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AB 2748: Like Lead and Methane Gas, Causation Issues Continue to Lurk

Wiemond Wu

University of the Pacific, McGeorge School of Law

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AB 2748: Like Lead and Methane Gas, Causation Issues Continue to Lurk

Wiemond Wu*

Code Sections Affected

Civil Code § 1544 (new); Code of Civil Procedure §§ 340.85 (new), 1021.3 (new).
AB 2748 (Gatto); Vetoed.

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I. INTRODUCTION

The worst methane gas leak in United States history and one of the largest lead contamination disasters slammed two Southern California communities in

2015.¹ These two environmental disasters in Vernon and Porter Ranch, California, may have caused long lasting, adverse health effects.² The California State Legislature sought to aid these specific victims by passing AB 2748, which would have rendered certain waivers of liability unenforceable, extended the statute of limitations to seek legal recourse, and awarded attorney's fees to prevailing plaintiffs in private nuisance actions.³ The legislative effort to aid these victims failed as a result of the Governor's veto.⁴ Before discussing the legal implications of AB 2748 were it enacted successfully, the remainder of the introduction sets the scene as to what happened during each environmental disaster: Part A of this section describes the events of the Exide Technologies lead contamination in Vernon, California.⁵ Part B of this section describes the details of the Aliso Canyon methane gas leak in Porter Ranch, California.⁶

A. Lead Contamination in Vernon, California

In 2015, parents in Vernon began complaining that the nearby battery recycling plant operated by Exide Technologies (Exide) caused their children to suffer developmental delays, deafness, vision problems, and other physical ailments commonly associated with high levels of lead exposure.⁷ Lead is a powerful neurotoxin that poses a huge risk for young children as they often play

* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2018; B.A., Political Science and B.A., Legal Studies, University of California, Berkeley, 2014. Thank you to the Board of Editors of Vol. 48 of the Law Review for entrusting me with this great opportunity, and to my colleague and friend Kendall Fisher for the competitive energy she brings to anything and everything. Lastly, I am thankful for the love and support from my wonderful family and friends back home. Without all of you, law school would still only be a dream, and not a reality.

1. Matt McGrath, *California Methane Gas Leak 'Largest in US History,'* BBC NEWS (Feb. 26, 2016), <http://www.bbc.com/news/science-environment-35659947>; Alejandro Davila Fragoso, *The Massive Methane Blowout In Aliso Canyon Was the Largest in US History,* CLIMATE PROGRESS (Feb. 26, 2016), <http://thinkprogress.org/climate/2016/02/26/3754378/gas-leak-largest-ever>; Tony Barboza, *Exide Cleanup: Toxic Lead Removal Could be California's Biggest Yet,* L.A. TIMES (Aug. 18, 2015), available at <http://www.latimes.com/local/lanow/la-me-ln-exide-cleanup-20150817-story.html> [hereinafter Barboza, *Exide Cleanup*] (on file with *The University of the Pacific Law Review*); see also *infra* Parts I.A. & I.B (describing the details for the causes and effects of the two environmental disasters).

2. McGrath, *supra* note 1; Fragoso, *supra* note 1; Barboza, *Exide Cleanup, supra* note 1; see also *infra* Parts I.A & I.B (describing the details for the causes and effects of the two environmental disasters).

3. *Infra* Part III (elaborating on AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 1544; CAL. CIV. PROC. §§ 340.85, 1021.3).

4. *Infra* Part IV (analyzing the legal implications of AB 2747 as if Governor Jerry Brown did not veto the bill); see also Edmund J. Brown, Jr., *Letter of Veto Message from Governor Edmund J. Brown, Jr. to the Members of the California State Assembly* (Sept. 26, 2016) (on file with *The University of the Pacific Law Review*).

5. *Infra* Part I.A (describing the Exide Technologies lead contamination in Vernon, California).

6. *Infra* Part I.B (describing the Southern California Gas methane gas leak in Porter Ranch, California).

