TORTS—DAMAGES—NEW JERSEY RECOGNIZES NEGLIGENCE ACTION FOR PURELY ECONOMIC LOSSES UNACCOMPANIED BY PHYSICAL HARM—*People Express Airlines, Inc. v. Consolidated Rail Corp.*, 100 N.J. 246, 495 A.2d 107 (1985).

The English and American law courts traditionally have denied negligence claims for purely economic losses.[1] Until recently, this denial endured as a judicially-created, per se prohibitory rule[2] barring recovery for monetary losses when the plaintiff suffered neither physical injury nor property damage.[3] In the last several decades, however, courts have established a patchwork of qualifications and exceptions to this per se rule.[4] In *People Express Airlines, Inc. v. Consolidated Rail Corp.*,[5] the New Jersey Supreme Court expressly rejected the per se rule and allowed a negligence cause of action for purely economic losses.[6] As a result of this decision, New Jersey joined California in outrightly repudiating the per se rule in claims for negligence.[7]

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[1] Harvey, *Economic Losses and Negligence*, 50 CANADIAN B. REV. 580, 581-82 (1972); James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 45-46 (1972). *See also* Byrd v. English, 117 Ga. 191, 43 S.E. 419 (1903) (disallowing claim against construction company for business interruption losses due to negligent execution of contract since no injury was incurred by plaintiff or his property); Stevenson v. East Ohio Gas Co., 73 N.E.2d 200, 204 (Ohio Ct. App. 1946) (claims in negligence limited to persons sustaining personal injuries or property damage); Elliot Steam Tug Co., Ltd. v. The Shipping Controller, 1 K.B. 127, 139 (1921) ("the common law does not recognize a person whose only rights are a contractual right to have the use or service of the chattel for purposes of making profits or gains without possession or property in the chattel").

[2] *See* People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246, 251, 495 A.2d 107, 109 (1985).

[3] *Id.; see also* Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 126 (Iowa 1984) ("The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.") (citations omitted).

[4] *See, e.g.*, Harvey, *supra* note 1, at 584-89; James, *supra* note 1, at 44; MacGrath, *The Recovery of Pure Economic Loss in Negligence—An Emerging Dichotomy*, 5 OXFORD J. LEGAL STUD. 350, 364-65 (1985). *See also infra* notes 64-86 and accompanying text.

[5] 100 N.J. 246, 495 A.2d 107 (1985).

[6] *Id.* at 263, 495 A.2d at 116. The court used the term "business-interruption losses" to refer to those losses resulting from the temporary suspension of People Express's business operations. *See id.* at 249-50, 495 A.2d at 108-09.

[7] *See* J'Aire Corp. v. Gregory, 24 Cal.3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979) (adopting test of foreseeability for recovery of economic losses). *Cf.* Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (despite fact that defendant's negligent conduct would foreseeably injure plaintiff fishermen, loss of economic advantage held neither cognizable nor compensable). The *Union Oil* court seemingly adopted the same foreseeability analysis as did the *People Express* and *J'Aire* courts; however, one commentator noted that the decision merely "carved out [a] limited exception for commercial fisherman. . . ." Note, *Economic Loss in the United States*, 5

The facts giving rise to this action occurred in the early morning hours of July 22, 1981 when Consolidated Rail Corporation (Conrail) attempted to unite several railway cars in its Port Newark, New Jersey, freight yard.[8] This "coupling" procedure was negligently performed and resulted in the collision of several cars.[9] As a result of the collision, a tank car, owned by Union Car Company (Union Car) and leased to BASF Wyandotte Company (BASF), was punctured.[10] The tank car contained ethylene oxide, a flammable liquid manufactured by BASF, which Conrail was transporting to one of BASF's customers.[11] Upon impact, the ethylene oxide spilled into the freight yard and ignited.[12] Fearing an explosion of the burning tank car and wary of possible health hazards, municipal authorities ordered the evacuation of the region within a one-mile radius surrounding the fire.[13] People Express Airlines (People Express), located in the North Terminal at Newark International Airport, was situated within the evacuation area.[14] Although the explosion never occurred and the fire did not spread beyond the freight yard, People Express was forced to cease business operations for a twelve hour period.[15]

People Express instituted a suit in negligence against Conrail, BASF and Union Car as defendants.[16] The airline sought damages for losses sustained due to the interruption of its business operations.[17] Specifically, since most of the airline's reser-

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OXFORD J. LEGAL STUD. 485, 490 (1985); *see also infra* notes 67-80 and accompanying text.

8 Brief for Defendant-Respondent, BASF Wyandotte Company at 2, People Express Airlines, Inc. v. Consolidated Rail Corp., 194 N.J. Super. 349, 476 A.2d 1256 (App. Div. 1984) (No. A-2934-83T5), *modified*, 100 N.J. 246, 495 A.2d 107 (1985) [hereinafter Brief for Respondent]. Although respondent's brief noted that the mishap occurred on July 27, 1981, *see id.*, the New Jersey Supreme Court stated that the accident occurred on July 22, 1981. *See People Express*, 100 N.J. at 249, 495 A.2d at 108.

9 *People Express*, 100 N.J. at 249, 250, 495 A.2d at 108, 109. Since this case involved an appeal of a summary judgment ruling, the supreme court relied upon the facts alleged by plaintiff in its complaint. *Id.* at 249, 495 A.2d at 108.

10 *Id.* at 249, 495 A.2d at 108.

11 Brief for Respondent, *supra* note 8, at 2.

12 *People Express*, 100 N.J. at 249, 495 A.2d at 108.

