3418 Third Ave., Suite 1
Sacramento, CA 95817
Tel: (916) 448-5100

General Counsel for *Amicus Curiae*
The Civil Justice Association of California

RECEIVED

SEP 28 2018

CLERK SUPREME COURT

Prometheus Press * Sacramento, CA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 3

INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE. 7

ARGUMENT 10

I. THERE IS NO TORT LIABILITY FOR ECONOMIC LOSS CAUSED TO A PLAINTIFF BY INJURY TO THE PERSON OR PROPERTY OF ANOTHER PARTY. 10

II. CLEAR CONSIDERATIONS OF POLICY JUSTIFY "CARVING OUT" FROM THE GENERAL DUTY RULE IN NEGLIGENCE THAT CATEGORY OF CASES WHERE PLAINTIFFS SEEK ECONOMIC LOSSES CAUSED BY INJURY TO THE PERSON OR PROPERTY OF ANOTHER. 15

A. Limitless Liability. 16

B. Disproportionate Liability. 17

C. Excessive Litigation.. 19

III. THE PRINCIPAL AUTHORITIES RELIED UPON TO ADVANCE BUSINESS PLAINTIFFS' THEORY OF RECOVERY FOR THEIR PURE ECONOMIC LOSSES HAVE BEEN REJECTED BY THE MAJORITY OF OTHER STATE COURTS AND SUBJECTED TO SCHOLARLY CRITICISM. 20

CONCLUSION. 24

CERTIFICATE OF WORD COUNT 25

PROOF OF SERVICE

TABLE OF AUTHORITIES

Page

California Cases

Biakanja v. Irving
(1958) 49 Cal.2d 647 20-23

Bily v. Arthur Young & Co.
(1992) 3 Cal.4th 370 15

J'Aire Corp. v. Gregory
(1979) 24 Cal.3d 799 21-23

Kim v. Toyota Motor. Co.
(2018) 6 Cal.5th 21 9

King v. CompPartners, Inc.
(2018) 5 Cal.5th 1039 9

Moradi-Shalal v. Fireman's Fund Ins. Companies
(1988) 46 Cal.3d 287 20

Winn v. Pioneer Medical Group, Inc.
(2016) 63 Cal.4th 148 9

Federal and Other State Cases

532 Madison Ave. Gourmet Foods v. Finlandia Center
(2001) 96 Y.Y.2d 280 . . . . 14, 15

Aikens v. Baltimore and Ohio R. Co.
(1985) 348 Pa. Super. 17 . . . . 17, 23

Barber Lines A/S v. M/V Donau Maru
(1st Cir. 1985) 764 F.2d 50 . . . . 12-14, 20

Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.
(Tex. 2000) 29 S.W.3d 282 23

Dundee Cement Co. v. Chemical Labs., Inc.
(7th Cir. 1983) 712 F.2d 1166 19

Guy v. Liederbach
(1983) 501 Pa. 47 22

H. Rosenblum, Inc. v. Adler
(N.J. 1983) 461 A.2d 138 21

Local Joint Exec. Bd. of Las Vegas v. Stern
(1982) 98 Nev. 409 23

Pelham v. Griesheimer
(1982) 92 Ill. 2d 13 22

Raritan River Steel Co. v. Cherry, Bekaert & Holland
(1988) 322 N.C. 200 22

Robins Dry Dock & Repair Co. v. Flint
(1927) 275 U.S. 303 . . . . 10, 11, 13

State of La. ex. rel. Guste v. M/V Testbank
(5th Cir. 1985) 752 F.2d 1010 . . . . 11, 12

Ultramares Corp. v. Touche
(N.Y. 1931) 174 N.E. 441 . . . . 9, 21

Articles, Texts, Treatises, and Miscellaneous

Benson, *The Problem with Pure Economic Loss*
(2009) 60 *S.C. L. Rev.* 823. 18

Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*
(2006) 48 *Ariz. L. Rev.* 773 23

Boston, *Liability of Attorneys to Nonclients in Michigan: A Re-examination of Friedman v. Dozorc and a Rule of Limited Liability* (1991) 68 *U. DET. L. REV.* 307 22

