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## Public Nuisance as Modern Business Tort: A New Unified Framework for Liability for Economic Harms

Catherine M. Sharkey

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**PUBLIC NUISANCE AS MODERN BUSINESS TORT:  
A NEW UNIFIED FRAMEWORK FOR LIABILITY  
FOR ECONOMIC HARMS**

*Catherine M. Sharkey*<sup>1</sup>

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INTRODUCTION

Public nuisance is taking the modern tort world by storm. Once relegated to the backwaters—a marginal note in the main torts casebooks, the subject of scant law review articles—the public nuisance cause of action is now front and center in the most vexing legal controversies of our time:<sup>2</sup> global climate change,<sup>3</sup> electronic cigarettes,<sup>4</sup> COVID-19 work-related harms,<sup>5</sup> and the opioid crisis.<sup>6</sup> Commentators have trained attention on the hybrid nature of public nuisance, specifically the public versus private dimension. This Article focuses on public nuisance’s innovative use as a means of recovering purely financial losses between non-contracting parties (*i.e.*, “strangers”), in particular where the economic loss rule (ELR) potentially bars recovery. Framed as such, public nuisance could emerge as the quintessential business tort of the 21st century.

In the realm of business torts resulting in purely financial losses, plaintiffs can simultaneously allege claims for negligent infliction of economic losses and public nuisance. The recently published *Restatement (Third) of Torts: Liability for Economic Harm* calls for a drastic curtailment of the scenarios in which negligent infliction of economic loss is a viable cause of action between strangers.<sup>7</sup> At the same time,

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2. See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 743, 743 (2003) (“The tort of public nuisance has awakened from a centuries-long slumber.”); see also Steven Czak, *Public Nuisance Claims After ConAgra*, 88 FORDHAM L. REV. 1061, 1075 (2019) (“Whether as a means of addressing the opioid crisis, gun violence, or the hazards of lead paint, states and communities have come to view public nuisance as an avenue of resolving serious social health and safety issues.” (internal citations omitted)).

3. See, e.g., Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENVTL. L. REV. 49, 50 (2018).

4. See, e.g., Tiffany Kary & Jef Feeley, *Juul Accused by School Districts of Creating Vaping ‘Nuisance’*, BLOOMBERG (Oct. 7, 2019, 5:52 PM), <https://www.bloomberg.com/news/articles/2019-10-07/juul-accused-by-school-districts-of-creating-vaping-nuisance> (last updated Oct. 8, 2019, 10:15 AM).

5. See, e.g., *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228, 1234 (W.D. Mo. 2020); *Massey v. McDonald’s Corp.*, 2020 Ill. Cir. LEXIS 465 (Ill. Cir. Ct. June 24, 2020).

6. See, e.g., Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 135, 135 (2018).

7. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM §§ 1, 7 (A.L.I. 2020) [hereinafter RTT: LEH].

the *Third Restatement* presents public nuisance as an *exception* to the ELR's presumptive barring of negligence claims, recognizing that "[t]he social and private costs of a public nuisance can . . . be large," and that therefore "[a]llowing certain classes of private parties a right of action can . . . usefully deter repetition of the wrong."<sup>8</sup>

The *Third Restatement's* approach—essentially to shoehorn negligence causes of action between non-contracting parties for purely financial losses into public nuisance—is flawed. As a doctrinal matter, to recover damages under public nuisance a private plaintiff must demonstrate “special injury,” which has been ubiquitously interpreted by courts as requiring an injury “distinct in kind” (rather than simply in degree) from that affecting the general public.<sup>9</sup> Commercial fishermen have been one of the few classes of private plaintiffs to prevail notwithstanding the constraints of the “special injury” rule, giving the impression that tort law simply holds commercial fisherman especially close to its heart.<sup>10</sup> As a pragmatic matter, it is not at all clear why forcing (or even encouraging) plaintiffs to cram their claims for negligently inflicted purely financial losses into the “impenetrable jungle”<sup>11</sup> of a public nuisance cause of action is either a necessary or effective means to combat the fear of unlimited liability that undergirds the ELR for negligence claims. As a theoretical matter, foreclosing actions for negligently inflicted financial losses generally—with exception only for those whose “distinct in kind” injuries arise from a violation of a public right actionable under public nuisance—could fall dramatically short of the goal of “usefully deter[ing] repetition of the wrong.”<sup>12</sup>

This Article proposes a new approach to reconciling the torts of negligence and public nuisance, centered on the “channeling” or enforcement rationale: namely, deputizing a class of significantly impacted individuals or entities who can sue to force the tortfeasor to internalize the social costs of its activities. The use of tort law as a device for minimizing accident costs by channeling scarce resources to

8. *Id.* § 8.

9. RESTATEMENT (SECOND) OF TORTS § 821C(1) (A.L.I. 2020) (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”).

10. See generally Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L. Q.* 755, 779–81 (2001).

11. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 86, at 616 (5th ed. 1984).

12. RTT: LEH § 8; see also Antolini, *supra* note 10, at 761 (noting the paradox of the special injury rule is that “the broader the injury to the community and the more the plaintiff’s injury resembles an injury also suffered by other members of the public, the *less* likely that the plaintiff can bring a *public* nuisance lawsuit[ ]”).

their most efficient use is foundational. Nonetheless, as a practical matter, the need to grapple with this issue in the realm of purely financial losses outside a narrow band of intentional business torts was (perhaps) to date not justified by cost internalization/deterrence principles given that victims with physical injuries and property damages could generally be counted on to vindicate the law as private attorneys general (including on behalf of the more remotely injured entities suffering purely financial losses). But, where the prospect of physical bodily injuries and property damage is attenuated, this cost-internalization function is especially important to deter excessively risky conduct likely to lead to significant financial losses. Moreover, the calculus may be shifting in an age of global financial crises, escalation of digital and informational harms, and growing sense that the societal harms of the 21st century involve risky conduct leading to purely financial harms. Where there are diffuse, widespread harms raising concomitant concerns of under- and over-deterrence, a new “channeling” paradigm is necessary to guide courts in fashioning the metes and bounds of public nuisance as the quintessentially modern business tort.

#### I. PUBLIC NUISANCE AS AN END RUN AROUND THE ELR FOR NEGLIGENCE

Public nuisance has emerged with renewed verve as a potentially viable end run around the formidable ELR which limits recovery in torts involving purely financial losses, unaccompanied by physical injury or property damage. In its broadest formulation by courts, the ELR amounts to a “categorical refusal to award tort damages for pure economic loss.”<sup>13</sup> But this formulation masks the underlying reality that there are several different ELRs: products liability,<sup>14</sup> contracting

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13. See *Nazareth Int'l, Inc. v. J.C. Penney Corp.*, 2005 WL 1704793, at \*7 (N.D. Tex. 2005) (“The economic loss rule is defined as ‘the principle that a plaintiff cannot sue in tort to recover for purely monetary loss—as opposed to physical injury or property damage—caused by the defendant.’” (citation omitted)); see also, e.g., *Primary Color Sys. Corp. v. Willwork, Inc.*, 95 N.E.3d 300, 300 (Mass. App. Ct. Dec. 14, 2017) (“[P]urely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage.” (quoting *FMR Corp. v. Bos. Edison Co.*, 613 N.E.2d 902, 903 (Mass. 1993))).

14. The products liability ELR bars plaintiffs from recovery when a product disappoints their economic expectations. See Catherine M. Sharkey, *The Remains of the Citadel (Economic Loss Rule in Products Cases)*, 100 MINN. L. REV. 1845, 1847 (2016) (“The economic loss rule in products cases rears its head in the mid-1960s—not coincidentally, right at the triumphant moment for strict products liability and the widespread adoption of the Uniform Commercial Code’s set of warranties between retailers and buyers (i.e., parties in privity of contract)—to reassert the contract-tort border, circumscribe the strict liability rule, and defend privity’s last bastion.”).

parties, third-party, and the “stranger” ELRs.<sup>15</sup> This Article homes in on the “stranger” ELR, which bars recovery in the context of non-contracting parties who lack a “special relationship” and who suffer purely financial losses as a result of negligence.<sup>16</sup>

In recent times, litigants have framed claims for recovery for financial losses as public nuisance (as opposed to negligence) at least in part to evade the stranger ELR.<sup>17</sup> Moreover, the newly minted *Third Restatement* has unwittingly fueled this approach through its explicit positioning of public nuisance as a carve-out to its broadly articulated “stranger” ELR.

### A. *The ELR Does Not Apply To Public Nuisance*

Historically, public nuisance stood apart from the purview of the ELR.<sup>18</sup> But neither courts nor scholars have devoted much effort to explain why.<sup>19</sup> Thus, as the ELR took wind and expanded far beyond its origins in products liability cases, some courts have applied it categorically to public nuisance claims and, in so doing, barred all recovery if the plaintiff has not suffered physical injury or property damage.<sup>20</sup> In some sense, this is the ELR “swallowing” the public nui-

15. See Catherine M. Sharkey, *In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule*, 85 U. CIN. L. REV. 1017, 1019–29 (2018) [hereinafter, Sharkey, *Cheapest Cost Avoider*]; see also Ward Farnsworth, *The Economic Loss Rule*, 50 VAL. U. L. REV. 545, 546–49 (2016) (distinguishing four distinct rules: products liability ELR; a services contract ELR; a third party contractual ELR; and a vicarious ELR); Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 714 (2006); Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 534–35 (2009); Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 813 (2006).

16. Sharkey, *Cheapest Cost Avoider*, *supra* note 15, at 1019–29.

17. See Czak, *supra* note 2, at 1075 (“[I]n the 1970s and ‘80s, plaintiffs’ attorneys began to push the traditional boundaries of nuisance, as the tort was vaguely defined and provided a means of avoiding potentially fatal shortcomings of other torts, such as . . . the inability to recover for purely economic losses.”).

18. See Johnson, *supra* note 15, at 529–32, 531 n.37 (listing nuisance among other causes of actions as “well-recognized” exceptions to any economic loss rule); John T. Nockleby, *When Losses Are Too Big: Evaluating the Economic Loss Doctrine in California*, 53 LOY. L.A. L. REV. 409, 415–16 (2020).

19. See, e.g., *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1480 (E.D. Pa. 1993) (merely stating, in conclusory fashion, that “[i]t is clear that the economic loss doctrine is not applicable to public nuisance claims . . .”), *rev’d on other grounds sub nom.* Fed Ins. Co. v. Richard I. Rubin & Co., 12 F.3d 1270 (3d Cir. 1993). Peter Benson has argued that the distinction is defensible due to the type of interest damaged. Peter Benson, *The Problem with Pure Economic Loss*, 60 S.C. L. REV. 823, 855 n.122 (2009).