13 *Id.*

14 *Id.*

15 *Id.*

16 *See id.* at 250, 495 A.2d at 109. People Express amended its complaint to include counts of nuisance and strict liability based on an abnormally dangerous activity and defective manufacturing of the tank car. *Id.* These causes of action, however, were not considered by the supreme court. *Id.*

17 *Id.* at 249, 495 A.2d at 108.

vations are accepted by telephone calls placed directly to employees in the North Terminal building, People Express claimed damages from lost reservations.[18] In addition, People Express sought recovery for losses resulting from the cancellation of scheduled flights during the evacuation.[19] People Express further claimed recovery for fixed operation costs, although its general office was closed during the evacuation period.[20] Significantly, People Express did not claim that the defendants caused damage to its property or injury to its employees.[21]

Conrail moved for summary judgment on the ground that economic losses were not recoverable in negligence absent physical harm to the plaintiff or its property.[22] Relying on the per se prohibitory rule, the trial court granted Conrail's summary judgment motion.[23] People Express sought an interlocutory request for leave to appeal, which was subsequently granted by the appellate division.[24] Reversing the trial court, the appellate division held that recovery of negligently caused business interruption losses in the absence of property damage was not automatically precluded.[25] Therefore, the appellate panel remanded the case with instructions that the trial court determine whether the coupling operation posed a foreseeable risk of harm to People Express.[26] Union Car, later joined by Conrail and BASF, petitioned the New Jersey Supreme Court for certification.[27] After granting certification,[28] the supreme court unanimously affirmed the appellate division's determination that recovery of purely economic losses was not automatically barred by the absence of physical

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18 *Id.* at 249-250, 495 A.2d at 108.

19 *Id.*

20 *Id.* at 250, 495 A.2d at 108-09.

21 People Express Airlines, Inc. v. Consolidated Rail Corp., 194 N.J. Super. 349, 352, 476 A.2d 1256, 1258 (App. Div. 1984), *modified*, 100 N.J. 246, 495 A.2d 107 (1985).

22 *People Express*, 100 N.J. at 250, 495 A.2d at 109.

23 *See People Express*, 194 N.J. Super. at 352, 476 A.2d at 1258.

24 *People Express*, 100 N.J. at 250, 495 A.2d at 109.

25 *Id.*

26 *Id.*

27 *Id.*

28 People Express Airlines, Inc. v. Consolidated Rail Corp., 99 N.J. 169, 491 A.2d 678 (1984); People Express Airlines Inc. v. Union Tank Car Co., 99 N.J. 170, 491 A.2d 678 (1984); People Express Airlines, Inc. v. BASF Wyandotte Co., 99 N.J. 170, 491 A.2d 679 (1984). The supreme court also denied People Express's motion to dismiss these petitions for certification. *People Express*, 100 N.J. at 250-51, 495 A.2d at 109.

harm.[29] The court, however, modified the appellate division's decision by specifically narrowing the category of plaintiffs who can recover purely economic losses.[30] Those who may recover, according to the court, are "particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct."[31]

The per se rule barring recovery for purely economic losses in negligence[32] developed simultaneously, yet independently, in America and England.[33] The rule was first alluded to by the Queen's Bench in the nineteenth century case of *Cattle v. The Stockton Waterworks Co.*[34] In that case, a contractor entered into an agreement with a third-party land owner for the construction of a tunnel.[35] Soon after commencing work, the contractor was forced to cease construction until a water company repaired a pipe which had been laid improperly under the soil.[36] The contractor then instituted suit against the water company for damages due to delays in completing the contract.[37] The court acknowledged that the rule in negligence barring recovery absent any damage to the complainant's property was "technical and against the merits;"[38] nevertheless, the court adhered to this rule

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29 *People Express*, 100 N.J. at 267, 495 A.2d at 118. The supreme court also ruled that its decision should be applied retrospectively. *Id.* at 268, 495 A.2d at 118.

30 *See id.* at 263, 495 A.2d at 116.

31 *Id.* The court described an identifiable class as one which "must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted." *Id.* at 264, 495 A.2d at 116 (citations omitted).

32 Claims for economic losses resulting from intentional conduct, however, traditionally have been actionable. Comment, *Foreseeability of Third-Party Economic Injuries—A Problem in Analysis*, 20 U. CHI. L. REV. 283, 287-88 (1953). The underlying rationale for this distinction seems to be a societal aversion to intentional torts as opposed to negligent torts. *See, e.g.*, Lumley v. Gye, 118 Eng. Rep. 749 (1853) (allowing employer's action for damages against defendant who maliciously induced third party employee to breach her contract with plaintiff employer). *But see* Dale v. Grant, 34 N.J.L. 142 (N.J. 1870) (denying recovery for lost profits resulting from intentional interference with contract by third party).

33 *See* James, *supra* note 1, at 45-48; *see also* Union Oil Co. v. Oppen, 501 F.2d 558, 566 (9th Cir. 1974).

34 10 L.R.-Q.B. 453 (1875).

35 *Id.* at 455, 456.

36 *Id.* at 456.

37 *Id.* For recovery of economic losses on the theory of negligent interference with contract, see RESTATEMENT (SECOND) OF TORTS 766C (1977); Harper, *Interference with Contractual Relations*, 47 NW. U.L. REV. 873 (1953); Note, *Negligent Interference with Contract: Knowledge as a Standard for Recovery*, 63 VA. L. REV. 813 (1977).

38 *Stockton Waterworks*, 10 L.R.-Q.B. at 457.

and denied the contractor's claim because he did not sustain property damage.[39]

In the United States, the per se rule was first enunciated in 1927 by the United States Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*.[40] In *Robins Dry Dock & Repair*, the plaintiffs time chartered[41] a steamship from the owner.[42] The defendant, operators of a dry dock, negligently damaged the ship's propeller causing the time charterers and the owner to incur lost profits.[43] Justice Holmes, writing for a unanimous Court, recognized that the ship's owner, who was under contract with the dry dock, might have had a cause of action for lost profits.[44] The time charterer's libel[45] did not, however, state a cause of action for lost profits in contract or tort.[46] As lessees, the time charterers were not in a direct contractual relationship with the dry dock thus barring a cause of action in contract.[47] Based on the time char-

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39 *Id.* at 457-58.