Farnsworth, *The Economic Loss Rule* (2016) 50 *VAL. U.L. REV.* 545 . . . . 11, 16, 19, 20

Harper *et al.*, *THE LAW OF TORTS* (2nd ed. 1986) § 25.18B 16

Hazard, *The Privity Requirement Reconsidered* (1996) 37 *S. TEX. L. REV.* 967 22

O'Brien, *Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss* (1989) 31 *ARIZ. L. REV.* 959 17

Pojanowski, *Private Law in the Gaps* (2014) 82 *FORDHAM L. REV.* 1689 19

REST.3D, TORTS, Econ. Harm §§ 1, 7, cmt. b 8

Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability* (1986) 23 *SAN DIEGO L. REV.* 37 22

Sczepanski (Note), *Stockler v. Rose: Michigan's Role in the "Play" of Third Party Liability for Negligent Accounting* (1995) 42 Wayne L. Rev. 195. 22

Squillante (Comment), *Expanding the Potential Tort Liability of Physicians: A Legal Portrait of "Nontraditional Patients" and Proposals for Change* (1993) 40 *UCLA L. REV.* 1617. 22

Stonestreet, *Replacing a Solid Wall with a Chain-link Fence: Special Relationship Analysis for Tort Recovery of Purely Economic Loss* (2002) 105 *W. VA. L. REV.* 213 16

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS LEAK CASES

INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California ("CJAC") welcomes the opportunity as amicus curiae[1] to address the issue this case presents — May plaintiffs affected by a manmade environmental disaster state a claim for negligence against the gas company that caused the disaster if the damages they sustained are solely economic?

That "manmade disaster" was the 2015 Aliso Canyon gas leak where an odorous gas escaping from a Southern California Gas ("SCG") well more than a mile from Porter Ranch affected residents of that community. Though the well leak was sealed within four to five months, during that time and through July 2016 SCG worked with government agencies at its own expense to temporarily relocate residents in the Porter Ranch area to hotels or other residences outside the area.

---

[1] CJAC previously requested, and was granted, an extension of time up to September 26, 2018 by which to lodge this brief. By separate application accompanying the brief, CJAC asks that it be accepted and filed.

When the gas cleared and the bad smells went away, more than 10,000 individuals filed hundreds of lawsuits against SCG alleging, on various legal grounds, personal injuries to themselves or their property from the gas leaks. Close to 350 separate actions involving approximately 50,000 individuals against SCG have been coordinated and are pending before the Superior Court.

Plaintiffs herein are businesses within a five-mile radius of Aliso Canyon (which amounts to more than 78 square miles) who concede they suffered no personal injury or damage to their property from the gas leak. Nonetheless, these plaintiffs seek damages for revenues they lost due a drop in business when many residents relocated temporarily outside the area.

In a two-to-one majority opinion, the appellate court answered "No" to the question presented, concluding, "Without *personal injury, property damage* or a *special relationship,* the general rule that *precludes* business plaintiffs from recovering for *pure economic losses* under a *negligence* theory remains viable."

That "general rule" to which the appellate opinion referred is the "economic loss" rule. While there are many versions of the rule as well as exceptions to it, the version at issue here provides that "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another" and the vast majority of courts "reject . . . categorically" claims for economic loss from negligent conduct affecting third parties. *REST.3D, TORTS, Econ. Harm* §§ 1, 7, cmt. b.

CJAC supports this venerable common sense rule because it comports with our principal purpose: to educate the public about ways to make our laws for determining who pays, how much, and to whom when the conduct of some occasions harm to others – more "fair, certain and economical." Toward this end, amicus has participated in numerous cases before the Court[2] that affect our purpose and threaten the interests of our members – businesses, professional associations and financial institutions.