7. Jed Kim, *In Los Angeles, Lack of Trust Makes Lead Cleanup Tougher,* MARKETPLACE (May 5, 2016), available at <http://www.marketplace.org/2016/05/03/world/cleaning-lead-tougher-without-communities-trust> (on file with *The University of the Pacific Law Review*).

outside and ingest soil and dust.⁸ California health officials confirmed that the children living near the Exide battery plant have higher levels of lead in their blood compared to those children living farther away.⁹

The 15-acre battery recycling facility previously operated around-the-clock to process approximately 25,000 batteries a day, melting down lead from used car batteries to produce new ones.¹⁰ The plant has spewed lead, arsenic, and other dangerous pollutants for almost a century since 1922.¹¹ More than 10,000 homes have been affected by the lead contamination in six different Los Angeles communities.¹² The plant operated for at least 33 years without a full permit, even after inspectors documented more than 100 environmental concerns.¹³ Citizen complaints of ash falling on nearby soil, streets, and businesses were ineffective in resolving the growing environmental concern.¹⁴

In 2014, the federal Department of Justice launched a criminal investigation.¹⁵ To avoid criminal prosecution, the Exide battery plant closed in March 2015.¹⁶ The settlement required Exide to pay \$50 million for a state-supervised pollution cleanup to remove the lead contamination.¹⁷ In 2016, California Governor Jerry Brown directed an additional \$176.6 million to expedite and expand lead testing.¹⁸ Testing each home for lead costs about \$40,000 and a week to complete.¹⁹ This removal of lead-contaminated soil from thousands of homes is the largest lead-removal project ever conducted in the United States.²⁰

8. Tony Barboza, *How A Battery Recycler Contaminated L.A.-Area Homes For Decades*, L.A. TIMES (Dec. 21, 2015), available at <http://www.latimes.com/local/lanow/la-me-exide-cleanup-story-so-far-20151121-story.html> [hereinafter Barboza, *Battery Recycler*] (on file with *The University of the Pacific Law Review*); Barboza, *Exide Cleanup*, *supra* note 1.

9. CALIFORNIA DEP'T OF TOXIC SUBSTANCES CONTROL, AN ANALYSIS OF CHILDREN'S BLOOD LEAD LEVELS IN THE AREA AROUND THE EXIDE SITE (Apr. 8, 2016), available at <https://www.dtsc.ca.gov/HazardousWaste/Projects/upload/An-Analysis-of-Children-s-Blood-Lead-Levels-in-the-Area-Around-the-Exide-Site.pdf> (on file with *The University of the Pacific Law Review*); Tony Barboza, *Higher Levels of Lead Found in Blood of Children Near Exide Plant in Vernon*, L.A. TIMES (Apr. 8, 2016), available at <http://www.latimes.com/local/lanow/la-me-exide-children-blood-lead-levels-20160408-story.html> [hereinafter Barboza, *Higher Levels of Lead*] (on file with *The University of the Pacific Law Review*).

10. Barboza, *Battery Recycler*, *supra* note 8.

11. *Id.*

12. *Id.*

13. *Id.* (explaining concerns including lead and acid leaks, an overflowing pond of toxic sludge, enormous cracks in the floor, and high levels of lead in the soil).

14. *Id.*

15. *Id.*, see also Tony Barboza, *Federal Grand Jury Investigating Exide Technologies over Vernon Plant*, L.A. TIMES (Dec. 24, 2016), available at <http://www.latimes.com/science/la-me-0816-exide-feds-20140816-story.html> (on file with *The University of the Pacific Law Review*).

16. Barboza, *Battery Recycler*, *supra* note 8.

17. Barboza, *Exide Cleanup*, *supra* note 1.

18. *Governor Brown Directs \$176.6 Million To Bolster Exide Cleanup*, OFFICE OF THE GOVERNOR (Apr. 20, 2016), <https://www.gov.ca.gov/news.php?id=19388>.

19. Barboza, *Battery Recycler*, *supra* note 8.

20. *Id.*; Barboza, *Exide Cleanup*, *supra* note 1.