20. See, e.g., *City of Chicago v. Beretta*, 821 N.E.2d 1099, 1139–44 (Ill. 2004) (applying the economic loss rule to bar recovery for solely economic losses in public nuisance); *Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088, 1093 (E.D. Mo. 2003) (holding that the economic loss rule applies in public nuisance cases, and absent physical or property damage, recovery is barred by the economic loss rule); *Davencourt at Pilgrims Landing Homeowners Ass’n v. Davencourt at*

sance doctrine. Courts adopting this approach reason that the ELR applies to all torts, and since public nuisance is a tort, the ELR should apply to bar recovery in public nuisance for purely financial losses.<sup>21</sup>

To be sure, notwithstanding the priority in tort given to physical bodily injury and property damage, if the ELR is articulated as “no liability in tort for purely financial losses,” it is overbroad. Few would question the viability of fraud or intentional misrepresentation actions for purely financial losses; relatively few question the existence of tortious interference with business. Thus, in jurisdictions that would otherwise apply the ELR to all unintentional torts, one strategic approach by litigants is to frame public nuisance as an intentional (as opposed to negligence or strict liability-based) tort so as to withstand the ELR.<sup>22</sup>

A second approach focuses on taming the ever-expanding unprincipled spread of the ELR, arguing that the rule should be confined to its origins in products liability suits or, if extended, only to suits involving contracting parties. Thus, for example, in *Tiara Condo Association, Inc. v. Marsh & McLennan Cos.*, the Florida Supreme Court was persuaded by this critique and limited the ELR to its origins in the realm of products liability.<sup>23</sup> The court warned of the danger of the expansive “no-duty” ELR and refused to extend it even to the realm of contracting parties.<sup>24</sup> Other jurisdictions have toed the line at contracting parties, refusing to apply the brittle no-duty rule in the realm of “stranger” negligence situations.<sup>25</sup>

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Pilgrims Landing, LC, 221 P.3d 234, 242 (Utah 2009) (applying the economic loss rule to public nuisance claims and barring such claims if for solely economic losses).

21. See, e.g., *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1030 (5th Cir. 1985) (“Were we to allow plaintiffs recovery for their losses under a public nuisance theory we would permit recovery for injury to the type of interest that, as we have already explained, we have consistently declined to protect. Nuisance, as Dean Prosser has explained, is not a separate tort subject to rules of its own but instead is a type of damage.” (citing WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 87 (4th ed. 1971)).

22. In Ohio, the ELR applies to “qualified” public nuisances (negligence), not to “absolute” public nuisances (intentional). See, e.g., *City of Cincinnati v. Deutsche Bank Nat’l Trust Co.*, 863 F.3d 474, 477–78 (6th Cir. 2017) (finding that, under Ohio law, the economic loss rule foreclosed the City’s qualified public nuisance claim but not its absolute nuisance claim).

23. 110 So. 3d 399, 407 (Fla. 2013) (holding that the economic loss rule applies only in the products liability context where there are economic losses stemming from a defective product, and that product only damages itself and no other property).

24. *Id.* at 402, 407 (noting that some courts have barred recovery of solely economic damages “where a defendant has not committed a breach of [tort] duty apart from a breach of contract” (the “no-duty” economic loss rule), but ultimately declining to extend the ELR beyond cases involving products liability).

25. See, e.g., *In re Opioid Litig.*, 2018 WL 3115102, at \*27 (No. 4000/2017) (N.Y. Sup. Ct.) (stating that the economic loss rule only bars tort actions between contracting parties, and because there is no contract here, there is no economic loss rule issue); *City of Boston v. Purdue*

*B. The Restatement Approach Fuels the ELR/ Public Nuisance Dichotomy*

The *Third Restatement* maps out an approach to the ELR that, on first impression, may seem limited to the realm of contracting parties. But on further study, the *Third Restatement* embraces a very broad “stranger” ELR. That said, even its broad articulation of the stranger ELR contemplates a carve-out for public nuisance.

The *Third Restatement* begins in Section 1 with the principle that “[a]n actor has no general duty to avoid the unintentional infliction of economic losses on another.”<sup>26</sup> Then, in Section 3, it narrowly defines the “economic loss rule” as a contracting parties ELR.<sup>27</sup> Section 7, however, embraces a broad “stranger” ELR (in principle, if not in name) that bars plaintiffs from recovering for financial losses caused by damage to property that plaintiffs do not own.<sup>28</sup> Notwithstanding this breadth, Section 8 contains a clear carve-out for public nuisance, with special emphasis on the traditional “special injury” rule: “An actor whose wrongful conduct harms or obstructs a public resource or public property is *subject to liability for resulting economic losses if the claimant’s losses are distinct in kind* from those suffered by members of the affected community in general.”<sup>29</sup> So long as a plaintiff can prove special injury that is distinct from that suffered by the public at large, she can recover purely financial losses stemming from infringements on public rights, evading the Section 7 “stranger” ELR.

The *Third Restatement’s* approach to business disputes involving purely financial losses—sharply curtailing negligence actions but allowing a potential escape hatch via public nuisance—has thereby fueled litigants’ strategy of using public nuisance as an end run around the ELR in negligence. The “special injury” requirement, moreover, has emerged as the core doctrinal distinction between a viable public nuisance claim and a barred negligent interference with economic relations tort.<sup>30</sup>

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Pharma, 2020 WL 416406, at \*8 (Mass. Sup. Ct. 2020) (The economic loss rule should only apply in the contracting-parties context, and thus was not applicable to the opioid case here.).

26. RTT: LEH § 1.

27. *Id.* § 3.

28. *Id.* § 7 cmt. a (embracing stranger economic loss rule, as elaborated in 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc., 750 N.E.2d 1097, 1101 (N.Y. 2001) and Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 307 (1927)).

29. *Id.* § 8 (emphasis added).

30. To be actionable as a public nuisance, the defendant’s conduct must infringe upon a public right. Professor Richard Epstein would limit such actions to their historical roots—namely, intrusions upon public property, such as roads, bridges, or bodies of water. See *Amicus Curiae* Brief of Competitive Enterprise Institute at 3, Oklahoma ex rel. Hunter v. Johnson & Johnson, Appeal No. 118,474 (Okla. Oct. 22, 2020) (arguing that a “basic error in the district court’s under-

The ELR for negligence causes of action and the special injury rule for public nuisance actions are not typically discussed side-by-side,<sup>31</sup> but the resurgence of public nuisance actions in the context of business or financial losses has provided occasion for courts to consider the doctrines together. Part II explores the consensus view that has emerged that these seemingly disparate doctrines are united by a shared underlying justification of limiting liability in the realm of financial losses.

## II. LIMITATION OF LIABILITY RATIONALES

The conventional justification for the “stranger” ELR is the need to protect against unlimited and disproportionate liability on the part of negligent tortfeasors, who must pay for physical injuries and property damage but not purely financial losses. Similarly, several courts called upon to consider public nuisance actions in the context of business losses have construed the special injury requirement—mandating that the injury alleged be distinct in kind, not simply degree, from that afflicting the general community—in like manner, as a necessary doctrine to limit potentially limitless liability. While the ELR requires personal injury or property damage for a negligence action to go forward, the special injury rule does not limit public nuisance recovery to these two types of harms.<sup>32</sup> Nonetheless, to the extent that courts do allow for public nuisance actions notwithstanding the ELR, they typically deploy the special injury requirement to cabin nuisance claims in order to prevent unlimited liability. This rationale, standing alone, does not explain why the line for recovery should be drawn at “dis-

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standing of the public nuisance doctrine” was that it strayed “[f]ar from its origins in common rights of the public to land and water”). But most courts (and statutes) have embraced broader conceptions of public resources to include air quality as well as general public health and safety. See RESTATEMENT (SECOND) OF TORTS § 821B(2) (A.L.I 2020) (“Circumstances that may sustain a holding that an interference with a public right is unreasonable include . . . whether the conduct is proscribed by a statute, ordinance or administrative regulation[.]”). See also OKLA. STAT. tit. 50, § 1 (2019) (“A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission . . . [a]nnoys, injures or endangers the comfort, repose, health, or safety of others . . .”).

31. A notable exception is *Louisiana ex rel. Guste v. M/V TESTBANK*, a classic oil spill public nuisance case, wherein the court explicitly recognized the danger of “permitting the use of nuisance theory to skirt the [stranger economic loss rule].” 752 F.2d 1019, 1030 (5th Cir. 1985); see also Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused “Middle Theory”*, 50 UCLA L. REV. 531, 567–71 (2002) (“[W]here a normatively justifiable plaintiff class, say of primary victims . . . is ascertainable, liability to them may be allowed in the tort of public nuisance and yet denied to those whose economic loss is a ripple effect of that suffered by the plaintiff class . . .”).

32. *But see Robinson v. Indianola Mun. Separate Sch. Dist.*, 467 So. 2d 911, 918 (Miss. 1985) (defining special injury to require a personal injury or property damage).

tinct in kind” injuries. With courts’ overriding concern for limitless liability (and thus over-deterrence) in the realm of financial losses, potential under-deterrence is left unaddressed. Moreover, in practice, judicial outcomes are inconsistent and defy principled justification.

### A. The “Stranger” ELR in Negligence

The conventional view of the “stranger” ELR is that it functions as a rather blunt line-drawing exercise necessary in order to keep tort liability within feasible bounds and in particular to stave off the specter of indeterminate and unlimited liability.

The New York Court of Appeals articulated this dominant approach in *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, where the court denied recovery for business interruption losses suffered by a delicatessen when a building collapsed due to the negligence of a developer, leading to closure of all foot traffic along a fifteen block stretch that included the deli:

As is readily apparent, an indeterminate group in the affected areas thus may have provable financial losses directly traceable to the two construction-related collapses, with no satisfactory way geographically to distinguish among those who have suffered purely economic losses. In such circumstances, limiting the scope of defendants’ duty to those who have, as a result of these events, suffered personal injury or property damage—as historically courts have done—affords a principled basis for reasonably apportioning liability.<sup>33</sup>

Most recently, the California Supreme Court reaffirmed this modern articulation of the “stranger” ELR in *Southern California Gas Co. v. Superior Court of Los Angeles County*,<sup>34</sup> a case involving a natural gas leak that immobilized a suburban community of some 30,000 people who suffered a variety of illnesses, including headaches, respiratory problems, and dizziness.<sup>35</sup> The first tier of impacted victims were residents who were moved to different locations to get away from the stench.<sup>36</sup> The issue posed in the case concerned the next tier of im-

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33. 750 N.E.2d 1097, 1103 (N.Y. 2001) (internal citations omitted); *id.* at 1101 (“This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant’s act.”).

34. 441 P.3d 881, 885 (Cal. 2019).