CJAC believes the judicially made bright-line exceptions to the "economic loss" rule (exceptions that do not apply here) – *e.g.*, for intentional conduct, deceit, misrepresentation, and whenever there exists a "special relationship" between the plaintiff and defendant – are sufficient to provide for economic loss recovery when justice requires. To go further and allow what plaintiffs seek – an opinion dispensing with the rule whenever the defendant's negligence constitutes a "foreseeable" risk of economic harm to plaintiffs – would destroy the rule and inflict the calamitous result Justice Cardozo predicted: "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche* (N.Y. 1931) 174 N.E. 441, 444.

---

[2] See, *e.g.*, *King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039; *Kim v. Toyota Motor. Co.* (2018) 6 Cal.5th 21; and *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148.

ARGUMENT

I. THERE IS NO TORT LIABILITY FOR ECONOMIC LOSS CAUSED TO A PLAINTIFF BY INJURY TO THE PERSON OR PROPERTY OF ANOTHER PARTY.

When it comes to recovery for negligently inflicted economic loss, courts have traditionally drawn a "bright line" beyond which recovery will not be permitted regardless of the foreseeability of injury. This bright line is the "economic loss" rule, which is based primarily on furthering fairness through pragmatism, clarity and predictability.

The stated rule is simple: if a plaintiff suffers only pure economic loss caused by a defendant's negligence, but no physical injury to his or her own person or property, that plaintiff is barred from recovering any damages. Unless some type of contractual or special relationship exists that may provide a remedy, recovery of economic damages will not be available because tort law does not generally recognize a duty of care to avoid causing purely economic harm in this situation.

Justice Oliver Wendell Holmes, in *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303, 309 ("*Robins*") was one of the first to draw this bright line distinction in a classic case involving a third-party plaintiff attempting to sue to recover for pure economic loss. There, charterers of a steamship sued a dry dock (with whom they had no contract) for damages from the loss of use of the chartered vessel occasioned by a delay in repairs due to the dry dock's negligence. It could hardly be gainsaid that the charterers' loss of business from the dry dock's negligent delay in repairing the dock was foreseeable, but so would have been the charterers' clients' loss of business, and those relying on the clients, and so on and on. Holmes opined for the Court that "[t]he law does not spread its protection so far," because "a tort to

the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong," thus denying liability on the grounds of foreseeability. With this famous sentence – "The law does not spread its protection so far." – Justice Holmes shut the door on any rippling effect from recognizing "economic loss" based on "foreseeability."

An important advantage of this no-liability version of the economic loss rule is "clarity." It "removes a large number of potential claims from the case-by-case analysis called for when a fact pattern falls outside any settled category. This category exists, and it is settled." Farnsworth, *The Economic Loss Rule* (2016) 50 *VAL. U.L. REV.* 545, 564.

Numerous cases underscore the widely accepted and "settled" nature of this particular "bright line" economic loss rule. In *State of La. ex. rel. Guste v. M/V Testbank* (5th Cir. 1985) 752 F.2d 1010 ("*Guste*"), for example, a container ship collided with a bulk carrier ship in the Mississippi River gulf outlet, causing a chemical spill and the closing of the outlet for weeks. A number of shipping interests, tackle and bait shops, and others sued the owners of the colliding ships on a variety of legal theories for recovery of their purely economic damages during the time the outlet was closed. The district court granted summary judgment for defendants and the appellate court affirmed, largely on the basis of the economic loss rule and its authoritative interpretation by *Robins*.

Plaintiffs argued that *Robins* was a contract interference case, but *Guste* rejected that characterization, saying *Robins* pushed the

"contract arguments aside and directly addressed [plaintiff's] effort to recover in tort." 752 F.2d at 1023.

> When the loss is economic rather than physical, that the loss caused a breach of contract or denied an expectancy is of no moment. If a plaintiff connected to the damaged chattels by contract cannot recover, others more remotely situated are foreclosed *a fortiori*.

Id. at 1024.