B. Methane Gas Leak in Porter Ranch, California

On October 23, 2015, Porter Ranch residents learned that more than 150 million pounds of methane leaked into the atmosphere in their own backyards.²¹ Since 1979, Southern California Gas Company (SoCalGas) neglected to replace a missing safety valve on a well because the valve was difficult to find and the well was not considered “critical.”²²

Although appearing non-threatening, “gas doesn’t know borders.”²³ Large, purple-stained clouds of methane gas that smelled like rotten eggs could be seen rolling over the community with the help of scientific equipment.²⁴ To add context, 1,411,851 new cars would need to be added to the road this year to have the same greenhouse gas effect.²⁵ That is approximately 5.788 million trips between New York and Los Angeles in a single car.²⁶ Assuming we can drive on water, we could circle Earth 648,351.8 times to get the same greenhouse gas effect as the Exide methane gas leak.²⁷ The leak released at least 8,156,400 metric tons of carbon dioxide.²⁸

Victims experienced coughing, aches, pains, nosebleeds, and other flu-like symptoms as a result of the pungent stench from methane additives.²⁹ Approximately 11,296 families evacuated the area to nearby hotels, halting the lives and businesses in the Porter Ranch community.³⁰ Families have demanded SoCalGas to fund their relocations to neighboring hotels.³¹

Hundreds of residents have filed claims against the government seeking \$3.5 million in damages for failing to respond and mitigate the effects of the

21. Erin Brockovich, *California Methane Gas Leak Is Worst U.S. Environmental Disaster Since BP Oil Spill*, DEMOCRACYNOW! (Dec. 30, 2015), http://www.democracynow.org/2015/12/30/erin_brockovich_california_methane_gas_leak.

22. Matt Ferner & Lydia O’Connor, *Here’s What It’s Like to Live Next to California’s Gas Blowout Catastrophe*, HUFFINGTON POST (Jan. 8, 2016), http://www.huffingtonpost.com/entry/california-methane-gas-leak_us_568f004de4b0cad15e644090 (defining a “critical well” as a well within 100 feet of a road or park or within 300 feet of a home).

23. *Id.*

24. *Id.*; mmforthepeople, *Aliso Canyon SoCalGas Leak Video*, YOUTUBE (Dec. 11, 2015), available at <https://www.youtube.com/watch?v=r1Fyevj25-o> (on file with *The University of the Pacific Law Review*).

25. Paul Blake, *How Many Cars and Burping Cows Equal the California Gas Leak?*, BBC NEWS (Jan. 11, 2016), <http://www.bbc.com/news/world-us-canada-35258036>.

26. *Id.*

27. *Id.*

28. Samantha Page, *Residents Sue Over ‘Negligent’ Practices by Gas Company, as Pipeline Leak Goes Into Third Month*, CLIMATE PROGRESS (Jan. 5, 2016), <http://thinkprogress.org/climate/2016/01/05/3735802/porter-ranch-lawsuit/>.

29. Ferner & O’Connor, *supra* note 22.

30. *Id.*; Blake, *supra* note 25.

31. Jane Mundy, *No Christmas Tree for Porter Ranch Gas Leak Victims*, LAWYERS AND SETTLEMENTS (Dec. 23, 2015), https://www.lawyersandsettlements.com/articles/porter-ranch-socal-gas-leak/interview-porter-ranch-lawsuit-gas-leak21151.html?utm_expid=360752213.Y4u1ixZNS6o8v_5N8VGVA.0&utm_referrer=https%3A%2F%2Fwww.google.com%2F.

emergency.³² Most legal recourse has been directed against SoCalGas.³³ The California Attorney General sued SoCalGas for violating state health and safety laws, creating a public nuisance, and violating California's Unfair Competition Law.³⁴ Los Angeles County has filed criminal charges against SoCalGas for failing to inform authorities immediately upon discovering the blowout.³⁵ Business owners have filed lawsuits for losses related to the gas leak.³⁶ Residents have also filed charges against SoCalGas, alleging claims of injury and wrongful death as a result of SoCalGas' failure to replace the safety valve.³⁷

The Vernon lead contamination victims claim that their community lacks the media attention and resources needed to help with cleanup compared to the more affluent Porter Ranch community.³⁸ Thus, in direct response to these two environmental catastrophes in Southern California, the California State Legislature intended, although unsuccessfully, to bring justice to all victims by leveling the litigation procedures under AB 2748.³⁹