35. The court elaborated:

In October 2015, a leak happened—and people noticed. An uncontrolled flow of natural gas from the Aliso Facility coated nearby neighborhoods in an oily mist. At its peak, the leak released some 55 tons of natural gas every hour. Porter Ranch residents reported unpleasant odors, headaches, dizziness, and respiratory problems. In addition to those symptoms, students at local schools complained of nosebleeds and vomiting.

*Id.* at 883.

36. *Id.* at 883–84 (“[T]he Los Angeles County health department directed SoCalGas to establish a relocation program available to Porter Ranch residents who lived within a five-mile radius

pacted parties, namely those merchants who lost the patronage of those people who were removed from the site. Justice Mariano-Florentino Cuéllar formulated the issue: “We must decide if local businesses—none of which allege they suffered personal injury or property damage—may recover in negligence for income lost because of the leak.”<sup>37</sup> In denying recovery to these merchants, Justice Cuéllar was frank about drawing an arbitrary line as a matter of policy in order to provide “[m]eaningful limits on tort liability,” which are “crucial to the functioning of our economy and of our courts.”<sup>38</sup> Justice Cuéllar approvingly quoted *532 Madison Ave. Gourmet Food’s* explanation that denying recovery for purely economic losses “affords a principled basis for reasonably apportioning liability.”<sup>39</sup> Moreover, Justice Cuéllar noted that his ruling aligned with the predominant view: “Concerned about line-drawing problems and potentially overwhelming liability, courts across the country have rejected recovery for purely economic losses stemming from man-made calamity . . . .”<sup>40</sup>

### B. *The “Special Injury” Requirement in Public Nuisance*

In *532 Madison Ave. Gourmet Foods*,<sup>41</sup> the New York Court of Appeals separately addressed claims for negligent infliction of economic losses and public nuisance. The court extensively analyzed the application of the ELR to the negligence claim but did not mention it during its public nuisance analysis.<sup>42</sup> By implication, then, the court suggested that the ELR does not apply to public nuisance claims, thereby encouraging the “end run” strategy and foreshadowing the approach espoused by Section 8 of the *Third Restatement*. The court nonetheless held that the plaintiffs failed to show a special injury and that therefore their public nuisance claim likewise failed.<sup>43</sup>

With respect to the special injury analysis, the New York Court of Appeals emphasized the need to limit potentially unlimited liability given the number of potential plaintiffs.<sup>44</sup> Indeed, this appeared to be the dispositive factor in terms of rejecting liability for public nuisance,

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of the leak site . . . . About 15,000 people were relocated in total, scattering to locations dozens—and in some cases hundreds—of miles away.”).

37. *Id.* at 883.

38. *Id.* at 896.

39. *Id.* at 889 (quoting *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1103 (N.Y. 2001)).

40. *Id.*

41. 750 N.E.2d 1097, 1099 (N.Y. 2001).

42. *See id.* at 1103.

43. *See id.* at 1104.

44. *Id.* at 1101.

given that so many plaintiffs suffered some kind of economic loss, from the “taxi driver” to the “hot dog vendor” to the “law firm.”<sup>45</sup> The court further reasoned that “[w]hile the degree of harm to the named plaintiffs may have been greater than to the window washer, per diem employee or neighborhood resident unable to reach the premises, in kind the harm was the same.”<sup>46</sup>

Several courts have taken this approach to reconciling claims for public nuisance and negligent infliction of economic losses. Thus, to the extent that courts have considered the two separate lines of jurisprudence together, the unifying feature tends to be the use of the “special injury” requirement as a limitation on liability. As one court explained:

It is clear that the special harm requirement is intended to serve the same purpose as the economic loss doctrine: to limit liability arising from an event. Public nuisances, by definition, affect many people. If every person or entity injured from a public nuisance could recover economic or even property damages, liability could be exorbitant; thus, only those plaintiffs who suffer special harm may recover.<sup>47</sup>

Moreover, to the limited extent the *Third Restatement* has posited a theoretical reconciliation across these separate jurisprudential lines, it too has embraced the conventional limitation of liability rationale. Similar to the “stranger” ELR, the “special injury” public nuisance requirement is designed to resist the pressures of potentially indeterminate and unlimited liability.<sup>48</sup> The tort law professor amici in *Southern California Gas Co.* embraced the reasoning from the *Third Restatement*:

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45. *Id.* at 1104–05.

46. *Id.* at 1105 (citing *Leo v. Gen. Elec. Co.*, 145 A.D.2d 291 (N.Y. App. Div. 1989), which is a classic commercial fishermen/pollution case). The court did acknowledge that a complete “loss of livelihood” would be so severe as to justify finding special injury. *Id.*

47. *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1481 (E.D. Pa. 1993), *rev’d on other grounds sub nom.* *Fed Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993); *see also* *City of Chicago v. Beretta*, 821 N.E.2d 1099, 1142 (Ill. 2004) (noting that both economic loss rule and “special injury” requirement of public nuisance are designed to limit liability and holding that “[p]laintiffs in the present case can neither avail themselves of the standing conferred upon individuals under section 821C(2) of the Restatement on the basis of having suffered a particular harm, nor escape the strictures of the *Moorman* doctrine [the Economic Loss Rule], because they have pleaded no injury to person or property.”); *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984) (analyzing public nuisance claim separately from the economic loss rule, but finding that there is no special injury because if all the businesses on the island are affected, the injury by definition cannot be special).

48. RTT: LEH § 8 cmt. c (“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 Chapter. Defendants would be subject to potentially massive and unpredictable liabilities . . .”).

[D]ecisions 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 plaintiffs' 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.<sup>49</sup>

### C. *The Limits of Limitation of Liability Rationales*

To date, the conventional justification for the special injury public nuisance requirement is that it serves a function akin to the “stranger” ELR in negligence—namely, as a necessary limitation on liability. But the underlying limitation of liability rationale does not provide a principled way to distinguish which class of victims, among all persons generally affected and injured or impaired, should be allowed to come forward, whether in negligence or public nuisance.<sup>50</sup> For example, it is nearly universally established—but not satisfactorily justified—that a fisherman may recover for the contamination of a quarry or wharf while the numerous businesses which suffer a decline in business because customers avoid the polluted area cannot.<sup>51</sup>

In crafting the “stranger” ELR and special injury requirement, the *Third Restatement's* overriding concern with unlimited liability ensures that there is not over-deterrence. But the corresponding risk of under-deterrence looms large. Nor does it make sense for recovery of purely financial losses to turn on whether the claim is framed as negligence or public nuisance. The *Third Restatement's* invocation of the potentially high “social and private costs of a public nuisance”<sup>52</sup> hardly suffices—after all, negligently inflicted economic harm can be

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49. Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief of California Tort Law Scholars in Support of Affirmance at 17, *In re S. Cal. Gas Leak Cases*, 441 P.3d 881 (Cal. 2019) (No. S246669) (quoting RTT: LEH § 8 cmt. c.). The amici elaborate:

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.”

*Id.* at 19.

50. RTT: LEH § 8 cmt. e (A class of victims must be identified that is “sufficiently distinct to allow principled separation” from all persons generally affected and injured or impaired in their daily life by the public nuisance at issue, and the special injury rule achieves that purpose.).

51. *Id.* cmt. d; Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief of California Tort Law Scholars in Support of Affirmance at 21–24, *In re S. Cal. Gas Leak Cases*, 441 P.3d 881 (Cal. 2019) (No. S246669).

52. RTT: LEH § 8 cmt. b.

quite severe in its consequences, and not every public nuisance action features such high costs.<sup>53</sup>

Several questions prod us in the direction of a new approach: why, in practice, should fishermen be “favorites” of the law? Why not subject both negligence and public nuisance plaintiffs to the same set of channeling considerations rather than force all plaintiffs into the public nuisance box? What if public nuisance were reframed as a new species of business tort, as opposed to an ad hoc or strategic end run around the ELR? Centered on a “channeling” rationale, this Article’s proposed approach is that the public nuisance special injury rule deputizes a subclass of significantly impacted individuals or entities to enforce against negligent conduct leading to widespread financial losses.

### III. “CHANNELING” OR ENFORCEMENT RATIONALES

Unlike the limiting liability rationale, the “channeling” or enforcement rationale supports the optimal deterrence goal of tort law: taking into account both over- and under-deterrence concerns. It also provides a coherent framework for reconciling public nuisance with the ELR in negligence. Moreover, the channeling rationale has deep historical roots in the realm of business torts leading to purely financial losses. And, from a modern perspective, it links the *Illinois Brick* indirect purchaser rule in antitrust with the special injury requirement for public nuisance.<sup>54</sup>

#### A. *Reconciling Public Nuisance “Special Injury” with the “Stranger” ELR*

The channeling or enforcement rationale provides a unified approach to reconciling public nuisance with the ELR.

##### 1. *Setting the Scene: Paradigmatic Cases*

To begin with the current state of affairs, there are cases in which courts hold that the ELR would bar recovery, but the public nuisance framework allows recovery. The most obvious example is when a particular person or group of people suffers unique or disproportionate

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53. The *Third Restatement* approach denies recovery to every plaintiff suffering even the most severe purely economic harm stemming from an unintentional violation of a private right, but it, in theory, would allow recovery to a specially, though potentially minimally, economically-affected victim of an unintentional violation of a public right.

54. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746–47 (1977) (holding that indirect purchasers who did not buy a product directly from an alleged violator lack standing to sue for money damages under antitrust law).

economic harm—public nuisance would allow them to recover, but a broad ELR would not.<sup>55</sup>

Consider the classic bridge closure case, where a defendant negligently destroys a bridge, cutting off businesses on one side from their customers, resulting in lost profits. This is a case that would come out differently under the conventional ELR and public nuisance frameworks. The viability of a business’s public nuisance claim alleging severe economic harm resulting from loss of access to its premises by its customers would rise and fall with the special injury inquiry, whereas no plaintiff suffering purely economic harms would be able to recover in negligence under the *Third Restatement’s* ELR.

These claims should rise or fall together—the business’s ability to recover should not be contingent on whether the case is framed as negligence or public nuisance. Consider in that regard how commercial fishermen are typically allowed to recover their purely financial losses after a negligently inflicted oil spill. The so-called “commercial fisherman’s exception” to the ELR—its scope as well as its underlying rationale—has bedeviled this small, but significant (given the frequency of oil spills) corner of the law. Some courts reach this result via public nuisance due to the fishermen suffering special injury; others via the “special relationship” or affirmative duty exception to the ELR in negligence. The two frameworks ought to be reconciled via the channeling rationale, not, as courts conventionally do, based on line-drawing given concerns about limitless liability.