Moreover, *Guste* explained:

> The bright line [economic loss] rule . . . has the virtue of predictability [counterbalanced] with the vice of creating results in cases at its edge that are said to be "unjust" or "unfair." Plaintiffs point to seemingly perverse results, where claims the rule allows and those it disallows are juxtaposed . . . [some] causing minor but recoverable damage [and others] causing great but unrecoverable economic loss. The answer is that when lines are drawn sufficiently sharp in their definitional edges to be reasonable and predictable, such differing results are the inevitable result – indeed, decisions are the desired product. . . The line drawing sought by plaintiffs is no less arbitrary because the line drawing appears only in the outcome – as one claimant is found too remote and another is allowed to recover. The true difference is that plaintiffs' approach would mask the results. The present [economic loss] rule [is] more candid, and . . ., by making results more predictable, serves a normative function. It operates as a rule of law and allows a court to adjudicate rather than manage.

752 F.2d at 1029.

Guste astutely and correctly observed that the "economic loss" rule articulated in *Robins* and its progeny is "a pragmatic limitation imposed . . . upon the tort doctrine of foreseeability." *Id.* at 1023.

Similarly, *Barber Lines A/S v. M/V Donau Maru* (1st Cir. 1985) 764 F.2d 50 ("*Barber*") involved a suit in negligence by one ship, The Tamara, against another, Donau Maru, because the defendant ship spilled fuel oil into the Boston Harbor and prevented the plaintiff from

docking at a nearby berth. The plaintiff had to discharge her cargo at another pier, which caused her to suffer solely economic loss. The appellate court affirmed the district court's dismissal of the negligence case based on *Robins, supra,* 275 U.S. 303, stating "a plaintiff may not recover for his economic loss resulting from doing harm to another or from physical damage to property in which he has no proprietary interest." 764 F.2d at 52.

Most instructive, *Barber* reviewed a number of opinions discussing the "economic loss" rule and the principled precedent of *Robins* to determine "whether that precedent remains good law." *Id.* at 53. In concluding that rule and decisions applying it "rest on a firm policy foundation," *Barber* identified and discussed two important "policy considerations" underlying it.

First, the court pointed to "pragmatic or practical administrative considerations which, when taken together, offer support for a rule limiting recovery for negligently caused pure financial harm." *Id.* at 54. Amongst these "pragmatic" considerations are that the number of persons suffering foreseeable financial harm from accidents is likely to exceed by far those who suffer traditional and recoverable physical harm.

> To use the notion of "foreseeability" that courts use in physical injury cases to separate the financially injured allowed to sue from the financially injured not allowed to sue would draw vast numbers of injured persons within the class of potential plaintiffs in even the most simple accident cases (unless it leads courts, unwarrantedly, to narrow the scope of "foreseeability" as applied to persons suffering physical harm).

764 F.2d at 54. A large number of different plaintiffs each with somewhat different claims threatens to raise significantly the cost of even relatively simple tort actions.

Second, *Barber* mentions considerations of "disproportionality" between liability and fault. Tort liability provides a powerful set of economic incentives and disincentives to engage in economic activity or to make it safer. Liability for pure economic loss, insofar as it proved vast, cumulative and unknowable in amount, could create perverse incentives. As an example, *Barber* asks, "Might not unbounded liability for foreseeable financial damage, make auto insurance premiums too expensive for many drivers?" *Id.* at 55. High premiums reflect not just the costs of the harm inflicted, but the administrative costs of lawsuits, jury verdicts in uncertain amounts, some percentage of unbounded or inflated economic claims, and lessened incentive for financial victims to avoid harm or to mitigate damage. Can one say, for instance, that still higher premiums are needed to make the public realize that driving is socially expensive or to provide greater incentive to drive safely?

Barber found these considerations of "administrability and disproportionality" underscore "judicial hesitance to award damages" in a case like the one before it, "and the "need to consider exceptions by class rather than case-by-case." *Barber, supra,* 764 F.2d at 56.

