**Case No. S246669**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**



SOUTHERN CALIFORNIA GAS COMPANY,
*Respondent to Petition for Review,*

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY;
*Respondent to Petition for Writ of Mandate.*

FIRST AMERICAN WHOLESALE LENDING CORPORATION, et al.
*Real Parties in Interest, Petitioners.*

After a Decision by the Court of Appeal,
Second Appellate District, Division Five, Case No. B283606

The Superior Court of Los Angeles County,
Judicial Council Coordination Proceeding No. 4861,
The Hon. John Shepard Wiley, Jr., Judge

# APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS; PROPOSED BRIEF OF AMICI CURIAE CALIFORNIA TORT LAW PROFESSORS

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## APPLICATION TO FILE BRIEF OF AMICI CURIAE

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

Proposed amici curiae Professors Richard Abel, Alison Anderson, Blake Emerson, Jill Horwitz, Kathleen Kim, Albert Lin, John Nockleby, Alex Wang, Jonathan Zasloff, and Adam Zimmerman make this application to file the accompanying brief in this case pursuant to California Rules of Court, Rule 8.520, subd. (f).[1]

Proposed amici are professors engaged in the study and teaching of tort law and policy. They include professors who have considerable experience in California and federal tort policy and practice. Proposed amici professors have an interest in ensuring the Court thoroughly considers the implications of this case on the future practice, study, and teaching of tort law, particularly the consequences for future mass tort litigation and litigants. The affiliations of each of the proposed amici are listed below to provide context for their interest and their ability to assist the Court in deciding this matter.[2]

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[1] No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, and no one other than amici, and their counsel of record, made any monetary contribution intended to fund the preparation or submission of the brief.

[2] The professional affiliation of each of the proposed amici and counsel is listed for reference purposes only. The views contained in the proposed brief of *amici curiae* represent the legal analysis of the proposed amici, and are not offered on behalf of the institutions with which they are affiliated.

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As proposed amici will be affected by this Court's decision and may assist the Court through their unique perspectives, proposed amici respectfully request the permission of the Honorable Tani Cantil-Sakauye, Chief Justice of the Supreme Court of the State of California, to file this brief.

Dated: September 5, 2018

By:_____

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## [PROPOSED] AMICI CURIAE BRIEF

### I. Introduction

This case is of great significance, not just because of the magnitude of the harm at issue, but because it asks the Court to consider a question it has never answered before: the viability of a negligence claim giving rise to purely economic loss in a case that involves no contractual or other transactional relationship between the parties. The importance of the question cannot be overstated—not just for the plaintiffs in this case, but for future mass tort plaintiffs—because while the events giving rise to the Aliso Canyon natural gas leak were extreme, man-made natural disasters like this one are not unique. In cases like this, tort liability creates a powerful, and necessary, incentive to deter activities that can harm not only the economy, but our natural environment.

Claims for economic loss untethered to other property damage are the exception in tort cases, and courts have taken varying approaches to addressing the viability of these claims in transaction-based and non-transaction-based cases. Because contracts delegate liability for economic damages, in some transaction-based cases, courts have unburdened defendants of owing a duty of care where economic loss is the only damage claimed. (*See Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58.) In non-transaction based cases, parties do not have the benefit of allocating responsibility themselves because of the high cost of doing so—precisely the kinds of scenarios for which tort law is designed. (*See* Robert Cooter and Thomas Ulen (6th ed. 2016) *Law and Economics*, pp. 189-190 ["*The economic essence of tort law is its use of liability to internalize externalities created by high transaction costs.*"] [emphasis in

original].) But a different concern arises in non-transaction-based cases for economic damages, which is that a defendant might be unfairly forced to bear the cost of economic damages suffered by parties several times removed from the defendant's act. (*See, e.g., Union Oil Co. v. Oppen* (9th Cir. 1974) 501 F.2d 558, 563.) Because property damage presents a liability-constraining nexus to establish proximate cause, in non-transaction-based cases, courts have limited claims for purely economic loss to narrowly-defined classes of plaintiffs to mitigate concerns about imposing liability for speculative or remote injuries. (*See Union Oil Co.*, 501 F.2d at 563 [a rule "which would allow compensation for all losses of economic advantages caused by defendant's negligence, would subject the defendant to claims based upon remote and speculative injuries which he could not foresee"]; *Curd v. Mosaic Fertilizer, LLC* (Fla. 2010) 39 So.3d 1216; *Masonite Corp. v. Steede* (Miss. 1945) 198 Miss. 530; *Hampton v. North Carolina Pulp Co.* (N.C. 1943) 223 N.C. 535; *Columbia River Fishermen's Protective Union v. City of St. Helens* (Or. 1939) 160 Or. 654.)