40 275 U.S. 303 (1927). Suit was instituted in federal court because the underlying claim was in admiralty. *See id.* at 307.

41 *Id.* at 307. A time charterer is akin to a lessee in that a charterer possesses a non-ownership interest in the vessel. *See* BLACK'S LAW DICTIONARY 1330 (5th ed. 1979).

42 *Robins Dry Dock & Repair*, 275 U.S. at 307.

43 *Id.*

44 *Id.* at 309.

45 An action in libel formerly was "the initiatory pleading in an admiralty action, corresponding to the declaration, bill or complaint." BLACK'S LAW DICTIONARY 824 (5th ed. 1979).

46 *Robins Dry Dock & Repair*, 275 U.S. at 309. While *Robins Dry Dock & Repair* involved negligent interference with contract, courts have applied its reasoning, hence the per se rule, to claims for economic loss resulting from physical injury to property in which the claimant had no ownership interest. *See, e.g.*, Louisiana v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), *cert. denied sub nom.* White v. M/V Testbank, 106 S.Ct. 3271 (1986). In *M/V Testbank*, the Fifth Circuit held, *inter alia*, that the plaintiffs who had no contractual relationship with the defendants and suffered no physical damage to their own property due to defendants' negligence could not recover. *Id.* at 1023-27. The court reasoned that "[i]n a sense, every claim of economic injury rests in some measure on an interference with contract or prospective advantage." *Id.* at 1023.

47 *Robins Dry Dock & Repair*, 275 U.S. at 308. The Court recognized that the time charterers might have been able to share in any recovery on the part of the owner on the theory that the owners would serve as "trustees for the [time charterers] to the extent of [their] share. . . ." *Id.* at 309. Nevertheless, in the Court's opinion, this theory did not justify an action in the charterers' own names against the defendant directly. *Id.* According to the Court, the time charterers "cannot get a standing by the suggestion that if some one [sic] else had recovered . . . [they] would have been bound to pay over a part by reason of [their] personal relations with the [time charterers]." *Id.* English courts have likewise wrestled with this theory. *See, e.g.*, Cattle v. Stockton Waterworks Co., 10 L.R.-Q.B. 453 (1875). In *Stockton Waterworks*, the court recognized, in dicta, that the third party land owner might have maintained an action against the defendant water company both for himself

terer's lack of ownership interest in the vessel, the Court determined that they did not possess an interest which would allow a right of recovery in tort.[48]

New Jersey courts also followed the majority of jurisdictions which held that economic losses were recoverable only when accompanied by physical injury or property damage.[49] In *Rickards v. Sun Oil Co.*,[50] the defendant, a barge operator, negligently damaged a drawbridge which served as the only means of access to the plaintiffs' business establishments.[51] Several plaintiffs brought an action seeking recovery of losses from expected gains.[52] In granting dismissal of the plaintiffs' complaints, the

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and in trust for the plaintiff for damages to his property. *Id.* at 457. The court, however, held that a plaintiff suffering economic loss without accompanying property damage as a result of a defendant's interference could not sue in his own name. *Id.*

48 *Robins Dry Dock & Repair*, 275 U.S. at 309. Both the *Stockton Waterworks* and *Robins Dry Dock & Repair* courts seemed persuaded by the lack of precedent in favor of the respective plaintiffs. *See Stockton Waterworks*, 10 L.R.-Q.B. at 457-58; *Robins Dry Dock & Repair*, 279 U.S. at 309-10. One commentator has postulated that the main reason for denying recovery under these circumstances was the fear of opening the gates to a flood of limitless liability. *See* Harvey, *supra* note 1, at 582. *Accord* Stevenson v. East Ohio Gas Co., 73 N.E.2d 200, 201 (Ohio Ct. App. 1946) (refusing, in part, to grant recovery because thousands of workmen similarly situated with plaintiff would then have cause of action for lost wages). In America, the per se rule traditionally has been applied to negligent interference with contract actions. MacGrath, *supra* note 4, at 361. This application illustrates the fears of the defense leading to unending litigation as well as indeterminate liability. *Id.* at 362. According to MacGrath:

> In such cases the only factor which forms any connecting link between the plaintiff and the defendant is the accident itself and it is clear that the destruction of impairment of a road, bridge or public utility may have the effect of rendering the performance of many contracts either more onerous or impossible.

Id.

49 *See, e.g.*, Guido v. Hudson Transit Lines, 178 F.2d 740 (3d Cir. 1950) (applying New Jersey law). For similar holdings from other states, see Cecere v. Harquail, 104 A.D.2d 6, 481 N.Y.S.2d 533 (1984); Kintner v. Claverack Rural Elec. Co-op., Inc., 329 Pa. Super. 417, 478 A.2d 858 (1984); Fred Frederick Motors, Inc. v. Krause, 12 Md. App. 62, 277 A.2d 464 (1971).

50 23 N.J. Misc. 89, 41 A.2d 267 (1945).

51 *Id.* at 91, 41 A.2d at 268. These establishments were located on Brigantine Island and included markets, cafes, hotels, a gas station, repair shop, fishing pier and a bar. *Id.* at 90-91, 41 A.2d at 268.