A third judicial opinion, *532 Madison Ave. Gourmet Foods v. Finlandia Center* (2001) 96 Y.Y.2d 280 ("*Gourmet Foods*"), illustrates the viability of the economic loss rule amicus urges be applied to this case. There, a section of the south wall of 540 Madison Avenue, a 39-story office tower, partially collapsed necessitating the closure of 15 heavily trafficked blocks on and around the building for weeks. Nearby businesses filed suits for negligence against the owners of the building with the collapsed wall claiming that shoppers and others were unable

to gain access to their businesses when the streets were closed and that they lost customers and revenue as a result. The trial court dismissed plaintiffs' negligence claims on the ground that plaintiffs "could not establish that defendants owed a duty of care for purely economic loss in the absence of personal injury or property damage." *Id.* at 286. The appellate court affirmed.

In rejecting plaintiffs' claims, *Gourmet Foods* explained that

> "as is readily apparent, an indeterminate group in the affected areas . . . may have provable financial losses traceable to the . . . construction related collapse, with no satisfactory way geographically to distinguish between those who have suffered purely economic losses. In such circumstances, limiting the scope of defendants' duty to those who have, as a result . . ., suffered personal injury or property damage – as historically courts have done – affords a principled basis for reasonably apportioning liability. [¶] We therefore conclude that plaintiffs' negligence claims based on economic loss alone fall beyond the scope of the duty owed them by defendants . . .."

Id. at 291-292.

II. CLEAR CONSIDERATIONS OF POLICY JUSTIFY "CARVING OUT" FROM THE GENERAL DUTY RULE IN NEGLIGENCE THAT CATEGORY OF CASES WHERE PLAINTIFFS SEEK ECONOMIC LOSSES CAUSED BY INJURY TO THE PERSON OR PROPERTY OF ANOTHER.

A judicial conclusion that a duty is present or absent is merely "a shorthand statement . . . rather than an aid to analysis . . .. '[D]uty,' is not sacrosanct in itself, but only an expression of the sum total of those *considerations of policy* which lead the law to say that the particular plaintiff is entitled to protection.' 'Courts, however, have invoked the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act . . ..'" *Bily*

v. Arthur Young & Co. (1992) 3 Cal.4th 370, 397; citations omitted; emphasis added.

One way of limiting liability through "duty," of course, the way the aforementioned authorities and amicus favor here, is by "a rule against liability rather than in favor of it. Since liability for economic loss has to be established on some particular ground, why bother explaining the non-existence of liability in any given area." Farnsworth, *supra*, at 564.

Strong public policy considerations underlie the non-liability "economic loss" rule as a carve-out from the duty element in negligence: preventing "limitless liability, disproportionate liability, and a proverbial flood of litigation." Stonestreet, *Replacing a Solid Wall with a Chain-link Fence: Special Relationship Analysis for Tort Recovery of Purely Economic Loss* (2002) 105 *W. VA. L. REV.* 213, 220.

A. Limitless Liability. The concern about limitless liability stems from recognition that any act can conceivably cause an indeterminate amount of effects. Thus, the personal injury or physical harm requirement – essential elements of the economic loss rule – serves to limit such potential liability only to those physically affected. "Only a limited amount of physical damage can ever ensue from a single act, while the number of economic interests a tortfeasor may destroy in a brief moment of carelessness is practically limitless." Harper *et al.*, *THE LAW OF TORTS* (2nd ed. 1986) § 25.18B.

Extending liability to the purely economic consequences of minor deviations from the acceptable standard of care could prove too burdensome for society to handle. Socially useful and productive activities may be deterred because the risk of liability is so great.

O'Brien, *Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss* (1989) 31 ARIZ. L. REV. 959, 967-68. The law can only, as Justice Holmes said in *Robins*, extend its protection "so far" and the traditional rule requiring personal injury or physical harm to property provides a bright line for the breadth of that potential liability.

Take, as a hypothetical example, the driver who carelessly switches lanes in the East Bay Caldecott Tunnel during a heavy morning work commute, causing several cars to pile-up and block the tunnel for hours. While we readily accept that the negligent driver would face liability for injuries to other drivers and damage to their automobiles from the collision, what about liability for the purely economic losses to drivers trapped in the tunnel? What about commercial drivers delivering time-sensitive goods and materials to others who will be unable to make those deliveries and suffer consequential economic loss? And then there are those destined for important airline connections where a missed flight occasioned by the negligent traffic tunnel delay may mean a lost contract or job.