It is this historical approach that we suggest the Court build on in this case. Bedrock principles of tort law and policy concerns dictate that the Court should not relieve defendants of a duty of care in non-transaction-based cases for purely economic losses. But defendants in these cases should be protected against disproportionate liability for remote damages through the application of a "particular foreseeability" test that ensures proximate causation. Case law considering claims for economic loss in a non-transaction-based context suggests that a plaintiff's injury can be considered "particularly foreseeable" when a plaintiff has a "special interest" within a "zone of risk" created by a defendant's activity, "an interest not shared by the general community." (*See, e.g., Curd*, 39 So.3d at 1228; *Union Oil Co.*, 501 F.2d at 570 [fishermen had cause of action for

economic damages resulting from oil spill impacts on fish because they suffered "a pecuniary loss of a particular and special nature"].) Determining, through application of the *Rowland v. Christian* factors, that a duty of care is owed in this case while applying a "particular foreseeability" test to determine proximate cause would limit recovery to groups of plaintiffs whose injuries are intimately tied to defendants' acts, preserve proper incentives to deter potential injuries, and provide a more streamlined approach for courts to resolve tort claims for economic damages alone.

## II. Discussion

California recognizes that parties generally owe a duty to those who are harmed by their failure to exercise ordinary care or skill. (*See* Cal. Civ. Code § 1714, subd. (a).) This statutory duty is consistent with the tort law principle that "liability for losses occasioned by torts should be apportioned in a manner that will best contribute to the achievement of an optimum allocation of resources." (*Union Oil Co.*, 501 F.2d at 569 [*citing* Calabresi, *The Cost of Accidents* (1970) pp. 69-73 and Coase, *The Problem of Social Cost* (1960) 3 J. Law & Econ. 1].) The imposition of responsibility serves as a tool to ensure that companies like Southern California Gas Company ("SoCalGas") will properly account for the risks inherent in their activities, and deters behavior that might lead to great harm. Relieving defendants of the duty that section 1714 imposes in a wide range of cases—as SoCalGas suggests the Court should do—is a proposition that should be approached with skepticism. In this non-transaction-based case, the Court can alleviate SoCalGas' concerns about remote liability without removing the important incentives section 1714 creates, by imposing a "particular foreseeability" test at the proximate cause stage of the inquiry in non-transaction-based cases.

### A. This Court Should Not Newly Create a Categorical Exception To California's General Duty of Care for All Economic Loss Cases

California courts have not recognized a universal exception to the general duty rule—that parties owe a duty of care to prevent harm caused by their negligence—for all economic loss cases. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 806, fn.3.) Nor should the Court create such a blanket exception here. Application of the *Rowland v. Christian* factors to the instant case demonstrates the undesirability of generally barring negligence claims in cases like this one. Instead, the Court should, consistent with past precedent, recognize that a duty of care is owed in non-transaction-based economic loss cases.

"California law establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 768; *see also* Cal. Civ. Code, § 1714, subd. (a).) Civil Code section 1714 "does not distinguish among injuries to one's person, one's property, or one's financial interests" and this Court has not recognized a blanket no-duty presumption for all economic loss cases. (*See J'Aire Corp.*, 24 Cal.3d at 806, fn. 3.) "[I]n the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.'" (*Cabral*, 51 Cal.4th at 771 [*quoting Rowland v. Christian* (1968) 69 Cal.2d 108, 112]; *see also* Restatement (Third) of Torts, § 7, cmt. a. ["No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases."].) In other words, "categorical no-duty rule[s]" should be adopted only sparingly, out of deference to California's general presumption of duty. (*See Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1144.)