52 *Id.* at 91, 41 A.2d at 268. The plaintiffs' action was technically grounded in nuisance. *Id.* The *Rickard's* court, however, adhered to a negligence analysis in support of its denial of recovery. *Id.* at 91-95, 41 A.2d at 268-70. Often, plaintiffs seeking recovery of purely economic damages allege both negligence and public nuisance theories of recovery. *See, e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974); Burgess v. M/V Tamano, 370 F. Supp. 247, 248 (D. Me. 1973); Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 129-30 (Iowa 1984); Birchwood Lakes Colony Club, Inc. v. Medford Lakes, 90 N.J. 582,

court relied on the absence of proximately-caused property damage.[53] The court adhered to the per se rule because it feared opening the door to a flood of limitless liability disproportionate to the defendant's wrong for remote consequences.[54] Although the court recognized that the barge owner owed a duty to the public to refrain from negligent acts, the court reasoned that the owner could not be held liable for damages that were not the natural and proximate cause of his negligence.[55]

587, 449 A.2d 472, 474 (1982); Hampton v. North Carolina Pulp Co., 223 N.C. 535, 542, 27 S.E.2d 538, 543 (1943).

[53] *Rickards*, 23 N.J. Misc. at 94-95, 41 A.2d 269-70.

[54] *Id.* at 94, 41 A.2d at 269; *see also* J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 806, 598 P.2d 60, 65, 157 Cal. Rptr. 407, 412 (1979). Although the *J'Aire* court allowed the plaintiff's action for negligent interference with prospective economic advantage, the court recognized that:

> The chief dangers which have been cited in allowing recovery for negligent interference with prospective economic advantage are the possibility of excessive liability, the creation of an undue burden on freedom of action, the possibility of fraudulent or collusive claims and the often speculative nature of damages.

Id. at 807, 598 P.2d at 65, 157 Cal. Rptr. at 412 (citing Prosser, Law of Torts (4th ed.)). *See generally In Re* Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) (denying recovery because injuries were too remote); General Foods Corp. v. United States, 448 F. Supp. 111, 113 (D. Md. 1978) (noting that allowing recovery "would open the door to virtually limitless suits, often of a highly speculative and remote nature"); Byrd v. English, 117 Ga. 191, 43 S.E. 419 (1903) (denying recovery for negligent interference with contract because negligence was not the proximate cause of plaintiff's injury); Brink v. Wabash R.R. Co., 160 Mo. 87, 60 S.W. 1058 (1901) (disallowing parents of deceased son to bring action for negligent interference with contract because damages were too remote); Druskin v. T.A. Gillespie Co., 11 N.J. Misc. 42 (1933) (denying recovery for loss of profits because evidence was too uncertain, speculative and too remote); Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio 1946) (limiting liability for negligent explosion to persons who suffered personal injuries or property damage as opposed to economic loss based on contract). The *Stevenson* court stated that:

> In strict logic and morally it may be said that he who commits a wrongful act should be answerable for all the losses which flow from that act, however remote. But, as has been said, it were [sic] infinite for the law to attempt to do this, and any such rule would set society on edge, and fill the courts with endless litigation. Hence the law has been compelled to adopt the practical rule of looking only to the proximate cause, and to the natural and proximate or immediate and direct result; and whatever differences there may be, in other respects, between the measure of damages in actions for breach of contract and in actions for tort, the rule is the same in both,—that only such damages are recoverable as are the natural and proximate consequence of the breach or wrongful act, and not those that are remote.

Id. at 202 (citing North v. Johnson, 58 Minn. 242, 59 N.W. 1012 (1894)).

[55] *Rickards*, 23 N.J. Misc. at 94, 41 A.2d at 269. The *Rickards* court applied the term "natural" to damages which "might reasonably have been foreseen—such as occur in an ordinary state of things," and "proximate" to indicate "that there must be no other culpable and efficient agency intervening between the defendant's der-

In 1962, the New Jersey Superior Court, Chancery Division in *Henry Clay v. Jersey City*[56] allowed the occupant of a factory to maintain an action for loss of future profits.[57] In *Henry Clay*, a building owned by Henry Clay Corporation (Henry Clay), and leased to Van Leer Manufacturing Corporation (Van Leer), was damaged by Jersey City's negligent maintenance of a sewer line.[58] The court determined that Jersey City was liable for the reasonable cost of repairs necessary to restore the building to its former condition.[59] Furthermore, the court allowed both Henry Clay and Van Leer to recover those damages representing loss of future profits incurred while the building was being repaired, even though Van Leer did not possess an ownership interest in the property.[60] The court did not focus on this lack of ownership interest in the property,[61] but allowed Van Leer to recover because its damages were "capable of being estimated with a reasonable degree of certainty."[62]

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eliction and the loss." *Id.* at 92, 41 A.2d at 268. *See also* Note, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664, 687 (1964) (noting that the real inquiry should be "whether the defendant's duty [is] coextensive with foreseeable injury to plaintiff's economic interests, since defendant cannot be held for invasion of an interest of which he had no knowledge. . . ."). At the outset of its opinion, the appellate division in *Rickards* noted that "there was nothing in the record before it to show defendant's foreknowledge that the bridge constituted the only vehicular access to the island." *People Express*, 194 N.J. Super. at 355, 476 A.2d at 1259. Analyzing *Rickards*, the *People Express* court reasoned that if the defendant had such knowledge, the *Rickards* court might have reached a different decision. *Id.*

56 74 N.J. Super. 490, 181 A.2d 545 (Ch. Div. 1962), *aff'd*, 84 N.J. Super. 9, 200 A.2d 787 (App. Div. 1964), *certif. denied*, 43 N.J. 264, 203 A.2d 717 (1964).

57 *Id.* at 501, 181 A.2d at 551.

58 *Id.* at 493-94, 181 A.2d at 547. Specifically, the sewer line leaked, dispersing sewage into the soil which supported the building. The soil washed away and undermined the structure. *Id.*

59 *Id.* at 497, 181 A.2d at 549.

60 *Id.* at 494, 181 A.2d at 547.