II. LEGAL BACKGROUND

AB 2748 would have altered the litigation procedures for the residents affected by Exide and SoCalGas by rendering certain waivers of liability ineffective, extending statutes of limitations, and awarding attorney's fees.⁴⁰ Part A of this section briefly summarizes the current law on contractual releases of

32. Staff Writer, *California Governor and State Agencies Face Lawsuit in Aliso Canyon Gas Leak*, LAWYER HERALD (Apr. 20, 2016), <http://www.lawyerherald.com/articles/43298/20160420/california-aliso-canyon-jerry-brown-southern-california-gas-co.htm>.

33. See generally *Attorney General Lodges Lawsuit Over the Aliso Canyon Gas Leak, Citing Violations of State Health and Safety Laws*, CALIFORNIA ATTORNEY GENERAL (Feb. 2, 2016), <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-lodges-lawsuit-over-aliso-canyon-gas-leak> (announcing lawsuit against SoCalGas); Suzanne Goldenberg, *Los Angeles Files Criminal Charges Against SoCalGas Over Massive Gas Leak*, THE GUARDIAN (Feb. 2, 2016), <https://www.theguardian.com/us-news/2016/feb/02/los-angeles-gas-leak-southern-california-gas-porter-ranch>; Jonathan Lloyd & Patrick Healy, *Family Files Wrongful Death Lawsuit Over Porter Ranch Gas Leak*, NBC LOS ANGELES (Feb. 3, 2016), <http://www.nbclosangeles.com/news/local/Porter-Ranch-Aliso-Canyon-Gas-Leak-Wrongful-Death-Lawsuit-367517691.html> (on file with *The University of the Pacific Law Review*); Bryan Watt, *Owners of 2 Businesses in Porter Ranch File Lawsuit for Losses Related to Gas Leak*, 89.3 KCPP (Jan. 25, 2016), <http://www.scpr.org/news/2016/01/25/57033/owners-of-two-businesses-in-porter-ranch-file-laws/>; Page, *supra* note 28.

34. CALIFORNIA ATTORNEY GENERAL, *supra* note 33.

35. Goldenberg, *supra* note 33.

36. Watt, *supra* note 33.

37. Page, *supra* note 28; Lloyd & Healy, *supra* note 33.

38. Melanie Mason, *L.A.-Area and State Officials Call for Quicker Cleanup of Exide Plant Contamination*, L.A. TIMES (Jan. 26, 2016), available at <http://www.latimes.com/politics/la-pol-sac-exide-cleanup-legislators-20160126-story.html> (on file with *The University of the Pacific Law Review*).

39. *Hearing on AB 2748 Before the Sen. Judiciary Comm.*, 2015 Leg., 2015–2016 Sess. (Cal. 2015), available at <https://www.youtube.com/watch?v=o6leD2Oejno> (on file with *The University of the Pacific Law Review*).

40. *Infra* Part III (elaborating on AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 1544; CAL. CIV. PROC. §§ 340.85, 1023)).

liability.⁴¹ Part B discusses the current statute of limitations for filing actions for injury and wrongful death related to exposure to hazardous materials.⁴² Part C outlines the current law governing attorney's fees.⁴³ Part D discusses the causation issues in toxic tort litigation.⁴⁴

A. *Contractual Release of Liability*

Under existing law, a tortfeasor may avoid liability by agreement, with or without consideration.⁴⁵ The theory of assumption of the risk supports that plaintiffs can voluntarily and expressly consent to a known risk, reinforcing the plaintiff's freedom to enter into contracts on his or her own right.⁴⁶ However, as a matter of law and policy, a release of liability "does not extend to the claims" the victim does not know of or have reason to know of "at the time of executing the release," which would have materially affected the victim's settlement with the polluter.⁴⁷ Existing law also prohibits contracts that exempt the tortfeasor from liability for willful injury.⁴⁸

B. *Two Year Statute of Limitations⁴⁹ & The Discovery Rule*

Current law provides that an action for injury or death to another individual caused by the wrongful act or neglect of another must commence within two years of the injury.⁵⁰ The California Court of Appeal for the Second District previously held that a plaintiff has knowledge of the legal cause of his or her injuries when the media extensively covers the release of toxic chemicals that allegedly caused the plaintiff's injuries.⁵¹ The California Senate disagreed; in

41. *Infra* Part II.A. (discussing the current California law on contractual releases of liability).