A blanket no-duty rule in all economic loss cases is unwarranted. Courts apply the factors articulated in *Rowland* when assessing whether to create a categorical no-duty exception to the general duty presumption. (*Kesner*, 1 Cal.5th at 1143.) Specifically, courts consider "(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved." (*Rowland*, 69 Cal.2d at 113.) Application of the *Rowland* factors here aptly demonstrates why a blanket no-duty rule for all economic loss cases, and particularly for non-transaction-based economic loss cases, would produce undesirable results: the plaintiffs' injuries were highly foreseeable given the dangerous nature and geographic location of SoCalGas' gas storage facility business; their injuries are easily quantifiable and closely connected to SoCalGas' negligence in causing the gas leak; SoCalGas' failure to properly maintain its equipment and inaccurate reports to regulators demonstrate moral culpability; the state has a strong interest in preventing future harmful and costly disasters such as this one; and the costs associated with the leak are most appropriately borne by SoCalGas, a publicly-traded company whose parent carries billions of dollars in liability insurance.

This Court has already determined that "[the] factors and ordinary principles of tort law such as proximate cause are fully adequate to limit recovery without the drastic consequence of an absolute rule which bars recovery in all [economic loss] cases." (*J'Aire Corp.*, 24 Cal.3d at 808.) The Court should not deviate from that precedent.

### B. Different Limitations on Liability Should Apply in Economic Loss Cases Depending on Whether or Not They Are Transaction-Based

While California courts have limited the duty of care defendants owe to plaintiffs in transaction-based economic loss cases, imposing those same limitations in non-transaction-based economic loss cases would not be consistent with California law or tort principles. Thus, we suggest that the Court eschew the application of *Biakanja v. Irving*, which is designed for transaction-based cases, here. Instead, the Court should find, utilizing the *Rowland* factors, that a duty of care is owed, and achieve the goal of appropriately limiting liability by applying a "particular foreseeability" test at the proximate causation stage of the negligence inquiry. Approaching non-transaction-based cases in this way maintains the critical tort incentive of duty of care—ensuring that "responsibility be fixed wherever it will most effectively reduce the hazards to life and health"—while also protecting defendants from a "conceivably limitless scope" of liability. (*Escola v. Coca-Cola Bottling Co.* (1944) 24 Cal.2d 453, 462; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 376.)

#### 1. This Court's Precedent Properly Limits Defendants' Duty of Care to Prevent Economic Loss in Transaction-Based Cases

It is well-settled that the Court has limited California's general presumption of a duty of care—which is otherwise applicable to all injuries, whether economic or not—to bar recovery of economic losses in many transaction-based cases. This limitation makes sense in transaction-based cases, where the relationship between the parties is such that liability concerns may be addressed through contract, and thus should ordinarily be resolved by contract law. (*Robinson Helicopter Co., Inc.*, 34 Cal.4th at 988 [noting that where a contract is present, economic expectations are

"protected by commercial and contract law" and the economic loss limitation thus "prevent[s] the law of contract and the law of tort from dissolving one into the other."]; *Erlich v. Menezes* (1999) 21 Cal.4th 543, 551 ["conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law."]; *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 107 ["courts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies."] [Mosk, J. concurring and dissenting].)

Accordingly, this Court has recognized only a limited number of exceptions to the economic loss doctrine in such cases, in circumstances under which a third party not in privity of contract has been damaged by a party's activities pursuant to (or disregarding) the contract. (*See, e.g., Biakanja v. Irving* (1958) 49 Cal.2d 647 [the plaintiff, a beneficiary of a will, had a negligence claim against the defendant, a notary, for economic losses due to negligent performance of contract to draft will]; *J'Aire Corp.*, 24 Cal.3d 799.) Otherwise, the general presumption is that there is no duty of care with respect to purely economic loss in transaction-based cases. (*See Quelimane Co.*, 19 Cal.4th at 58.)

In transaction-based cases, courts apply the six factors first articulated in *Biakanja* to determine whether an exception to this general no-duty presumption should be afforded. (*See, e.g., Bily*, 3 Cal.4th at 397.) Those six factors—the extent to which the transaction was intended to affect the plaintiff, the foreseeability of the harm to the plaintiff, the degree of certainty of the plaintiff's injury, the closeness of the defendant's conduct to the plaintiff's injury, the moral blame attached to the defendant's conduct, and the policy of preventing future harm—are

consistent with an understanding that the general no-duty presumption in transaction-based economic loss cases is drawn from a desire to separate the worlds of contract and tort. (*See Biakanja*, 49 Cal.2d at 650.) They are expressly designed to articulate the need for tort resolution when a third party affected by a transactional relationship but which had no role in the negotiation of that transaction suffers direct harm as a result of the relationship: in other words, a circumstance in which the concern about tort intrusion on contract-based remedies would not be valid because of the plaintiff's non-participation in the transaction giving rise to the injury.