Surely it was foreseeable to any reasonable driver that his or her negligence while driving in the tunnel could have these economic loss impacts on others; but would we want a law that imposes on that driver or the driver's automobile insurer obligations to cover all these purely economic losses for all the other motorists? Amicus thinks not.

B. Disproportionate Liability. Allowing recovery for purely economic loss can "create a disproportion between the large amount of damages that might be recovered and the extent of the defendant's fault." *Aikens v. Baltimore and Ohio R. Co.* (1985) 348 Pa. Super. 17,

21. The level of negligent conduct may be slight, but the far-reaching implications great. Due to the interconnected nature of modern life, allowing negligence liability for foreseeable, freestanding economic losses would lead to crushing disproportionate liability and "be an ineffective means of discouraging loss-creating activity or facilitating loss spreading." Benson, *The Problem with Pure Economic Loss* (2009) 60 *S.C. L. Rev.* 823, 831, n.16.

Referring to the example of the unlucky motorist who crashes in the tunnel, what if the crash delayed a group of corporate executives on their way to the closing of a multi-billion dollar trade deal with a foreign nation? The dignitaries become offended at the tardiness of the executives and view the delay as a dilatory tactic. Preferring not to do business with a company whose executives cannot attend a meeting on time, the disgusted dignitaries call off the deal and the company loses millions in potential profits.

It is foreseeable that a crash in a tunnel will delay many motorists on a busy highway. It is also foreseeable that these motorists will be late for their appointments or work obligations and this may result in lost wages, discipline, loss of employment, or worse as in the case of our tardy executives. Even if we assume the economic loss to the executives was proximately caused by the motorist's negligence, holding the motorist liable for the millions in lost profits of the corporation seems highly disproportional to the extent of fault. The economic loss rule seeks to prevent situations such as this where, through the chain of cause and effect, a minor deviation from the reasonable standard of care causes harm resulting in the imposition of crushing liability clearly disproportional to the culpability of the

defendant. "Sound policy requires a judicial carve-out for claims for economic losses absent injury to the plaintiff's person or property." Pojanowski, *Private Law in the Gaps* (2014) 82 *FORDHAM L. REV.* 1689, 1709.

C. Excessive Litigation. A third policy concern supporting the economic loss rule is the prevention of a litigation flood if purely economic losses can be recovered in a negligence suit. Allowing such a cause of action could not only lead to administrative overload for the court system, but it could also saddle the public with a "crushing burden of litigation." *Dundee Cement Co. v. Chemical Labs., Inc.* (7th Cir. 1983) 712 F.2d 1166, 1172.

Referring again to our tunnel crash example, every person delayed by the accident would have a potential cause of action for economic damages whether it be for lost wages, increased transportation expenses, or any other possible delay damages. If recovery against the driver is permitted for the commercial carrier who incurs lost profits because of late deliveries, then can the manufacturer that expected the on-time shipment recover for any damages it may sustain? What about distributors of the manufacturer that expected the product to be available? What about the retailers, the consumers? The number of potential plaintiffs could climb into the thousands. Limiting the pool of potential plaintiffs to only those physically impacted eliminates this potential flood of claims for economic loss.

All these aforementioned public policy concerns are "about indeterminate and runaway liability." Farnsworth, *supra* at 565. That they underpin a rule that seems inflexible and too harsh in its results,

suggests it is "better viewed as giving effect to other important policies – namely clarity, simplicity, and predictability. If the cost of this rigidity seems too high, relief can be provided selectively by statute . . .." *Id.*; on this point see the amicus curiae brief filed herein by the Chamber of Commerce, *et al.*, pp. 36-38.

The point to all of this is that when it comes to the economic loss rule at issue here – the plaintiff cannot collect in tort for economic loss caused by injury to the person or property of a third party – exceptions to it should be made "by class rather than case by case. The existence of these [above mentioned public policy] factors, together with [the judiciary's] comparative inability to evaluate their empirical significance, cautions . . . against departing from [existing and well-settled] law." *Barber, supra,* 764 F.2d at 54.