#### a. Business losses due to bridge closure

In *Aikens v. Debow*,<sup>56</sup> the plaintiff, a motel and restaurant, brought a negligence action against a truck driver and the truck driver’s employer after the truck driver damaged a bridge, leading to its closure, which caused the motel and restaurant to lose business profits. The court held that the plaintiffs would only recover for economic losses where there is: 1) physical damage; 2) property damage; 3) a contractual relationship between the parties; or 4) a “special relationship” between the parties based on the foreseeability of both the particular

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55. Massachusetts, for example, has a very broad economic loss rule: “‘purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage.’” *Primary Color Sys. Corp. v. Willwork, Inc.*, 95 N.E.3d 300, 300 (Mass. App. Ct. Dec. 14, 2017). Cf. Catherine M. Sharkey, *Can Data Breach Claims Survive the Economic Loss Rule?*, 66 DEPAUL L. REV. 339, 346 (2017) (“[T]he extent to which the [stranger] economic loss rule serves as a formidable barrier to credit card data security breach cases depends upon the underlying state law; in particular, whether a state adopts the majority or minority position on the rule, as well as how it defines various exceptions thereto.”).

56. 541 S.E.2d 576, 579 (W. Va. 2000).

plaintiff and particular injury as well as whether the plaintiff “is affected differently from society in general.”<sup>57</sup>

It is striking that the *Aikens* court defines the special relationship necessary for the imposition of negligence liability in “special injury” terms (by using a comparative analysis of the plaintiff’s harms versus those of the community), but nonetheless eschews that its analysis should in any way reconcile with public nuisance. Indeed, the court goes out of its way to state that its reasoning in this case “does not encompass, and has no effect upon . . . nuisance law.”<sup>58</sup>

The *Aikens* court also specifically discusses that the reason for this special relationship limitation for negligence claims is a concern about unlimited liability:

This Court’s obligation is to draw a line beyond which the law will not extend its protection in tort, and to declare, as a matter of law, that no duty exists beyond that court-created line. It is not a matter of protection of a certain class of defendants; nor is it a matter of championing the causes of a certain class of plaintiffs. It is a question of public policy. Each segment of society will suffer injustice, whether situated as plaintiff or defendant, if there are no finite boundaries to liability and no confines within which the rights of plaintiffs and defendants can be determined.<sup>59</sup>

In *Stop & Shop Cos. v. Fisher*,<sup>60</sup> storeowners sued a barge owner after the barge collided with a drawbridge, resulting in obstruction of the bridge that linked storeowners to many of their customers. The court held that the case could proceed under the public nuisance framework, even though it would be barred by the ELR if brought as either a negligence or private nuisance claim:

We recognize the wisdom of the general rule which denies recovery for negligently caused economic harm. However, not all negligent acts give rise to a public nuisance, or more particularly, to an obstruction of a public way. In light of the degree of harm required for an obstruction to amount to a public nuisance, and the dependence of businesses and their customers on access to business establishments, we conclude that recovery may be warranted in some cases.<sup>61</sup>

The court justified recovery in the public nuisance context by looking to the severity of the financial losses:<sup>62</sup>

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57. *Id.* at 589.

58. *Id.* at 591.

59. *Id.* at 592.

60. 444 N.E.2d 368, 369 (Mass. 1983).

61. *Id.* at 373.

62. *Id.*

Our old rule [which severely limited public nuisance claims to those with either 1) physical harm to the plaintiff's property or 2) obstruction of a public way which cut off immediate access to a public highway or river] has the advantage of avoiding a multitude of suits by setting up a clear and restrictive line of demarcation between special and general damages. While such a clear line also has a certain theoretical appeal, we conclude that its clarity does not compensate for the fact that it precludes any claim, even in cases where an established business may have been virtually destroyed . . . Accordingly, we hold that an established business may state a claim in nuisance for severe economic harm resulting from loss of access to its premises by its customers.<sup>63</sup>

Instead of limiting public nuisance recovery to either physical damage or the destruction or obstruction of a public way cutting off access to a highway or waterway (as was historically the case), the court reasoned that the requirement of "severe economic harm" would sufficiently cabin liability.

b. Commercial fishermen's business losses following oil or chemical spills

In *Burgess v. M/V Tamano*,<sup>64</sup> an oil tanker struck an outcropping, leading to an oil spill in the surrounding bay. Numerous plaintiffs—including commercial fishermen, commercial clam diggers, and businesses on the local beach—brought tort claims for financial losses.<sup>65</sup> The court dismissed the claims of the motel owners, grocery stores, and other local businesses who claimed loss of profits as a result of reduced tourism due to the oil spill, but allowed the claims of commercial fishermen and clam diggers to proceed.<sup>66</sup> In finding that the commercial fishermen and clam diggers suffered "special injury," the court relied on the fact that these plaintiffs directly used the harmed entities (in this case, fish and clams), whereas the hotels and local businesses suffered "indirect" harm.<sup>67</sup> The court also engaged in an analysis of the severity of the harm, and the comparative harm of the fishermen related to the community.<sup>68</sup> According to the court, fishermen and clam diggers are dependent on the fish and clams for their

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63. *Id.* at 372.

64. 370 F. Supp. 247, 248 (D. Me. 1973).

65. *Id.* at 249.

66. *Id.* at 250–51.

67. *Id.*

68. *Id.* at 250 ("It would be an incongruous result for the Court to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious act of another, should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public.").

livelihood, which could be destroyed by the oil spill.<sup>69</sup> By contrast, the motel's injury is the same type of injury suffered by the community.<sup>70</sup> There are myriad similar cases in which commercial fishermen successfully recover business losses via public nuisance claims.<sup>71</sup>

In *Union Oil Co. v. Oppen*,<sup>72</sup> the court reasoned that the ELR would apply to fishermen bringing a public nuisance claim after an oil spill, but the special relationship exception allowed the fishermen to recover under negligence for their purely economic losses. In determining whether there was a sufficient special relationship, the *Oppen* court looked to “the foreseeability of harm . . . , 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.”<sup>73</sup> The court noted that foreseeability was the “crucial determinant” among the factors, and found that “[t]he defendants understood the risks of their business and should reasonably have foreseen the scope of its responsibilities.”<sup>74</sup> Finding that the other factors and a “cheapest cost avoider” analysis also weighed in favor of finding a duty of care, the court held that “the defendants are under a duty to commercial fishermen to conduct their drilling and production in a reasonably prudent manner so as to avoid the negligent diminution of aquatic life.”<sup>75</sup>

The court mentioned that its negligence holding was not foreclosed by the fact that the defendant's actions might also constitute a public nuisance<sup>76</sup> but nonetheless, the opinion ends on a word of caution:

69. *Id.*

70. *Burgess*, 370 F. Supp. at 251.

71. *See, e.g.,* *Leo v. Gen. Elec., Co.*, 145 A.D.2d 291, 294 (N.Y. App. Div. 1989) (granting recovery to commercial fishermen against polluter of leaked chemicals in Hudson River given the special nature of their harm, namely extremely severe economic harm); *Carson v. Hercules Powder Co.*, 402 S.W.2d 640, 641 (Ark. 1966) (allowing recovery for public nuisance where local fisherman's livelihood was threatened by pollution of the river leading to the destruction of the local fishing industry).

72. 501 F.2d 558, 565 (9th Cir. 1974).

73. *Id.* at 566 (citing *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958)).

74. *Id.* at 568–69 (“Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case.”).

75. *Id.* at 569–70. *See also* *Sharkey, Cheapest Cost Avoider, supra* note 15, at 1042 (“While acknowledging that ‘fixing the identity of the best or cheapest cost-avoider is more difficult than might be imagined,’ the court articulated several relevant factors: (1) excluding as cost-avoiders those who ‘could avoid accident costs only at an extremely high expense’; (2) evaluating administrative costs on each party; (3) avoiding imposing costs on activities unrelated to the accident; and (4) allocating the loss to the ‘party who can best correct any error in allocation.’” (quoting *Oppen*, 501 F.2d at 569–70)).

76. *Oppen*, 501 F.2d at 570.

Nothing said in this opinion is intended to suggest . . . 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. The plaintiffs in the present action lawfully and directly make use of a resource of the sea, *viz.* its fish, in the ordinary course of their business.<sup>77</sup>

The court also stressed that the “injury here asserted by the plaintiff is a pecuniary loss of a particular and special nature, limited to the class of commercial fishermen,” which is notably different from the injury suffered by those in the community who simply want to take their boats out for an “‘occasional Sunday piscatorial pleasure.’”<sup>78</sup>

Many of the factors that courts rely upon in finding an affirmative duty in negligence clearly overlap with the special injury public nuisance factors. As situating *Burgess* and *Oppen* side-by-side shows, the special injury (*Burgess*) and special relationship (*Oppen*) considerations invoked by courts are often the same, and are deployed for a common purpose, namely to limit liability. As this Article aims to demonstrate, each of these doctrines might be readily reframed pursuant to a unified framework based on a channeling rationale.

## 2. Reframing the Doctrines Based on “Channeling”

### a. The “Special Injury” Public Nuisance Requirement Revisited

To date, although courts nearly ubiquitously apply the same formulation of the “special injury” requirement—namely that injuries alleged must be different in kind, not simply degree, to warrant recovery—there is little rhyme or reason to the results reached under this approach.<sup>79</sup> Instead, it seems that the underlying rationale of limiting liability sometimes (but not always) rears its head to cut off recovery.

The *Third Restatement* defends fishermen’s recovery via public nuisance claims by arguing that fishermen “are the class of victims most immediately and obviously affected by contamination of a waterway,

77. *Id.*

78. *Id.* (quoting *Oppen v. Aetna Ins. Co.*, 485 F.2d 252, 260 (9th Cir. 1973)).

79. Compare *Overcash v. South Carolina Elec. & Gas Co.*, 614 S.E.2d 619, 622 (S.C. 2005) (holding that personal injuries cannot qualify as special injuries), with *Birke v. Oakwood Worldwide*, 87 Cal. Rptr. 3d 602, 610 (Cal. Ct. App. 2009) (“When the public nuisance causes personal injury to the plaintiff or physical harm to his land or chattels, the harm is normally different in kind . . . and the tort action may be maintained.” (quoting RESTATEMENT (SECOND) OF TORTS § 821C cmt. d (A.L.I. 2020))). See generally WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 88 (4th ed. 1971) (“[C]ourts have not always found it at all easy to determine what is sufficient ‘particular damage’ to support [a] private action [for public nuisance], and some rather fine lines have been drawn in the decisions.”).

and they can be separated with tolerable clarity from other classes of affected plaintiffs.”<sup>80</sup> Clearly uncomfortable with the perception of fishermen as a special class, the comments in the *Third Restatement* plead that “[d]escribing this state of affairs as a ‘fishermen’s exception,’ or explaining it on the ground that fishermen are ‘favorites of admiralty,’ is unfortunate and best avoided.”<sup>81</sup> But, as of yet, no other class has proven as capable of consistent recovery, and thus, in practice, fishermen seem to benefit from special principles allowing recovery, while non-fishermen are turned away by courts’ invocation of the limiting liability rationale.