For example, in *J'Aire*, a restaurant sued a contractor in negligence for economic losses resulting from the contractor's failure to timely complete a renovation of premises leased by the restaurant. (*J'Aire*, 24 Cal.3d at 802.) Only the owner of the premises and the contractor had entered into any kind of contractual relationship, but the restaurant business allegedly lost business and profits due to the contractor's failure to complete the work within a reasonable time. (*Id.*) The Court implicitly recognized that a general no-duty rule applies in transaction-based economic loss cases but explained that "[e]ven when only injury to prospective economic advantage is claimed, recovery is not foreclosed" and applied the *Biakanja* factors to overcome the presumption of no duty. (*Id.* at 804.) But in *Bily* and *Quelimane Co.*, the Court found no exception to the no-duty presumption. In *Bily*, investors in a company sued the company's auditor for negligence, claiming they suffered economic damages as a result of the auditor's reported conclusions about the company's viability. (*Bily*, 3 Cal.4th at 377-378.) The Court "decline[d] to permit all merely foreseeable third party users of audit reports to sue the auditor on a theory of professional negligence" based, in part, on the conclusion that the nature of auditor liability cases "permits the effective

use of contract rather than tort liability to control and adjust the relevant risks through 'private ordering'..." (*Id.* at 398.) In *Quelimane Co.*, the plaintiffs, who had purchased properties by tax deed that they then attempted to resell, claimed that the defendant title companies' refusal to issue title insurance had prevented the resale of their properties, causing them economic damage. (*Quelimane Co.*, 19 Cal.4th at 35.) The Court, applying the *Biakanja* factors, did not "recognize a duty to avoid business decisions that may affect the financial interests of third parties, or to use due care in deciding whether to enter into contractual relations with another." (*Id.* at 58.) Because "[w]ith rare exceptions, a business entity has no duty to prevent financial loss to others with whom it deals directly," it followed that a business entity "has no greater duty to prevent financial losses to third parties who may be affected by its operations." (*Id.* at 59.) In other words, the title insurance company bore no responsibility to the plaintiffs to ensure that they met with success in their attempts to contract with others to sell their properties. Both *Bily* and *Quelimane* highlight the rationale for the no-duty assumption in transaction-based economic loss cases: in many such cases, contract law, not tort law, provides the correct framework to resolve disputes.

In sum, California precedent properly presumes the absence of a duty of care in transaction-based economic loss cases, and then creates exceptions through application of the *Biakanja* factors where a duty is warranted because concerns about tort and contract law overlap are not implicated. But this Court has not extended that framework beyond the realm of transaction-based cases, with good reason.

### 2. A "Particular Foreseeability" Limitation on Liability Should Apply in Non-Transaction-Based Cases

Non-transaction-based cases are different because the absence of a duty of care is not, and should not be, presumed. In cases like this one, there are no concerns that the realm of torts would intrude where contract law would better govern. In fact, tort law is designed precisely to address scenarios like the one here, where it would be impossible for SoCalGas to transact with every party that could potentially be injured by its activities. (*See* Cooter and Ulen, pp. 189-190; Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs* (1965) 78 Harv. L. Rev. 713, 739-742.) But courts recognize that the purpose of tort law is not served by imposing liability on defendants like SoCalGas for remote economic injuries that they could not have possibly anticipated; doing so would not optimize the internalization of external costs. (*See Union Oil Co.*, 501 F.2d at 563; *Bily*, 3 Cal.4th at 376.) Therefore, rather than assuming the absence of a duty of care and applying the *Biakanja* factors to determine whether an exceptional duty should be imposed, in non-transaction-based cases, section 1714's general duty of care should be the rule, with exceptions to that duty only created via application of the *Rowland* factors. Concerns about limiting liability can be resolved by applying a "particular foreseeability" test to assess proximate causation.