61 *See id.* at 497-98, 181 A.2d at 549. The distinction between the tenant's and landlord's right to recover was addressed by the *People Express* court. *See People Express*, 100 N.J. at 260-61, 495 A.2d at 114 (stating that "the [*Henry Clay*] court treated the tenant's and owner's claims separately; the tenant's claims were purely economic, stemming from the loss of use of its property right. . . ."). *Id.*

62 *Henry Clay*, 74 N.J. Super. at 498, 181 A.2d at 549. The court, however, denied recovery for lost profits suffered by Van Leer's subsidiary because they were speculative and uncertain. *Id.* at 500, 181 A.2d at 550. *Compare* Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 129 (Iowa 1984) (Iowa Supreme Court commenting that expenses incurred for rental equipment might not be "purely *economic* in nature, but rather . . . an integral part of . . . direct or physical *property* damage" (emphasis in original) (distinguishing Schlitz v. Cullen-Schlitz & Assoc., Inc., 228 N.W.2d 10 (Iowa 1975)); *see also* Brief for Respondent, *supra*, note 8, at 18 (arguing that even though Van Leer did not allege property

During the last few decades, courts throughout the United States and England have become reluctant to apply the per se rule uniformly.[63] Indeed, the rule has been ameliorated by numerous judicially-created exceptions.[64] The majority of these decisions, however, involve a special relationship between a negligent tortfeasor and a foreseeable plaintiff.[65] Akin to a third-party beneficiary scenario, the injured plaintiff has been allowed a cause of action when it was foreseeable that the plaintiff reasonably relied on the tortfeasor's services to another party.[66] For example, in *Biakanja v. Irving*,[67] a notary public attempted to prepare a will for the testator that later proved invalid because the notary failed to have it properly attested.[68] Nevertheless, the Supreme Court of California allowed the beneficiary to recover economic losses although she was not in privity with the notary public.[69] The court set forth a test which balanced various factors, such as the foreseeability of harm to the plaintiff and the proximity between that harm and the notary public's negligent conduct.[70] Specifically, the court found that the special relationship between the parties created a duty of care.[71] The court then

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damage, court was aware of damage to building because of Henry Clay's claims and that tenant does indeed suffer decrease in value of leasehold where building is damaged).

63 *See People Express*, 100 N.J. at 256, 495 A.2d at 112.

64 *Id.; see also* Union Oil Co. v. Oppen, 501 F.2d 558, 565 (9th Cir. 1974). Courts which have allowed recovery for economic loss when a special relationship existed between the tortfeasor and plaintiff include Western Union Tel. Co. v. Mathis, 215 Ala. 280, 110 So. 399 (1926) (telegraph company); Lucas v. Hamm, 56 Cal.2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962) (wills); Rozny v. Marnul, 43 Ill.2d 36, 250 N.E.2d 656 (1969) (surveyor); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) (public weighers).

65 *See People Express*, 100 N.J. at 256, 495 A.2d at 112.

66 *Id.*

67 49 Cal. 2d 647, 320 P.2d 16 (1958).

68 *Id.* at 648, 320 P.2d at 17. *Compare* Immerman v. Ostertag, 83 N.J. Super. 364, 369, 199 A.2d 869, 873 (Law Div. 1964) (recognizing that notary public may be held liable for economic damages in negligence if there is "causal relationship between the negligence and plaintiff's loss.").

69 *Biakanja*, 49 Cal.2d at 651, 320 P.2d at 19.

70 *Id.* at 650, 320 P.2d at 19.

71 *Id.* at 648-49, 320 P.2d at 18. More specifically, the court stated:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

determined that this duty of care had been violated because the beneficiary of the will was a foreseeable plaintiff and her injury was the proximate cause of the notary public's negligence.[72]

In 1979, the Supreme Court of California, relying on the balancing approach it had set forth in *Biakanja*, expanded the recovery of economic losses beyond the scope of the "special relationship" exception by allowing recovery for "negligent loss of expected economic advantage."[73] In *J'Aire Corporation v. Gregory*,[74] the lessee of a restaurant brought suit against a contractor to recover damages resulting from the delay in completion of a construction project.[75] In analyzing the merits of the claim, the court cited *Biakanja* and noted that the absence of privity does not bar claims for prospective economic gains when a special relationship existed between the parties.[76] Applying the *Biakanja* test to the instant case, the court found that the contractor owed a duty of care to the lessee of the restaurant.[77] In so doing, the court opined that allowing such a cause of action was consistent with the recent trend in California of expanding recovery.[78] Noting that economic loss was recoverable when it was accompanied by property damage or physical injury, the court stated that the lack of a physical manifestation of injury should not bar recovery of purely economic losses.[79] As a result, the court held that the contractor owed the lessee a duty of care because it was reasonably foreseeable that the contractor would cause economic injury to the lessee.[80]

Id. at 650, 320 P.2d at 19.

72 *Id.*

73 *See* J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 805, 598 P.2d 60, 64, 157 Cal. Rptr. 407, 411 (1979).

74 *Id.*

75 *Id.* at 802, 598 P.2d at 62, 157 Cal. Rptr. at 409.

76 *Id.* at 804, 598 P.2d at 63, 157 Cal. Rptr. at 410.

77 *Id.* at 808, 598 P.2d at 65, 157 Cal. Rptr. at 412.

78 *Id.* (citing Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)). *See generally* Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980) (mother who watched child die while trapped in elevator could recover for emotional distress); Rowland v. Christian, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (social host liable for injury to guest while on host's premises). *Compare* Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (holding social host who knowingly provides intoxicating liquor to guest liable for injuries to foreseeable third parties). *See also infra* notes 97-101 and accompanying text.

79 *J'Aire Corp.*, 24 Cal.3d at 806, 598 P.2d at 64, 157 Cal. Rptr. at 411.