My contention here is that the “special injury” requirement should be reframed, with a focus not on its effect as a limitation on liability, but guided by the necessity to incentivize enforcement for injuries that are “distinct in kind” in the sense that they represent potentially widespread, significant harms otherwise unaddressed, leading to under-deterrence of tortfeasors. The special injury requirement would thereby “channel” liability for situations in which there is a significant loss concentrated on a particular party. The aim should be to find a “class of victims most immediately and obviously affected by”<sup>82</sup> the violation of a public right (broadly conceived),<sup>83</sup> incentivize this class of persons to sue the tortfeasor, who must thereby internalize the social costs of its actions, and thus realize tort law’s objective of allocative efficiency in the case of economic or business torts.

The main challenge is to identify a first tier of the most significantly impacted plaintiffs to come forward in cases involving widespread financial harms. Relevant to this inquiry is the desire to avoid multitudinous actions leading to multiple recovery and thus over-deterrence. As a historical matter, the “special injury” requirement for public nuisance was intended to exclude large numbers of small claims by achieving appropriate deterrence through direct administrative actions.<sup>84</sup> William Blackstone noted in his *Commentaries* that a public

80. RTT: LEH § 8 cmt. d.

81. *Id.* § 7 cmt. e (“Referring to the result as a ‘fisherman’s exception’ to the rule of this Section is again misleading.”); see also *id.* § 8 cmt. d (“Courts occasionally view these patterns together and infer the existence of a ‘fishermen’s rule’ exempting that class from the usual rules governing recovery for economic loss. The inference is faulty.”).

82. *Id.* § 8 cmt. d.

83. See *supra* note 30 (rejecting Professor Epstein’s narrow definition of infringement of public right).

84. See Anonymous, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536) (“[E]ach nuisance done in the King’s highway is punishable in the Leet and not by an action, unless it be where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt.”).

nuisance is usually not privately actionable because “it would be unreasonable to multiply suits by giving every man a separate right of action.”<sup>85</sup> In the modern era, however, it is critical to consider the need for enforcement against the types of widespread financial harms in which there are not likely to be physical injuries (such as data breaches).<sup>86</sup>

b. The “Stranger” Economic Loss Rule for Negligence Revisited

Instead of being justified as a means of preventing unlimited liability, the “stranger” ELR—as embraced in *532 Madison Ave. Gourmet Foods, Southern California Gas*, and the *Third Restatement*—would likewise need to be reframed pursuant to the “channeling” rationale. Indeed, Professor Ward Farnsworth (Reporter for the *Third Restatement*) defended the “stranger” ELR as a mechanism to reduce the number of potential suits, in effect by channeling tort liability through a small class of plaintiffs, typically those who have suffered physical injury.<sup>87</sup> Professor Farnsworth built upon the earlier channeling justification proposed by Mario Rizzo, who emphasized how the property owner who recovers losses can then reimburse the contractors and others for their increased costs of completion under contract.<sup>88</sup> But,

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85. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 167 (1893).

86. For this reason, Professor Farnsworth’s channeling rationale for ELR falls short as it is premised on the existence of someone with physical injury or property damage coming forward. See Farnsworth, *supra* note 15, at 566.

87. See *id.* (defending the stranger economic loss rule as an all or nothing search for a “best plaintiff” who can bring suit and properly disincentivize future negligence: ideally, the best plaintiff will be one who has been physically harmed, and if no such party exists, only plaintiffs with viable public nuisance claims can possibly serve to deter future recurrence of the damage-inducing conduct).

88. Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281, 283–85 (1982). Rizzo was responding to Bishop’s argument that the economic loss rule made sense in light of the fact that economic losses often represent private losses, but not social losses, as money is simply transferred from one party to another. See W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 27 (1982). For example, when a restaurant located on an island loses money when customers are not able to reach it via a bridge that is negligently destroyed, these private losses to the restaurant are offset by gains to other restaurants on the mainland who benefit from additional patrons, now not able to cross the bridge.

Rizzo instead argues that liability should be denied when the litigation costs exceed the value of permitting recovery. Rizzo, *supra* note 88, at 283. He argues for what he terms “channeling” contracts, creating guidelines for generally denying recovery when there are contracting parties to incentivize negotiating parties to indemnify one another and allocate risks themselves. *Id.* at 291–97. Rizzo argues for allowing for recovery when economic losses are concentrated—given that this limits liability and keeps litigation costs contained, and denying recovery when channeling contracts could have been made *ex ante* at relatively low cost. *Id.* at 285.

Rizzo’s explanation is subject to the objection that one has never seen a contract used to spread the losses back to the ultimate injured persons, which is too costly to do. See, e.g., Robert

whereas Professor Farnsworth defends the status quo “no-duty” stranger ELR, the channeling rationale should allow for recovery in this realm, in line with the reformulation of the “special injury” public nuisance requirement for a subclass of significantly impacted plaintiffs, whose claims must be brought forward in order to adequately deter the tortfeasor.

The doctrinal holding of the much-disparaged *People Express Airlines, Inc. v. Consolidated Rail Corporation* could be justified on such a reformulated channeling rationale.<sup>89</sup> In *People Express Airlines*, a chemical leak at a railroad yard led to the evacuation of the airline’s nearby Newark airline terminal, leading to a business shut-down.<sup>90</sup> The New Jersey Supreme Court recognized a duty of care on the part of the railroad to take reasonable measures to avoid causing purely economic damage to “particularly foreseeable” plaintiffs comprising an identifiable class that the railroad knows or has reason to know are likely to suffer from its conduct.<sup>91</sup> According to the court, a defendant that breaches this duty is liable for economic losses that are proximately caused by its breach of duty. This puts the onus on defendants to take greater care in handling their activities.

While the court in *People Express Airlines* does not analyze the case formally as a public nuisance case, the court looks for guidance to both special relationship exceptions to the “stranger” ELR in negligence and to the special injury requirement in the public nuisance context.<sup>92</sup> The court uses examples from each of these lines of juris-

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J. Rhee, *A Production Theory of Pure Economic Loss*, 104 Nw. U. L. REV. 49, 67 (2010) (“[Rizzo’s] explanation does not fit the data. Most cases of pure economic loss involve high contracting costs because the parties are strangers.”). His view also does not explain why the measure of damages does not include an allowance for the loss of third parties who are allowed recovery. Yet, it would be better to give the windfall to the plaintiff for deterrence purposes than to leave it with the defendant, who now does not bear the full costs of his harm-producing conduct.

89. The Third Restatement Reporter’s Note seeks to marginalize the *People Express* minority position. RTT: LEH § 7 reporter’s note a (“Contrary positions have been taken only occasionally in the case law.” (citing *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107 (N.J. 1985); *Mattingly v. Sheldon Jackson C.*, 743 P.2d 356, 359 (Alaska 1987))). As Professor Robert Rabin aptly put it: decades after the demise of the airline that gave the case its name, *People Express* remains “a lonely outpost.” Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV. 857, 858 (2006). Its relatively ad hoc standard, embodied in a fact-intensive “particular foreseeability” test, has been avoided by other courts with—as Professor Rabin put it — “a striking degree of unanimity.” *Id.*

90. *People Express Airlines, Inc.*, 495 A.2d at 108.

91. *Id.* at 118 (“[A] defendant who has breached his duty of care to avoid the risk of economic injury to particularly foreseeable plaintiffs may be held liable for actual economic losses that are proximately caused by its breach of duty”).

92. *Id.* at 112 (“One group of exceptions is based on the ‘special relationship’ between the tortfeasor and the individual or business deprived of economic expectations.”); *id.* at 113 (“A

prudence to support its use of a “particular foreseeability” standard for recovery in negligence. Additionally, it uses these examples to criticize a blanket no-duty rule, prohibiting any recovery for purely economic losses, stating “these exceptions expose the hopeless artificiality of the per se rule against recovery for economic losses.”<sup>93</sup>

The court’s approach could be better defended on channeling grounds. The channeling insight is that those few entities in the first tier that suffer substantial economic loss, like the airline in *People Express Airlines*, may recover, while the multitude of others in second and third tiers whose losses are increasingly indirect (e.g., customers) cannot. Moreover, the concern about infinite extension of liability seems misplaced here, for one can easily stop with significant claims brought by the first tier of impacted entities (like *People Express*), and tell the passengers of *People Express* (in the second or third tier of impacted entities) who have to reroute that their inconvenience is part of life, like thunderstorms and blackouts. The remedy allowed here “channels” liability for situations in which there are significant losses—even if purely financial losses—concentrated on particular parties in much the same way as allowing, in the context of public nuisances, private claims where “special injury” can be shown.

Moreover, the holding in *Southern California Gas* might also be re-framed on these channeling terms. Justice Cuéllar emphasized the limitation of liability rationale when denying the merchants’ actions for lost profits.<sup>94</sup> But the problem with this approach is that it could result in under-deterrence given the total harm in question. Looked at through the channeling lens—whether framed as an economic loss/negligence or public nuisance cause of action—the key questions to ask are: Who are the “immediate and obvious” victims of the gas leak? Does deputizing the first tier of plaintiffs—namely those who have suffered either personal injuries or property damages—suffice for deterrence purposes? Are the marginal gains from expanding the circle of plaintiffs to the next tier of impacted victims worth the higher administrative costs that multiple actions for lost profits entail?

As an initial cut, the first tier of impacted victims should include individuals who were forced to relocate as well as public entities that incurred expenses responding to the leak. Whether or not the remaining businesses (i.e., the plaintiffs in *Southern California Gas*) should recover should depend upon whether they are necessary as additional

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very solid exception allowing recovery for economic losses has also been created in cases akin to private actions for public nuisance.”).

93. *Id.* at 114.