### a. The "particular foreseeability" test rests on longstanding precedent allowing recovery of purely economic loss.

Instead of placing limitations on the duty of care owed in non-transaction-based economic loss cases, we propose a "particular foreseeability" test that is integrated into the proximate causation inquiry. This squares with proper application of the *Rowland* factors, which weigh in favor of imposing a general duty of care, and builds on existing precedent acknowledging claims for purely economic loss.

Courts have historically recognized that limited classes of plaintiffs may recover purely economic losses in non-transaction-based cases. (*See, e.g., Union Oil Co.*, 501 F.2d 558; *Curd*, 39 So.3d 1216; *Shaughnessy v. PPG Industries, Inc.* (W.D. La. 1992) 795 F. Supp. 193 [owner of a fishing and hunting guide service had a claim for purely economic losses sustained as a result of defendant's pollution of nearby water bodies]; *People Express Airlines, Inc. v. Consolidated Rail Corp.* (N.J. 1985) 495 A.2d 107 [airline had cause of action for economic losses due to railyard explosion that caused evacuation of its terminal]; *Burgess v. The M/V Tamano* (D. Me. 1973) 370 F. Supp. 247 [commercial fishermen had cause of action for economic losses caused by oil spill from defendant's tanker, despite their lack of individual property rights in aquatic life that had been harmed]; *Masonite Corp.*, 198 Miss. 530 [owner of fishing resort that lost substantially all its business due to pollution released by defendant's manufacturing plant could recover economic loss damages]; *Hampton*, 223 N.C. 535 [fishery owner had cause of action for economic losses caused by pollution from defendant's pulp manufacturing business]; *Columbia River Fishermen's Protective Union*, 160 Or. 654 [commercial fishermen had cause of action for economic losses due to pollution released from

defendants' plants].) These cases demonstrate the feasibility of limiting liability for economic losses in the non-transaction-based context. They also suggest the need for a more widely applicable test that can be employed in all non-transaction-based economic loss cases.

*Union Oil Co.* and *Curd* are particularly instructive non-transaction-based cases. In *Union Oil Co.* commercial fishermen brought an action to recover economic losses from the reduction in fishing potential due to a significant man-made natural disaster: the 1969 Santa Barbara oil spill caused by a leak from Union Oil's offshore oil drilling platform. The *Union Oil Co.* court considered whether the commercial fishermen plaintiffs could recover their losses through a negligence claim, acknowledging that although the fishermen did not own the fish that had been killed as a result of the spill, "harm would be done" if the lack of a property interest were found to bar their claim. (*Union Oil Co.*, 501 F.2d at 568.) In so finding, the *Union Oil Co.* court referred to a series of riparian cases wherein operators of businesses dependent on the health of a river had successfully stated claims for purely economic damages when a company's pollution of the river injured their business interests. (*Id.* at 567-568 [*citing Forth Worth & Rio Grande Railway Co. v. Hancock* (Tex.Civ.App. 1926) 286 S.W. 335; *Masonite Corp.*, 198 Miss. 530; *Hampton*, 223 N.C. 535.].) The court concluded that the ultimate question was whether the fishermen's damages had been foreseeable and answered that question in the affirmative. (*Union Oil Co.*, 501 F.2d at 569.) It pointed to two policy factors to bolster this conclusion: "the public's deep disapproval of injuries to the environment" and the concept that "liability for losses occasioned by torts should be apportioned in a manner that will best contribute to the achievement of an optimum allocation of resources." (*Id.*) But the court took great care to limit Union Oil's liability to a

"legitimate sphere," explaining that the plaintiffs were uniquely entitled to a claim because their injuries represented "a pecuniary loss of a particular and special nature, limited to the class of commercial fishermen"—especially foreseeable, and clearly constrained. (*Id.* at 570.)