80 *Id.* at 805, 598 P.2d at 64, 157 Cal. Rptr. at 411. *See also* Ales-Peratis Foods Int'l, Inc. v. American Can Co., 164 Cal. App. 3d 277, 209 Cal. Rptr. 917 (1985). In *Ales-Peratis*, the Superior Court of Los Angeles County imposed liability for economic losses for the negligent manufacture of a product. *Id.* at 290, 209 Cal. Rptr.

The New Jersey Supreme Court has recently allowed recovery for economic losses based upon negligent misrepresentation.[81] In *Rosenblum v. Adler*,[82] the plaintiffs relied on financial statements in purchasing stock of a company.[83] The stock later proved to be worthless, and the statements were deemed fraudulent.[84] The stock owners claimed that the financial statements were prepared negligently and that the accountants' negligence was the proximate cause of the resultant harm.[85] Analyzing liability in terms of duty, the court held that the auditor had a duty to provide accurate information to all reasonably foreseeable recipients of financial statements.[86]

It was against this background that the New Jersey Supreme Court rendered its decision in *People Express*. There, the court held that a plaintiff could recover purely economic losses resulting from the defendant's negligence.[87]

Justice Handler, writing for a unanimous court, began his analysis by recognizing that liability in negligence for economic loss traditionally turned upon the existence of physical harm to the plaintiff or to his property.[88] The supreme court determined that courts which adhere to this per se rule consider physical harm to be a necessary element to limit damages.[89] Justice Han-

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at 925. The court viewed its decision "as a logical extension of recent decisions of the California Supreme Court." *Id.* at 280, 209 Cal. Rptr. at 918.

81 Rosenblum v. Adler, 93 N.J. 324, 461 A.2d 138 (1983).

82 *Id.*

83 *Id.* at 329, 461 A.2d at 140.

84 *Id.*

85 *See id.*

86 *Id.* at 344, 461 A.2d at 148. The supreme court later analyzed the liability it had extended in *Rosenblum* in terms of the "special relationship" between the auditors and stock owners. *See People Express*, 100 N.J. at 257, 495 A.2d at 112; *see also infra* notes 109-113 and accompanying text.

87 *People Express*, 100 N.J. at 267, 495 A.2d at 118.

88 *Id.* at 251, 495 A.2d at 109. The appellate division had framed the issue as:

> whether the evidence can support the finding of a foreseeable risk of harm to plaintiff in the coupling operation such as to result in the imposition of a duty of care. Basically, the analysis should weigh the likelihood, either known to defendants or of which they should have known, that their conduct would ignite a fire with a potential for so great an explosion as reasonably to require prolonged evacuation of plaintiff's building. But also to be considered is whether plaintiff's loss was a direct or remote consequence of defendants' conduct. In this evaluation the lack of any actual property damage may be a significant factor, but not, as we now hold, one which is controlling either upon the question of remoteness or upon the ultimate issue of liability.

People Express, 194 N.J. Super. at 356, 476 A.2d at 1259-60. *Compare infra* notes 107-113 and accompanying text.

89 *See People Express*, 100 N.J. at 252, 495 A.2d at 110.

dler reasoned that the issue is typically one of causation, and that, in addition to the plaintiff's economic damages and the defendant's negligent act, the physical harm requirement satisfies part of the definition of proximate cause.[90]

The *People Express* court recognized that the physical harm rule is often viewed as a vehicle for limiting liability.[91] The rule, according to the court, is premised on the judicial concerns of preventing mass litigation, fraudulent claims, and liability which is disproportionate to the defendant's fault.[92] In its analysis of the physical harm rule, the court recognized that a plaintiff who has sustained physical harm in addition to economic loss cannot automatically recover from the negligent tortfeasor.[93] The court noted that liability is limited by two factors: first, the tortfeasor is liable only for proximately caused damage, and second, the tortfeasor's duty to the plaintiff has been defined narrowly by the courts.[94] Based on these limitations, the court attacked the physical harm requirement and stated that "principles of duty and proximate cause are instrumental in limiting the amount of litigation and extent of liability in cases in which no physical harm occurs just as they are in cases involving physical injury."[95]

The court stressed, moreover, that the physical harm rule has been relaxed in New Jersey and elsewhere in the interest of public policy and fairness.[96] To support this contention, the court cited *Portee v. Jaffee*,[97] a New Jersey Supreme Court decision, and *Dillon v. Legg*,[98] a California Supreme Court decision.[99] Both

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90 *Id.* at 251, 495 A.2d at 109.

91 *Id.* at 252, 495 A.2d at 110 (citing *In re* Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968); Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio 1946); Weller & Co. v. Foot & Mouth Disease Research Inst., 1 Q.B. 569 (1965)).

92 *Id.*

93 *Id.* at 252-53, 495 A.2d at 110. More specifically, the court stated that "the courts have recognized that a tortfeasor is not necessarily liable for *all* consequences of his conduct . . . [the] harm may be great and very remote in its final consequences . . . [s]ome limitation is required." *Id.* (emphasis in original).

94 *Id.* at 253, 495 A.2d at 110.

95 *Id.*

96 *Id.*

97 84 N.J. 88, 417 A.2d 521 (1980).