94. See *supra* notes 37–40 and accompanying text.

enforcers. In making this determination, it is appropriate for judges to consider the extent to which other harmed parties (including private and public entities) have already come forward to force the tortfeasor to internalize the total social harms. Relevant to this inquiry is the fact (which emerges at the tail end of Justice Cuéllar’s opinion) that fifty thousand claimants in related litigation brought forth claims for property damage.<sup>95</sup> It is also worth considering whether any shortfall in deterrence has been (or is likely to be) met by regulatory fines against the defendant, which do not entail payments to the plaintiffs.<sup>96</sup> Indeed, this was likewise the case in *Southern California Gas*.<sup>97</sup>

B. “Vicarious Avengers” for “Derivative Harms”: A Historical Perspective

A channeling or enforcement rationale has deep roots in the emergence of early historical business torts. Consider, for example, the tort of intentional interference with prospective advantage, available to plaintiffs whose prospective financially advantageous transaction with a third party (with whom they do not have a contract) was interfered with by some unlawful means (like fraud or physical force). *Tarleton v. M’Gawley*,<sup>98</sup> an 18th century English case, provides a dramatic and illuminating example. In that case, the defendant fired shots from one ship, the *Othello*, to prevent the indigenous people from trading with merchants on another ship, the *Bannister*, giving rise to recognition of tortious liability for unlawful interference with prospective advantage, where there is clearly “an intention not to permit any to trade” with the claimant, using unlawful means.<sup>99</sup>

If such deliberate interference were tolerated, enormous socially beneficial gains from trade would be lost. Conduct involving force or fraud has long been regarded as suspect at common law; thus, the only issue is *who* brings the cause of action and receives the remedy. Typi-

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95. *S. Cal. Gas Co. v. Sup. Ct. L.A. Cty.*, 441 P.3d 881, 895–96 (Cal. 2019) (“[W]e recognize Plaintiffs’ concern that SoCalGas’s alleged negligent behavior will go insufficiently deterred if we deny recovery here. But SoCalGas is not getting off scot-free. At oral argument, the company represented that some 50,000 claimants have alleged in other litigation that they suffered property damage caused by the leak—several hundred of whom are local businesses.”).

96. Note that, once such fines are collected, the government could establish a compensation fund.

97. *S. Cal. Gas Co.*, 441 P.3d at 896 (“[T]he company has spent some \$450 million on remedial measures and agreed to pay another \$120 million as part of a settlement with local authorities. SoCalGas, operating in a heavily regulated domain, also remains under investigation—and may face further consequences in the future.”).

98. 170 Eng. Rep. 153, 153 (K.B. 1793); see also RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS* 1175–78 (12th ed. 2020).

99. *Tarleton*, 170 Eng. Rep. at 153.

cally, customers simply do not have a sufficient stake to fight against the conduct and thereby restrain the aggressive defendant, when they do not themselves suffer physical injury or property damage, even if their economic losses are real. The directly-threatened consumers have little stake in bringing the action at issue, because the size of the individual consumer surplus that they would have reaped from the relevant transaction is likely to be individually small (though significant when considered across all consumers). In the absence of all of them banding together in a class-action lawsuit, and the coordination costs that would involve, the more efficient solution is to confer a direct action on the seller, whose aggregate producer surplus lost is great enough to incentivize the bringing of the action at issue, thus essentially vindicating tort law's attempts to restore allocative efficiency.

Given that the indigenous people in *Tarleton* may not have had any desire (or ability) to sue for the wrongful acts of the defendant, the defendant could continue to take wrongful and socially wasteful actions. The suit must be brought by the disappointed trader, or it will not be brought at all. The onus is on traders to sue for the public good as well as for their own economic advantage. Essentially the tort can be viewed as allowing traders to sue in a derivative way, basing their harm primarily on the "unlawful" means used to cause harm to others, with whom they would have contracted. Allowing the trader to sue is thus driven primarily by enforcement and deterrence goals. To be sure, the cause of action compensates the trader for the harm it suffered, but the cause of action is most needed to deter the defendant from unlawful activities.

In a similar vein, consider the unfair competition or "passing off" business tort.<sup>100</sup> The passing off action builds from the proposition that a disappointed buyer has an action against the seller who has passed off its own goods as the superior product of a rival.<sup>101</sup> As with intentional interference with prospective advantage, the ultimate victims (the end consumers) are not in a position to enforce the rules of competition because their individual harms are typically marginal (though potentially quite large as a class). Nor would a suit by end consumers vindicate the interests of the rival in its own product's reputation and goodwill. In recognizing the "passing off" cause of action, tort law relies on rival competitors to bring suit to reinforce the proper rules of competition. The claim is that the defendant has

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100. EPSTEIN & SHARKEY, *supra* note 98, at 1220–21; *see also* Catherine Romero Wright, *Reverse Passing Off: Preventing Healthy Competition*, 20 SEATTLE U. L. REV. 758, 788 (1997).

101. EPSTEIN & SHARKEY, *supra* note 98, at 1220–21.

falsely represented that its own product is better than it really is, by pretending its product is the plaintiff's, or by claiming that its product has desirable attributes associated with the plaintiff's product that it, in fact, lacks. The defendant's misrepresentations induce third parties to desert the plaintiff; the measure of damages is the profits from lost sales, which depend critically on the fraction of defendant's buyers that would have migrated to the plaintiff's wares if the passing off had not happened.

There is a close kinship between actions for unfair competition and those for violation of the Lanham Act, the trademark statute.<sup>102</sup> The Lanham Act makes actionable "the deceptive and misleading use of marks in . . . commerce . . . [and] protect[s] persons engaged in such commerce against unfair competition."<sup>103</sup> The statutory scheme put into place by the Lanham Act undid Judge Learned Hand's restrictive ruling in *Ely-Norris Safe Co. v. Mosler Safe Co.*<sup>104</sup> which held that, pursuant to traditional common law, an aggrieved competitor could not sue as "a vicarious avenger of the defendant's customers." The Lanham Act more broadly recognizes rights against a false designation of origin or any false description or representation in favor of any rival competitor that believes it is likely to be damaged.<sup>105</sup> With the Lanham Act, Congress encouraged commercial firms to act as "vicarious avengers" of consumers' rights.<sup>106</sup>

### C. *The Illinois Brick Indirect Purchaser Rule for Antitrust Claims: A Modern Perspective*

Moving to modern perspectives on judicially created rules implementing the "channeling" function, consider the U.S. Supreme Court's recent move (in *Apple Inc. v. Pepper*) to recognize antitrust claims notwithstanding the backdrop of the restrictive *Illinois Brick*<sup>107</sup> indirect purchaser rule.

In 1977, the Supreme Court announced the rule that indirect purchasers—who, unlike direct purchasers, do not buy the relevant prod-

102. 15 U.S.C. §§ 1051–1141 (2018).

103. *Id.* § 1127.

104. 7 F.2d 603, 604 (2d Cir. 1925), *rev'd on other grounds*, 273 U.S. 132 (1927). For further discussion, see EPSTEIN & SHARKEY, *supra* note 98, at 1221–22.

105. *See* 15 U.S.C. § 1125 (2018).

106. *See* EPSTEIN & SHARKEY, *supra* note 98, at 1221–22. *But see* Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1377 (2011) ("We let competitors sue, and not consumers, under section 43(a)(1)(B) because we think competitors have their own interests to protect . . . A competitor in a Lanham Act suit does not act as a 'vicarious avenger of the public's right to be protected against false advertising.'" (quoting *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 230 (3d Cir. 1990)).

107. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 747 (1977).

uct directly from the alleged violator, but instead from somewhere down the supply chain—do not have standing to sue for damages under federal antitrust law.<sup>108</sup> The Court reasoned that not only would it be far too difficult for the state and local governmental plaintiffs to trace their damages through a convoluted supply chain (which involved layers of contractors and sub-contractors), but that recovery presented a grave risk of subjecting the defendants to multiple suits.<sup>109</sup> Thus, for the sake of simplicity and efficiency, the Court drew a clear line, barring indirect purchasers from pursuing money damages in antitrust actions.<sup>110</sup>

Although conventionally viewed as a line-drawing exercise designed to preclude unlimited liability (like the ELR), the “channeling” rationale provides a richer theoretical justification, one prone to evolve in modern contexts to satisfy enforcement and deterrence goals. The Court’s *Apple Inc. v. Pepper*<sup>111</sup> decision highlights this capacity for evolution. In a sharply divided 5-4 opinion, the Court held that iPhone users who bought apps on Apple’s App Store constitute “direct purchasers” vis-à-vis Apple, notwithstanding the fact that they technically purchased the apps from third-party app developers.<sup>112</sup> In rejiggering the restrictive *Illinois Brick* rule to enable recovery, the Court was guided by an enforcement rationale—evinced concern that a contrary holding would “provide a roadmap . . . to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.”<sup>113</sup>

The Court’s decision could have far-reaching implications for the platform economy and entities that offer services on the Internet using vendors or other suppliers. It is also a key example of the Court wielding an enforcement or channeling rationale in order to modify a restrictive judicial rule designed (like the ELR) to stave off the prospect of multiplicity of suits.

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108. *Id.* at 746–47.

109. *Id.* at 730–33.

110. *Id.* at 746–47. Note that, in reality, the line-drawing was not quite so clean and simple: Indirect purchasers can and do sue in federal court, including for damages, under the laws of the many states (more than 30) that have refused to apply the *Illinois Brick* rule to their own state antitrust law. Additionally, courts have recognized certain exceptions to the bar against indirect purchaser standing. Alexander Kristofcak, *FCA v. FDA: The Case Against the Presumption of Immateriality from Agency Inaction*, 95 N.Y.U. L. REV. 235 (2020).

111. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019).

112. *Id.* at 1521.

113. *Id.* at 1523. The majority’s reasoning prompted a vociferous dissent, which noted that, as a doctrinal matter, the iPhone users were suing under “exactly the kind of ‘pass-on theory’ *Illinois Brick* rejected.” *Id.* at 1528 (Gorsuch, J., dissenting). Moreover, the dissent forewarned that the decision would simply prod Apple to enter into “less efficient” contractual arrangements with its app developers to avoid liability under the antitrust laws. *Id.* at 1530.

## IV. OPIOIDS AS PUBLIC NUISANCE

In a spate of recent cases, various public and private entities have sued pharmacies and opiate manufacturers and distributors. Across the board, the complaints in these cases allege that the opioid epidemic constitutes a public nuisance. How might we apply insights gleaned from the unifying “channeling” theory for “special injury” public nuisance and the ELR to these cases?

A. *A Patchwork of Existing Doctrinal Approaches*1. *The Application of the ELR to Public Nuisance*

As described above, some courts apply the ELR to public nuisance claims, while others do not.<sup>114</sup> The ELR has not featured so prominently in the opioid cases. The New York and Massachusetts state courts have held that the ELR only bars tort actions between contracting parties.<sup>115</sup> The federal multi-district litigation (MDL) is located in Ohio, which applies the ELR to “qualified” public nuisances (which mirror negligence torts) but not “absolute” public nuisances (involving intentional acts or statutory violations).<sup>116</sup> But, given that public nuisance is a state tort, it is likely that each underlying state’s approach would be at play.

2. *The “Special Injury” Requirement*

The majority view seems to be that governmental entities do not need to show special injury to bring a public nuisance claim, but such public entities can generally only seek abatement (not damages).<sup>117</sup>

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114. See *supra* notes 18–21 and accompanying text.

115. See, e.g., *In re Opioid Litig.*, 2018 WL 3115102, at \*35 (No. 4000/2017) (N.Y. Sup. Ct. June 18, 2018) (stating that the economic loss rule only bars tort actions between contracting parties, and because there is no contract here, there is no economic loss rule issue); *City of Boston v. Purdue Pharma*, 2020 WL 416406, at \*9 (Mass. Super. Ct. Jan. 3, 2020) (“[T]he Cities seek damages for a myriad of public costs that they allege they have been forced to expend to combat an opioid epidemic. Because the claims are not contract-related, the economic loss doctrine does not apply.”).