*Curd* is one of the latest in a long line of decisions that have built on the foundations laid by *Union Oil Co.* The *Curd* court considered a nearly identical question: whether commercial fishermen could recover for economic losses due to the defendant's release of pollutants despite the fact that they owned no property damaged by the releases. (*Curd*, 39 So.3d at 1218.) This time, the pollution was caused by a fertilizer company's discharge of contaminated wastewater, which "resulted in a loss of underwater plant life, fish, bait fish, crabs, and other marine life." (*Id.*) The *Curd* court recognized that limitations on recovery of purely economic losses in cases like this one were driven by concerns that "a defendant would be subject to claims based upon remote and speculative injuries that he could not foresee." (*Id.* at 1224.) Drawing heavily on *Union Oil Co.* and other cases in which commercial fishermen were found to have a claim for economic damages in the absence of a property interest, the court concluded that the fishermen had a claim because the fertilizer company's activities created a "zone of risk" within which the commercial fishermen had a "special interest" that was "not shared by the general community." (*Id.* at 1228.) The fertilizer company's risky storage of pollutants and hazardous contaminants "placed the fishermen's peculiar interests directly within the zone of risk created by the presence of its facility." (*Id.*) It was therefore responsible for the fishermen's economic losses.

This Court has also recognized the utility of maintaining a duty of care but establishing limitations on proximate causation beyond mere foreseeability. (*See Bily*, 3 Cal.4th at 406-407.) Although *Bily* was a

transaction-based economic loss case, the theoretical basis for the Court's analysis there is relevant. As discussed above, in *Bily*, the Court applied *Biakanja* and declined to create an exception to the categorical no-duty rule for auditor liability. In so doing, the Court cited concerns that a mere foreseeability assessment at the proximate cause stage of the inquiry would not be enough to prevent "lawsuits of questionable merit," resulting in "a level of liability that is morally and economically excessive." (*Id.* at 406.) But the Court still recognized the existence of "a further narrow class of persons who, although not clients, may reasonably come to receive and rely on an audit report and whose existence constitutes a risk of audit reporting that may fairly be imposed on the auditor." (*Id.* at 406-407.) In other words, there was a group of plaintiffs with "special interests" inside a foreseeable "zone of risk"—plaintiffs whose "particular and special" injuries entitled them to recovery. (*See Curd*, 39 So.3d at 1228; *Union Oil Co.*, 501 F.2d at 570.) In *Bily*, the Court resolved this problem by declining to permit a cause of action for negligence but allowing the limited class of plaintiffs to recover on a theory of negligent misrepresentation. (*Bily*, 3 Cal.4th at 407.) The Court's resolution suggests both that there are circumstances under which a duty of care exists even in cases of purely economic loss *and* that the recognition of limitations on proximate causation beyond simple foreseeability can properly limit liability in such cases.

The "particular foreseeability" test we propose builds on this existing case law to allow recovery for purely economic losses in non-transaction-based cases when a plaintiff has a "special interest" that is "not shared by the general community" within a "zone of risk" created by a defendant's activity. (*See, e.g., Union Oil Co.*, 501 F.2d at 570; *Curd*, 39 So.3d at 1228.) We further suggest that this "particular foreseeability" test

be applied to determine whether the negligence element of proximate cause, rather than duty, has been satisfied. Accordingly, in non-transaction-based economic loss cases, courts would assume a duty of care, applying the *Rowland* factors, in the first step of the negligence inquiry, but would then consider whether the plaintiff's injury was "particularly foreseeable" to determine whether it could be said to have been proximately caused by the defendant's acts. Where an injury falls outside the "zone of risk" affected by a defendant's activities, or where it does not implicate a "special interest" of the plaintiff's, it cannot be said to be proximately caused by the defendant's behavior.

Using this case as an illustration, SoCalGas would be assumed to owe a duty of care to the plaintiffs in the operation of its gas storage facility. But this does not mean that SoCalGas would be threatened by "potentially unlimited liability." (*Bily*, 3 Cal.4th at 406.) SoCalGas has argued that allowing plaintiffs to recover here would result in lawsuits by a whole slew of potential claimants, including businesses outside the relocation zone, suppliers and wholesalers to businesses inside and outside of Porter Ranch, and manufacturers of products that were sold by businesses affected by the gas leak. But the "particular foreseeability" test would foreclose recovery by any of those potential plaintiffs, none of whom are either located within the "zone of risk" of SoCalGas' activities or have "special interests" within the zone of risk. SoCalGas could not, therefore, be said to be the proximate cause of any of those claimants' alleged injuries—the injuries are simply too far removed from SoCalGas' negligent act. On the other hand, businesses located within the evacuation zone, and which are "dependent on customers who work or live in the vicinity of the gas leak"—in other words, which have a "special interest" that is "not shared by the general community" within the "zone of risk" created by

SoCalGas' activities—could demonstrate that SoCalGas was the proximate cause of their economic loss injuries. (*See So. Cal. Gas Co. v. Superior Court* (2017) 18 Cal.App.5th 581, 596 [Baker, J. dissenting].)