98 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

99 *People Express*, 100 N.J. at 253, 495 A.2d at 110 (citing Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980); Dillon v. Legg, 68 Cal.2d 728, 411 P.2d 912, 69 Cal. Rptr. 72 (1968)). In *Portee*, the mother of a seven-year-old boy recovered damages for emotional and mental distress after having witnessed him suffer and die while trapped in an elevator, although she did not, herself, suffer physical harm. *Portee*, 84 N.J. at 98-101, 417 A.2d at 526-28. Similarly in *Dillon*, the court allowed a mother who witnessed an automobile accident which resulted in the death of her

of these decisions utilized the foreseeability test in allowing recovery for mental distress absent physical injury to the claimant.[100] The *People Express* court noted that allowing a cause of action for emotional distress damages, absent physical harm to the claimant, has not resulted in unfair awards.[101]

In the court's opinion, the requirement of physical harm as an element of recovery in a claim for economic loss served merely to limit, not deny liability.[102] Decidedly concerned with the plight of innocent victims who suffer purely economic losses, the court relied on contemporary tort theory in rejecting the per se rule.[103] The court likened the tort process to "a human institution designed to accomplish certain social objectives."[104] One objective, the court stressed, was that absent overriding public policy, innocent victims should be compensated for their injuries.[105] Furthermore, the court reasoned that holding a negligent tortfeasor liable serves to discourage similar negligent behavior, fosters safer products, vindicates reasonable conduct, and shifts the costs of dangerous activities to those who are best able to sustain them.[106]

Justice Handler next defined the parameters of a cause of action for economic loss based on a negligence claim.[107] The *People Express* court considered the numerous exceptions to the per se rule that allow recovery absent physical harm to the plaintiff,[108] and concluded that recovery should turn on whether or

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young child to institute suit against the motorist for emotional and mental distress. *Dillon*, 68 Cal.2d at 741-47, 441 P.2d at 921-25, 69 Cal. Rptr. at 81-85.

100 *See People Express*, 100 N.J. at 253, 495 A.2d at 110. The *People Express* court observed that in both *Dillon* and *Portee*, a "zone of danger" test was abandoned in favor of a foreseeability test. *Id.*

101 *Id.* The court also noted that recovery has been allowed for other kinds of negligent torts despite the fear of infinite liability. *Id.* at 253-54, 495 A.2d at 110-11.

102 *Id.* at 254, 495 A.2d at 111.

103 *Id.*

104 *Id.*

105 *Id.* at 254-55, 495 A.2d at 111. The *People Express* court stated that "the overarching purpose of tort law [is] that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct." *Id.* at 255, 495 A.2d at 111 (citing Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984)); *see also* Evers v. Dollinger, 95 N.J. 399, 471 A.2d 405 (1984); Costa v. Josey, 83 N.J. 49, 415 A.2d 337 (1980); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

106 *People Express*, 100 N.J. at 255, 495 A.2d at 111.

107 *Id.* at 255-56, 495 A.2d at 112.

108 *Id.* at 256, 495 A.2d at 112.

not the factors justifying the exception are present. The court noted three exceptions to the per se rule: the existence of a "special relationship" between the tortfeasor and the person or business suffering economic losses,[109] membership in a particularly foreseeable group,[110] and private actions for public nuisance.[111] The court opined that the recurring theme throughout the exceptions is foreseeability and its relation to proximate cause and duty.[112] Therefore, the court held that a plaintiff, who is a member of an identifiable class which the defendant knows or should know is likely to suffer purely economic damages, may recover from the tortfeasor for those damages proximately caused by the defendant's breach of duty.[113]

The court further held that, in order to hold the defendant liable, a proximate causal relationship must exist between the economic losses and the breach of the duty of care.[114] The court recognized that although New Jersey courts have not dealt directly with the per se rule, they have adhered to a proximate cause analysis in determining whether a plaintiff's claim for economic loss states a judicially-recognized cause of action.[115] Furthermore, the *People Express* court reasoned that allowing economic recovery where the plaintiffs are particularly foreseeable is consistent with the underlying policy of New Jersey's tort

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109 *Id.* (citing Lucas v. Hamm, 56 Cal.2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. den.*, 368 U.S. 987 (1962) (attorney); Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958); Hardy v. Carmichael, 207 Cal. App. 2d 218, 24 Cal. Rptr. 475 (Ct. App. 1962) (termite inspectors); M. Miller Co. v. Central Contra Costa Sanitary Dist., 198 Cal. App.2d 305, 18 Cal. Rptr. 13 (Ct. App. 1961) (engineers); Rozny v. Marnul, 43 Ill.2d 36, 250 N.E.2d 656 (1969) (surveyor); Rosenblum v. Adler, 93 N.J. 324, 461 A.2d 138 (1983) (auditor); Immerman v. Ostertag, 83 N.J. 364, 199 A.2d 869 (Law Div. 1964) (notary public)).

110 *Id.* at 258, 495 A.2d at 113 (citing Carbone v. Ursich, 209 F.2d 178 (9th Cir. 1953)).

111 *Id.* at 259, 495 A.2d at 113.

112 *Id.* at 262, 495 A.2d at 115.

113 *Id.* at 263, 495 A.2d at 116. In formulating its ruling, the court recognized that not every case will fit within the confines of its holding. *Id.* at 264, 495 A.2d at 116. The court reasoned that future courts will rely on public policy declarations to insure that meritorious claims are adjudicated. *Id.*

114 *Id.* at 264, 495 A.2d at 116.

115 *Id.* To bolster its reasoning, the court cited Henry Clay v. Jersey City, 84 N.J. Super. 9, 200 A.2d 787 (App. Div. 1964), which ruled that a lessee's economic losses were the direct and proximate cause of the city's negligence. *See People Express*, 100 N.J. at 265, 495 A.2d at 117. The court further reasoned that "[t]he economic injury was close in time and space; the defendant had ample opportunity to ascertain the identity and nature of the plaintiff's interests. Further, the amount of litigation and extent of liability was finite, rather than expansive." *Id.*

law.[116]

Applying its newly announced rule to the facts of the case, the court found that People Express Airlines had established a cause of action in negligence.[117] In reaching this determination, the court was persuaded by the proximity of the airline to the site of the explosion, the obvious nature of the airline's business operations, and the foreseeability of monetary losses resulting from the explosion.[118] Additionally, the court noted that the defendants had knowledge of the explosive nature of their products which should have prompted them to formulate an emergency evacuation plan.[119] In addition, the court allowed its decision to be applied retrospectively, reasoning that it was "well grounded in traditional tort principles and flow[s] from well-established exceptional cases that are philosophically compatible with this decision."[120]

In renouncing the per se prohibitory rule, the New Jersey Supreme Court in *People Express* has assumed the functions of the legislature in its avowed effort to better serve justice.[121] As the supreme court has recently declared, courts have traditionally been the forum for defining the scope of tort liability.[122] Indeed, the per se prohibitory rule, itself, was judicially created.[123] Thus, it is just that the judiciary renounce its former rule and formulate a substitute rule allowing recovery for economic losses.