116. In the negligence context, the ELR only applies to claims arising between contracting parties:

The economic loss rule recognizes that the risk of consequential economic loss is something that the parties can allocate by agreement when they enter a contract. This allocation of risk is not possible where, as here, the harm alleged is caused by involuntary interactions between a tortfeasor and a plaintiff.

*In re Nat’l Prescription Opiate Litig.*, 2018 WL 6628898, at \*19 (N.D. Ohio 2018).

117. See, e.g., *In re Nat’l Prescription Opiate Litig.*, 452 F. Supp. 3d 745, 773–74, (N.D. Ohio 2020) (finding that, unlike the government entity plaintiffs in the MDL, a private medical center had to show special injury to assert a public nuisance claim); CAL. CIV. PROC. CODE § 731(a)

That said, there is no uniform doctrinal rule; instead, inconsistency abounds across courts, whose decisions consider a range of factors. For example, in a high-profile global warming case in the U.S. Court of Appeals for the Second Circuit, Professor Richard Epstein, as amicus, assumed that municipalities such as New York City would need to show special injury; the city contested this. However, neither side marshalled case law support for its respective contrary positions.<sup>118</sup>

It is nonetheless conventionally accepted that a public entity does not have to show special injury to bring a public nuisance claim, at least when seeking an injunction.<sup>119</sup> It is likewise broadly accepted that public entities may seek injunctions and abatement, but not monetary damages.<sup>120</sup> Some courts nonetheless allow for recovery of costs

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(West 2011) (offering abatement as the only remedy for public entities bringing public nuisance claims).

118. Professor Epstein suggests that New York City's claim for public nuisance should fail given that it cannot show special injury. Brief of Amicus Curiae Professor Richard A. Epstein in Support of Defendants-Appellees and Affirmance, *City of New York v. BP P.L.C.*, No. 18-2188 at 3 (2d. Cir. Feb. 14, 2019) (Doc. No. 188). He argues that allowing New York City to proceed will lead to an unwanted avalanche of litigation. *Id.* at 2; *see also* Amicus Curiae Brief of Competitive Enterprise Institute at 7, *Oklahoma ex rel. Hunter v. Johnson & Johnson*, Appeal No. 118,474 (Okla. Oct. 22, 2020) (arguing that "absent a claim to special damages, diffuse harms [are] appropriately redressed through regulatory action," not through liability for public nuisance). In reply, New York City insists (albeit in a footnote) that, as a public entity, it need not show special injury. It points to 532 *Madison Ave. Gourmet*, which states that "[a] public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large." Corrected Reply Brief at 28 n.10, *City of New York v. BP P.L.C.*, No. 18-2188 (2d Cir. Mar. 25, 2019) (Doc. No. 215) (quoting 532 *Madison Ave. Gourmet Foods, Inc v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1099 (N.Y. 2001)).

In New York, it is clear that public entities can bring public nuisance claims seeking a remedy of abatement. *See Copart Indus. Inc. v. Consol. Edison Co.*, 362 N.E.2d 968, 971 (N.Y. 1977) ("A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency." (emphasis added) (internal citations omitted)); *City of New York v. Smokes-Spirit.Com Inc.*, 911 N.E.2d 834, 841 (N.Y. 2009) ("It is well settled that a governmental entity, such as the City, may bring an action to abate a public nuisance . . ."). However, whether a public entity can bring a claim for damages in New York is unclear. In the *Smokes-Spirits* case, the court does not say one way or another, but the plaintiff entity did seek reimbursement for the costs of abating the public nuisance, and the court did not indicate that such a request was improper. *Id.* at 837.

119. *Cox v. New Castle Cty.*, 265 A.2d 26, 27 (Del. 1970) (allowing a claim brought by the county seeking the abatement of a public nuisance to go forward with no mention of special injury). *See City of Chicago v. Commonwealth Edison Co.*, 321 N.E.2d 412, 419 (Ill. App. Ct. 1974) (allowing for public nuisance claim seeking injunction by city to move forward with no mention of special injury); *City of Omaha v. Danner*, 185 N.W.2d 869, 871 (Neb. 1971) (specifically stating that due to the city's statutory authority to suppress nuisances that "[t]he Legislature has impliedly empowered plaintiff to obtain a decree in equity abating a public nuisance without special damage to plaintiff."). *See also Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 373 (D. Conn. 1989) (The town brought public nuisance claim seeking injunction with no mention of special injury limitation.).

120. Section 731 of the California Code of Civil Procedure specifically states that private parties can recover damages for public nuisances, but abatement is the only remedy specifically

associated with abatement. In *People v. ConAgra Grocery Products*, various public entities brought a public nuisance claim against a lead paint manufacturer.<sup>121</sup> The public entities prevailed and were granted an abatement.<sup>122</sup> Notably, their recovery included an “abatement fund” of more than \$1 billion to pay for the cost of removing the lead paint from the affected buildings.<sup>123</sup> So, while the city was not technically awarded damages, the cost of abating the nuisance was put entirely on the shoulders of the tortfeasor.<sup>124</sup> Similarly, the court in *State of Oklahoma v. Purdue Pharma* ordered the defendant opioid manufacturers to pay \$465 million to fund a statewide opioid epidemic abatement plan.<sup>125</sup> The State had not shown special injury, only that the defendant’s misleading marketing of dangerous and addictive drugs “annoy[ed], injure[d] or endanger[ed] the comfort, repose, health, or safety of others” in a way that affected a considerable number of persons.<sup>126</sup>

But what if a public entity demonstrates “special injury”? Would it then be allowed to seek monetary damages? If a public entity brings a public nuisance claim alleging harm to its own property or interests—as opposed to the community interest generally—some courts will treat the public entity akin to a private individual who must show special injury to receive damages. In *City of St. Louis v. Benjamin Moore & Co.*, a lead paint public nuisance case, the Supreme Court of Missouri explained:

Although the city characterizes its suit as one for an injury to the public health and suggests that it is for this injury that it is suing, this

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mentioned that public entities can seek. CAL. CIV. PROC. CODE § 731 (West 2011). Additionally, California cases have held that public entities cannot recover abatement costs or damages even for public nuisances where the public entity can show special injury. *See* *Torrance Redev. Agency v. Solvent Coating Co.*, 763 F. Supp. 1060, 1065 (C.D. Cal. 1991); *see also e.g., In re Lead Paint Litig.*, 924 A.2d 484, 502 (N.J. 2007) (holding a city to be a private plaintiff by virtue of the remedy requested).

121. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 514 (Cal. Ct. App. 2017).

122. *Id.* at 525, 549.

123. *Id.* at 568–71.

124. Other cases suggest that sometimes a public entity can succeed in having the courts force tortfeasors to pay for the costs of abating a public nuisance. *See* *Lane v. City of Mt. Vernon*, 342 N.E.2d 571, 573 (N.Y. 1976) (“Moreover, it has long been recognized that when a local government, in the proper exercise of its delegated powers, summarily abates a public nuisance, it may compel the owner of the property involved to bear the cost of abatement.”); *Chow v. Kshel Realty Corp.*, 2011 N.Y. Misc. LEXIS 2094, at \*45 (N.Y. Sup. Ct. 2011) (“Having violated sections 27-127 and 27-128 of the Administrative Code, the Kshel Defendants’ conduct constituted a public nuisance under section 7-703(d), entitling the City to reimbursement for funds spent demolishing the Building.”).

125. Final Judgement After Non-Jury Trial, *Oklahoma ex. rel. Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816, at 41–42 (Dist. Ct. Cleveland Cty. Okla., Nov. 15, 2019).

126. *Id.* at 21–22 (citing Okla. Stat. tit. 50, §§ 1–2 (1981)).

is not the case. The damages it seeks are in the nature of a private tort action for the costs the city allegedly incurred abating and remediating lead paint in certain, albeit numerous, properties. In this way, the city's claims are like those of any plaintiff seeking particularized damages allegedly resulting from a public nuisance. The city, therefore, must meet the same causation standard as must other nuisance claimants and must show specific and particularized harm from the public nuisance of lead paint, different in kind from the harm to the rest of the community.<sup>127</sup>

But does this differential treatment of public and private plaintiffs make sense? As Professor Thomas Merrill argued:

If public nuisance is a single cause of action—as the [Second] *Restatement* implicitly insists—and private parties can in some circumstances obtain damages under this cause of action, what possible argument supports the conclusion that public officials cannot obtain damages? At the same time, if public nuisance is a single cause of action, and public officials cannot obtain damages, what possible argument supports awarding damages to private parties for the same violation?<sup>128</sup>

In support of his argument that public nuisance should not be a tort, Merrill asked: “If the undifferentiated interference with the public right means that it is not feasible to calculate damages, why carve out an exception for a subclass of the public that can show some impossible-to-define higher-than-normal damages?”<sup>129</sup>

To date, there is no consistent approach to the special injury requirement in opioids litigation. The complaints of all three Ohio counties in the first track of the federal MDL state that they have suffered special injury, even though they seek abatement rather than compen-

127. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007). The court held that no recovery was permitted because the city could not show actual causation between the company and the lead paint harms alleged. *Id.* at 115, 117 (“[A]ctual causation can be established only by identifying the defendant who made or sold that product . . . The trial court did not err in entering summary judgment against the city based on its inability to provide any product identification evidence.”).

Likewise, in *State v. General Electric Co.*, the court stated:

To satisfy the “special injury” requirement in this case and establish any entitlement to compensatory damages on their common-law public nuisance claim, the Plaintiffs must show that the State has suffered some discrete physical harm or pecuniary loss apart from the more generalized injury to the public’s interest that results from the public nuisance, here the contamination of public groundwater at South Valley by hazardous substances . . . Absent proof of some discrete “special injury” to the State’s interest apart from the injury to the public’s interest in unappropriated groundwater, Plaintiffs may be limited to equitable relief seeking the abatement of the claimed nuisance.

335 F. Supp. 2d 1185, 1240–41 (D.N.M. 2004) (internal citations omitted).

128. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. ii, 18 (2011). Professor Merrill also uses this contradiction to note that the special injury requirement allowing for damages is a way to get around the economic loss rule. *Id.* at 18–19.