This "particular foreseeability" framework would apply with facility in other cases as well. In a scenario similar to *Union Oil Co.* or *Curd*, in which pollution is released to a water body, a court is similarly presented with a clear "zone of risk"—the area that could foreseeably be impacted by a release of pollutants—and certain plaintiffs who have unique "special interests" within that zone. Commercial fishermen are one such group, as would be, for example, resort businesses that cannot attract tourists as a result of pollution damage to a shoreline or fishery (like the plaintiff in *Masonite Corp.*). But wholesalers who experience a decline in business because of impacted fish catches would not meet the bar for recovery. In all cases, the "particular foreseeability" test limits a claim for relief to those plaintiffs whose economic losses stem from a special dependence on the impacted "zone of risk," cutting off claims for remote and speculative damages.

**b. Imposing a "particular foreseeability" proximate cause test after application of the *Rowland* factors to resolve the duty inquiry advances important tort policies and principles.**

We suggest this application of the "particular foreseeability" test for three reasons. First, this approach is consistent with the Restatement (Third) of Torts. Second, assuming a general duty of care in non-transaction-based cases maintains key tort incentives to prevent injurious behavior. Third, this approach creates a clear dividing line between transaction-based and non-transaction-based cases, and gives courts a clear counterpart to *Biakanja* for non-transaction-based cases.

The Restatement (Third) of Torts emphasizes that the general presumption of duty should only be modified or disregarded in "exceptional cases." (Restatement (Third) of Torts, § 7, subd. (b).) Relying upon a foreseeability analysis to find a lack of duty is disfavored. (Restatement (Third) of Torts, § 7, cmt. j [no-duty rulings should be limited to "an articulated policy or principle in order to...protect the traditional function of the jury as factfinder."].) Applying a no-duty rule in transaction-based cases while assuming duty in non-transaction-based cases fits squarely within this framework. The no-duty rule in transaction-based cases follows an "articulated principle": that tort law should not interfere with contractual assignments of liability. But in non-transaction-based cases, concerns about "limitless liability" amount to questions of foreseeability and addressing them categorically at the duty stage of the inquiry "resolves [them] with a meat axe." (*So. Cal. Gas Co.*, 18 Cal.App.5th at 596 [Baker, J. dissenting].) Instead, the concept of "particular foreseeability" can be employed at the proximate cause stage to ensure that individual plaintiffs fall within the scope of individual defendants' liability.

This general duty of care presumption in non-transaction-based economic loss cases properly internalizes external costs, a core function of tort law. (*See, e.g.,* Cooter and Ulen, pp. 189-190.) Cases like this one, which implicate serious man-made environmental disasters, are illustrative of the need for a "particular foreseeability" test. Pollution routinely creates economic injury without damage to property, as environmental resources (like the fish in *Union Oil Co.* or the river in *Masonite Co.*) often are not the "property" of any individual. (*See Union Oil Co.*, 501 F.2d at 568.) One of the most important functions a "particular foreseeability" test can serve is to provide courts with a rubric to effectively assess tort liability in cases of environmental harm. And maintaining tort incentives is crucial:

regulatory schemes—particularly in the context of environmental law—often do not provide for damages or come with built-in limitations on recovery that do not always accurately reflect the significant health, safety, and economic costs of either engaging in inherently risky business operations or of noncompliance with the law. (*See Union Oil Co.*, 501 F.2d at 569 [acknowledging that "the public's deep disapproval of injuries to the environment and the strong policy of preventing such injuries...point to the existence of a required duty" of care].) Indeed, the existence of regulations themselves did not provide enough of an incentive to prevent SoCalGas' noncompliance, and the significant resulting injury, in this case.

Adopting this framework has the additional benefit of streamlining courts' review of negligence claims for purely economic loss. Rather than struggling to apply one-off exceptions, courts deciding economic loss cases would simply ask whether the case is transaction-based—in which case the *Biakanja* factors would apply—or non-transaction-based—in which case the *Rowland* factors and "particular foreseeability" proximate causation test would apply. The result is a clearer path forward for courts. Simply put, applying a "particular foreseeability" test to resolve the question of proximate causation in non-transaction-based cases satisfies underlying tort principles.