III. THE PRINCIPAL AUTHORITIES RELIED UPON TO ADVANCE BUSINESS PLAINTIFFS' THEORY OF RECOVERY FOR THEIR PURE ECONOMIC LOSSES HAVE BEEN REJECTED BY THE MAJORITY OF OTHER STATE COURTS AND SUBJECTED TO SCHOLARLY CRITICISM.

This Court has recognized that "reexamination of precedent may become necessary when subsequent developments indicate an earlier decision was unsound, or has become ripe for reconsideration." *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 297. At the very least, when those decisions are advanced for the purpose of enlarging negligence liability by eviscerating the well-settled version of the economic loss rule at play here, the Court should give serious consideration to not relying upon them, to limiting them to the facts that gave rise to their decisions. Two opinions that are key to plaintiffs' argument, and are both designated "passim" in their table of authorities, deserve the Court's skeptical eye: *Biakanja v. Irving* (1958)

49 Cal.2d 647 ("*Biakanja*") and *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799 ("*J'Aire*").

While both *Biakanja* and *J'Aire* can be easily distinguished from this case as they are "special relationship," professional service exceptions to the economic loss rule and no special relationship exists here, they are problematically cited as authority for enlarging liability for economic loss. *Biakanja* set forth a set of "factors" to be "balanced" in determining "duty" and *J'Aire* reiterated the same factors for the same purpose. The *Biakanja/J'Aire* factors are: "[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Biakanja, supra,* 49 Cal.2d at 650.

The first of these factors is a question of privity, born of a contractual analysis. The last three can be attributed to the foreseeability, injury, and proximate cause considerations of negligence theory in tort law, respectively. This approach is not particularly pertinent to this case because an analysis placing more significance on the first factor will result in an outcome similar to *Ultramares, supra,* 174 N.E. 441, which employed the privity/contract theory. Similarly, courts emphasizing the last three factors will likely reach the same decisions as if they had applied the general foreseeability rules in *H. Rosenblum, Inc. v. Adler* (N.J. 1983) 461 A.2d 138 and California cognates. As one commentator remarked, "Therefore, analysis of this approach [*i.e., Biakanja/J'Aire* factors] adds little insight into the

reasons driving the judicial expansion of liability. In addition, this balancing test approach has not been adopted by any other court." Sczepanski (Note), *Stockler v. Rose: Michigan's Role in the "Play" of Third Party Liability for Negligent Accounting* (1995) 42 Wayne L. Rev. 195, 196, fn 4.

A majority of courts in other jurisdictions and numerous legal scholars have been sharply critical of the *Biakanja/J'Aire* factors and the decision that gave birth to them. See, *e.g.*, *Guy v. Liederbach* (1983) 501 Pa. 47, 57 ("vague and leading to ad hoc determinations and inconsistent results"); Hazard, *The Privity Requirement Reconsidered* (1996) 37 *S. TEX. L. REV.* 967, 992 ("a potpourri of factors that gave no clue as to which . . . were decisive"); Boston, *Liability of Attorneys to Nonclients in Michigan: A Re-examination of Friedman v. Dozorc and a Rule of Limited Liability* (1991) 68 *U. DET. L. REV.* 307, 320 ("not achieved universal acceptance"); *Pelham v. Griesheimer* (1982) 92 Ill. 2d 13, 22 ("too broad"); and *Raritan River Steel Co. v. Cherry, Bekaert & Holland* (1988) 322 N.C. 200, 214 (rejected test as "difficult to apply" because the fifth and sixth factors, which look to moral blame and preventing future harm, are "not capable of precise application and seem to add little to an assessment of whether a defendant violated a particular duty of care.").

J'Aire, a pillar of plaintiffs' argument for finding "duty" here by making an exception to, or end-run around, the economic loss rule, has fared even worse than its progenitor *Biakanja*. See, *e.g.*, Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability* (1986) 23 *SAN DIEGO L. REV.* 37 ("hard to cabin," "anomalous"); Squillante (Comment), *Expanding the Potential Tort*