129. *Id.*

satory damages.<sup>130</sup> Both the New York and Oklahoma opioids complaints, by contrast, make no mention of special injury, nor do they request damages; both seek an abatement and the creation of an abatement fund to pay for the costs.<sup>131</sup> In the Massachusetts complaint, there is likewise no mention of special injury, even though the state seeks compensatory damages for the nuisance.<sup>132</sup>

### B. A Unified “Channeling” Approach

Plaintiffs in the opioids federal MDL include mostly public entities (municipalities and Native American tribes), but also some private entities (third-party payors and hospitals).<sup>133</sup> One such private plaintiff, the West Boca Medical Center, has framed its business losses due to the opioid epidemic simultaneously as claims for negligence and public nuisance perpetrated by various opioid distributors, pharmacies, and manufacturers.

130. See, e.g., Third Amended Complaint and Jury Demand ¶ 1074, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2019) (“Plaintiff has suffered, and will continue to suffer, unique harms as described . . . which are of a different kind and degree than Ohio citizens at large. These are harms that can only be suffered by Plaintiff.”); Complaint ¶ 314, *City of Cleveland v. AmerisourceBergen Drug Corp.*, No. 1:18-op-45132-DAP, (N.D. Ohio Mar. 6, 2018) (“The Plaintiff and Plaintiff’s Community have sustained specific and special injuries because its damages include, inter alia, health services, law enforcement expenditures, and emergency services.”); Corrected Second Amended Complaint and Jury Demand ¶ 1031, *In Re Nat'l Prescription Opiate Litig.*, No. 1:18-op-45090-DAP (N.D. Ohio May 29, 2018) (stating that the county suffered “unique harms . . . which are of a different kind and degree than Ohio citizens at large.”).

131. Complaint ¶¶ 74–78, *People v. Purdue Pharma L.P.*, No. 400016/2018 (N.Y. Sup. Ct. Aug. 14, 2018); Original Petition of State of Oklahoma at ¶¶ 116–20, *Oklahoma v. Purdue Pharma L.P.*, No. CJ-2017-816 (Dist. Ct. Cleveland Cty. Okla., Nov. 15, 2019).

132. First Amended Complaint and Jury Demand ¶¶ 901–10, *Commonwealth v. Purdue Pharma L.P.*, No. 1884-cv-01808 (Mass. Sup. Ct. Jan. 31, 2019). The state does request compensatory damages in its prayer for relief, in addition to abatement and reimbursement for the state’s costs of efforts undertaken to abate the nuisance. This suit is brought by the Attorney General via its *parens patriae* power. The nuisance claim itself is mainly tied to “deceptive marketing” by the opioid manufacturers, and that marketing led to public health injuries. The state seeks a remedy of abatement and the recovery of costs that the state has expended dealing with the opioid crisis. Additionally, the state lists among the injuries from the public nuisance “(b) health care costs for individuals, children, families, employers, the Commonwealth, and its subdivisions; (c) loss of productivity and harm to the economy of the Commonwealth; and (d) *special public costs borne solely by the Commonwealth* in its efforts to abate the nuisance and to support the public health, safety, and welfare.” *Id.* ¶ 906 (emphasis added). Thus, while special injury is not directly mentioned in the complaint, this bolded section certainly seems to be gesturing towards it.

133. *In re Nat'l Prescription Opiate Litig.*, 452 F. Supp. 3d 745, 773–74, (N.D. Ohio 2020) (“Although most of [the actions in this MDL], Summit County, Muscogee (Creek) Nation, and Blackfeet Tribe, involve governmental entities, at least one action, Cleveland Bakers, was brought by a private plaintiff.”).

The West Boca Medical Center is a 195-bed, acute care hospital in Palm Beach County, Florida which is “in the business of providing a service.”<sup>134</sup> According to West Boca Medical Center, hospitals such as itself in Southern Florida have been hit especially hard by the opioid epidemic. It alleges that the opioid epidemic constitutes a public nuisance: “[t]he nuisance is the over-saturation of opioids in the patient population of [West Boca Medical Center] and in the geographic area served by [West Boca Medical Center] . . . , as well as the adverse social, economic, and human health outcomes associated with widespread illegal opioid use.”<sup>135</sup>

Typifying the conventional doctrinal approach, Judge Dan Polster determined that the public entity plaintiffs, unlike private parties, need not show special injury in the federal MDL.<sup>136</sup> West Boca Medical Center, conversely, as a private plaintiff, had to demonstrate “special injury” to recover under public nuisance.<sup>137</sup> Judge Polster invoked the conventional “different in kind” standard for special injury: the hospital must assert a “special or peculiar injury to an individual different in kind and not merely in degree from the injury to the public at large.”<sup>138</sup> Judge Polster declined to dismiss the hospital’s public nuisance claim, finding that it sufficiently alleged that it “sustained concrete economic losses differing in kind from the generalized injury to public health, safety, and wellness suffered by the general public as a consequence of the multi-faceted opioid crisis.”<sup>139</sup>

The West Boca Medical Center case provides an opportunity to consider this Article’s proposed new approach of reconciling the special injury public nuisance requirement and exceptions to the ELR in negligence actions via the lens of channeling liability. In the suit, the hospital alleges three different kinds of business injuries stemming from the opioid epidemic: (1) unreimbursed charges for medical treatment of patients with opioid conditions (or conditions exacerbated by opioid use); (2) increased operational costs for providing more com-

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134. *Id.* at 758–59, 768.

135. *Id.* at 773.

136. *Id.* at 773–74 (Certain aspects of public nuisance law, including standing to bring a claim, differ when claims are asserted by private parties such as Plaintiffs.).

137. *Id.* at 774 (“Florida, like Ohio, follows the Restatement (Second) of Torts, so in order for West Boca to have standing to assert a public nuisance claim, it must assert a ‘special or peculiar injury to an individual different in kind and not merely in degree from the injury to the public at large.’” (quoting *Brown v. Fla. Chautauqua Ass’n*, 52 So. 802, 803 (Fla. 1910)).

138. *Id.* (quoting *Brown*, 52 So. at 803); *see also id.* at 806 (“[S]ustained concrete economic losses [differ] in kind from the generalized injury to public health, safety, and wellness suffered by the general public.”).

139. *In re Nat’l Prescription Opiate Litig.*, 452 F. Supp. 3d at 774.

plicated care to opioid addicts and dealing with “pill seekers”; and (3) increased costs as a direct purchaser of opioid pills.<sup>140</sup>

With respect to the first category of claimed business losses, channeling considerations weigh against liability. Hospitals provide a service and then seek compensation from the patient. If there are unreimbursed charges, West Boca Medical Center should seek them from their patients. Moreover, individual patients have brought cases included in the federal MDL seeking recovery for various damages, including their medical bills.<sup>141</sup> Those patients are the first tier of impacted victims and there is no reason to think that they are not adequate enforcers against these particular harms. In this instance, “the general interest in deterring injurious conduct” is satisfied, as “directly injured victims can generally be counted on to vindicate the law as private attorneys general.”<sup>142</sup> Indeed, allowing West Boca Medical Center to enforce on its patients’ behalf could lead to over-deterrence given the possibility of double recovery.<sup>143</sup>

But with respect to the second category of losses, channeling considerations weigh in favor of liability. The additional operational expenses incurred by West Boca Medical Center include additional training and diagnostic tools to distinguish pill-seekers from legitimate patients, and also the hiring of additional personnel to keep opioids secure.<sup>144</sup> Judge Polster refers to this category of injury as “classic business costs.”<sup>145</sup> With respect to these direct costs, hospitals such as West Boca Medical Center are the first-tier victims<sup>146</sup> and, if they are

140. See *id.* at 763, 768 (delineating three categories of “injuries to business or property”).

141. See *id.* at 769 (“In this MDL alone, there are scores of cases brought by individual parties seeking compensation for various damages, including their medical bills. If hospitals are damaged by patients not paying their medical bills, their remedy—as discussed above—should be to seek compensation from the patients who are not paying those bills.”).

142. *Id.* at 767 (quoting *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 270 (1992); see also *id.* at 769 (“To the extent the Defendants are liable to the patients for the costs of medical bills, it ought to be the patients’ responsibility to hold the Defendants liable as ‘private attorneys general.’”); *id.* at 769 (“In the case of unpaid medical bills, it is not entirely clear that the medical expenses injury does not belong, in whole or in part, to the patients.”)).

143. Judge Polster does refer to a “concern that allowing West Boca to pursue the first category of damages would lead to double recovery against the Defendants.” *Id.* at 766 n.21.

144. *Id.* at 760 (listing “operational costs such as ‘capital improvement costs,’ ‘additional security costs,’ and ‘additional training and educational costs for hospital personnel,’ as well as costs associated with being falsely induced to purchase and prescribe more opioid pills than were appropriate.”) (internal citations omitted).

145. *In re Nat’l Prescription Opiate Litig.*, 452 F. Supp. 3d at 769.

146. *Cf. id.* (describing the hospital’s operational expenses as “direct costs to hospitals that allegedly were borne as a result of the opioid crisis itself, not simply as a result of treating injured patients.”).

precluded from enforcing against such societal costs, the alleged tortfeasors would be potentially dramatically under-deterred.<sup>147</sup>

#### V. CONCLUSION: PUBLIC NUISANCE AS MODERN BUSINESS TORT

The public nuisance claim for recovery of significant financial losses has emerged as the quintessential 21st century business tort.<sup>148</sup> The resurgence of public nuisance actions in the context of business or financial losses has provided occasion for courts to consider side-by-side two doctrines that hitherto seemed unrelated: the ELR for negligence actions and the special injury rule for public nuisance actions. A judicial consensus has emerged that these seemingly disparate doctrines are functionally united by their shared aim to limit liability in the realm of financial losses.

The *Third Restatement's* approach to business disputes involving purely financial losses—sharply curtailing negligence actions but providing an escape hatch via public nuisance—has fueled litigants' strategy of using public nuisance as an end run around the ELR in negligence. The "special injury" requirement has emerged as the core doctrinal distinction between a viable public nuisance claim and a barred negligence interference with economic relations tort.

This Article contends that the "special injury" requirement should be reframed, with a focus not on its effect as a limitation on liability, but guided by the necessity to incentivize enforcement for injuries that are "distinct in kind" in the sense that they would otherwise not be enforced against, leading to under-deterrence. The special injury requirement would thereby "channel" liability for situations in which there are significant concentrated losses—including purely financial losses—on particular parties, just as the ELR does in the negligence context.

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147. *Id.* at 760. It is less clear that hospitals are needed to enforce against the third category of harms. While, as direct purchasers of opioid pills, hospitals "were direct targets of the Defendants' alleged misrepresentations," they presumably passed along these additional costs to patients in the form of higher medical bills. *Id.*

148. *But see Amicus Curiae* Brief of Competitive Enterprise Institute at 8, Oklahoma ex rel. Hunter v. Johnson & Johnson, Appeal No. 118,474 (Okla. Oct. 22, 2020) (arguing that "the interests in lands, air or water protected by the law of nuisance are identical for both private and public nuisance" and noting that, historically, "[n]either head of nuisance has ever covered financial losses . . .").