**c. "Particular foreseeability" should be a question of proximate cause, rather than duty.**

Courts outside California have sometimes viewed the foreseeability concerns implicated in non-transaction-based economic loss cases through the lens of duty, rather than proximate cause. (*See Curd*, 39 So.3d at 1224 ["Courts have applied [the economic loss] rule in a variety of ways. Some courts have concluded that the negligent defendant owes no duty to plaintiffs seeking compensation for such losses. In some cases, courts have

invoked the doctrine of proximate cause to deny recovery."] [*citing Byrd v. English* (Ga. 1903) 117 Ga. 191; *Chelsea Moving & Trucking Co. v. Ross Towboat Co.* (Mass. 1932) 280 Mass. 282; and *Brink v. Wabash R.R.* (Mo. 1901) 160 Mo. 87]; *see also Union Oil Co.*, 501 F.2d at 563.) The Court should not adopt that approach here. It is our belief, as we have advocated above, that conceptualizing the "particular foreseeability" test as a function of proximate causation, rather than duty, is more consistent with tort principles and provides a neater framework for evaluating these cases.

Application of the "particular foreseeability" test as an exception to a general presumption of lack of duty in all economic loss cases would be inconsistent with California law. In such a duty-based framework, the Court would adopt a general rule—which is applicable now only in a minority of jurisdictions—that defendants do not owe a duty of care to plaintiffs for purely economic loss. (*See, e.g., Sovereign Bank v. BJ's Wholesale Club, Inc.* (3d Cir. 2008) 533 F.3d 162, 176-177; *O'Connell v. Killington, Ltd.* (Vt. 1995), 665 A.2d 39, 42.) Instead of applying the *Biakanja* factors—as SoCalGas urges—to determine whether there is an exception to the general no-duty rule, it would then except from that general rule cases where the plaintiffs' injuries were "particularly foreseeable."

There are significant downsides to that approach. First, we believe establishing a blanket no-duty rule in non-transaction based economic loss cases would be inconsistent with proper application of the *Rowland* factors to determine whether to create an exception to the general rule of duty. (*See Rowland*, 69 Cal.2d at 113; *Cabral*, 51 Cal.4th at 772.) Second, as a matter of policy, it is important to preserve defendants' general duty of care in non-transaction-based cases. Third, replacing the *Biakanja* factors entirely with a "particular foreseeability" test would mean that courts would

no longer take into account the important policy considerations represented by *Biakanja* factors five and six in non-transaction-based economic loss cases. Replacing only the first four *Biakanja* factors with a "particular foreseeability" factor could mitigate this concern to a certain extent, but would undercut the limiting principle of the "particular foreseeability" test, permitting claims that might be foreclosed under a proximate cause-based version of the test. In sum, a "particular foreseeability" test should be applied at the proximate cause, rather than duty, stage of the inquiry to maintain consistency with California law and tort principles.

## III. Conclusion

Cases like this one demonstrate the need for an approach to economic loss claims that balances the important deterrent powers of tort law against the proper allocation of costs as between defendants and plaintiffs. While these interests can largely be balanced by the parties themselves in transaction-based cases (and the *Biakanja* factors apply to resolve cases in which they cannot), non-transaction-based cases are different. Eliminating the general duty of care in non-transaction-based cases would remove crucial incentives to prevent injury, and particularly here, given "the public's deep disapproval of injuries to the environment and the strong policy of preventing such injuries," would circumvent the purposes of tort law. (*See Union Oil Co.*, 501 F.2d at 569.) But imposing unchecked liability on defendants would be similarly abhorrent to tort principles. Application of a "particular foreseeability" test to assess proximate causation respects California law and the *Rowland* factors and maintains the deterrent power of assuming a duty of care, while protecting defendants from "limitless liability" in meaningful ways, allowing courts to resolve the question of liability with a "scalpel" instead of a "meat axe."

(*So. Cal. Gas Co.*, 18 Cal.App.5th at 596 [Baker, J. dissenting].) We respectfully urge the Court to adopt this approach here.

Dated: September 5, 2018

Respectfully submitted,

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(California Rules of Court 8.204(c))

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Dated: September 5, 2018

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Jeanne Fontenot