The court's decision is also a predictable expansion of liability in the area of negligent torts.[124] New Jersey courts earlier recognized an exception to the per se rule in cases in which a special

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116 *People Express*, 100 N.J. at 266, 495 A.2d at 117.

117 *Id.* at 267, 495 A.2d at 118. The court noted, however, that the cause of action it recognized would evolve more fully on a case-by-case basis. *Id.* at 268, 495 A.2d at 118.

118 *Id.*

119 *Id.* at 268, 495 A.2d at 118. The court noted that either actual or constructive knowledge of the foreseeability of economic losses will suffice. *Id.*

120 *Id.*

121 *Id.* at 259 n.2, 495 A.2d at 114 n.2. More specifically, the court stated:

> We believe, however, that it would be unwise for the Court to sidestep the question presented on this appeal by rigid adherence to the physical harm rule. Absent forthcoming remedies from our coordinate branches of government, it would seem to serve justice better for a court of law to fashion a remedy in a particular case, and perhaps be corrected by the legislature, than for innocent victims to have no redress at all.

Id. (citing Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984)).

122 Kelly v. Gwinnell, 96 N.J. 538, 555, 476 A.2d 1219, 1228 (1984).

123 *See supra* note 2 and accompanying text; *see also Robins Dry Dock & Repair*, 275 U.S. at 309; *Cattle*, 10 L.R.-Q.B. at 457-58.

124 *See* Kelly v. Gwinnell, 96 N.J. 538, 556, 476 A.2d 1219, 1228 (1984).

relationship existed between the tortfeasor and the plaintiff.[125] As the *People Express* court recognized, once a special relationship is established, the judiciary's requirement that a duty of care existed is satisfied. Pursuant to this exception, the plaintiffs, therefore, were "particularly foreseeable" and their injury was the proximate result of the tortfeasor's negligence.[126] By allowing an "identifiable class" of plaintiffs to recover for purely economic damages, the court extended the special relationship exception to its predictable outcome.[127]

The *People Express* decision is consistent with the current trend in New Jersey tort law and with contemporary tort policy.[128] Along with California,[129] New Jersey has reassessed the framework of its rules and bases for recovery in tort actions.[130] Compensation for innocent victims by those who are responsible for their harm is the central concern underlying modern tort policy.[131] Allowing a cause of action for plaintiffs who suffer economic injury without physical harm is consistent with this policy.

Nineteenth-century courts often denied recovery of purely economic losses due to a lack of precedent.[132] The real motivating factor, however, was the courts' fear that the economy would be unable to absorb such an extension of tort liability.[133] Since this fear is not well founded, there is no need to retain the per se prohibitory rule. By eradicating the rule, the *People Express* court impliedly recognized that there would be little, if any, detrimental impact on the economy.

Although expanding the special relationship exception, the *People Express* court limited recovery to a clearly identifiable class

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125 *See supra* notes 82-86, and accompanying text.

126 *See People Express*, 100 N.J. at 257, 495 A.2d at 112.

127 *Id.* at 264, 405 A.2d at 116.

128 *See id.* at 254-55, 495 A.2d at 111.

129 *See* Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1518 (1985) (arguing that "[d]uring the past two decades, the California Supreme Court has played an activist role, arguably without parallel, in rethinking the framework of American tort liability rules.").

130 For example, California and New Jersey both recognize a duty of care to one suffering emotional distress as a result of witnessing a negligently caused injury to another. *See* Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978).

131 *See People Express*, 100 N.J. at 255, 495 A.2d at 111.

132 *See supra* notes 34-39 and accompanying text.

133 *Compare* James, *supra* note 1, at 49 (arguing that "[t]he fact, for example, that a mid-twentieth century economy can absorb modern extensions of products liability does not necessarily show that the mid-nineteenth century economy could have done so.").

of plaintiffs. By clearly delineating between the foreseeable class of all plaintiffs and an identifiable class in an effort to exclude economic recovery for remote situations, the court sought to ameliorate the critics' concerns of widespread liability.[134] Not only does the court define an identifiable class,[135] it also sets forth situations which would not be governed by the narrow definition of its ruling.[136] For example, a person who had been travelling on a highway near Port Newark, New Jersey would not have a cause of action against any of the defendants named in the *People Express* action because their presence is deemed to be too fortuitous and their injuries too unpredictable.[137] As such, the court's decision is narrowly tailored to both the facts of the action and the adjudication of truly meritorious claims.

Significantly, the *People Express* court allowed its decision to be applied retrospectively. To date, there have been no reported decisions of claims which are disproportionate to the wrongdoer's harm. The floodgates have not been opened to unlimited liability. Perhaps society is ready for a rule which allows purely economic recovery in the absence of physical harm or property damage. As one commentator aptly summarized, "[p]roperty is, after all, just another form of financial interest."[138] By formulating a standard of "particular foreseeability" as an answer to the per se bar against claims for purely economic losses, the *People Express* court properly allows a forum to redress a litigant's bona fide claims, yet allays concerns surrounding widespread liability.

Lisa Rose

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134 *See, e.g.*, Rabin, *supra* note 129, at 1534-38.
135 *People Express*, 100 N.J. at 263, 495 A.2d at 116.
136 *Id.* at 264-65, 495 A.2d at 116.
137 *Id.*
138 Harvey, *supra* note 1, at 584 n. 22.