42. *Infra* Part II.B. (discussing the current California law on statutes of limitations for personal injury and toxic tort claims).

43. *Infra* Part II.C. (discussing the current California law on attorney's fees).

44. *Infra* Part II.D. (discussing current challenges and issues in proving causation in tort claims).

45. CAL. CIV. CODE § 1541 (West 2016); *Cilibrasi v. Reiter*, 103 Cal.App.2d 397, 399 (1951) ("It is a familiar principle of adjective law that in the absence of rescission of a contract of settlement of a claim for personal injuries accomplished according to law, and of a restoration of the consideration paid for the release of the claim the release of the tortfeasor is a valid contract and prevents recovery on the disputed claim.")

46. RESTATEMENT (THIRD) OF TORTS: APPOINTMENT LIAB. § 2 (AM. LAW INST. 2000) (June 2016 update) (providing in Comment k that "the rationale underlying contractual limitations on liability is that, in appropriate circumstances, individuals should be able to agree who should bear a risk of injury.")

47. CAL. CIV. CODE § 1542 (West 2016); ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 5 (June 2, 2016).

48. CAL. CIV. CODE § 1668 (West 2016); ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 5 (June 2, 2016).

49. 3 Witkin, Cal. Procedure § 433 (5th ed. 2012) (defining a statute of limitations as prescribing the period of time for which actions may be brought in a court of law and providing that such a period of time is to offer repose and prevent surprise claims).

50. CAL. CIV. PROC. § 335.1 (West 2016).

51. *McKelvey v. North American Boeing, Inc.*, 74 Cal.App.4th 151, 161 (1999).

response, they passed Senate Bill 331 to codify Section 340.8 of the California Code of Civil Procedure.⁵² Section 340.8 codified the discovery rule laid out by the California Supreme Court in *Jolly v. Eli Lilly & Co.*,⁵³ which held that publicized media reporting on hazardous material or toxic substance contamination is not enough to alert victims that their injuries are caused by the polluter.⁵⁴

It is important to determine when a plaintiff is “on notice” of the cause of injury because a plaintiff must file an action for injury as a result of hazardous exposure to toxic substances within “two years after the plaintiff becomes aware of (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused by the wrongful act of another, whichever occurs later.”⁵⁵

Section 340.8 further provides that the time for commencement of a wrongful death must be “either (1) two years after the death of the decedent, or (2) two years from the first date on which the plaintiff is aware of, or has reason to be aware of the physical cause of wrongful death and sufficient facts to put a reasonable person on inquiry notice that the death was caused by the wrongful act of another.”⁵⁶ Thus, the discovery rule creates a “fact-intensive” inquiry as to when a plaintiff becomes sufficiently aware of a defendant’s alleged wrongdoing for the purposes of triggering the statute of limitations.⁵⁷

C. Calculating Attorney’s Fees in Tort Litigation

California law provides that “the measure and mode of compensation of attorneys” is left to the agreement of the parties, and each party bears their own costs.⁵⁸ However, a prevailing party⁵⁹ is entitled to its litigation costs.⁶⁰ Parties

52. S.B. 331, 2003-2004 Reg. Sess. (Cal. 2003); ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 6 (June 2, 2016).

53. *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1110–11 (1988).

54. *Id.* (internal quotations omitted) (“Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . A plaintiff need not be aware of the specific facts necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.”); *Norgart v. Upjohn Co.*, 21 Cal.4th 383, 398 (1999); *Clark v. Baxter Healthcare Corp.*, 83 Cal.App.4th 1048, 1059 (2000); SENATE FLOOR, COMM. ANALYSIS OF S.B. 331, 2003–2004 Reg. Sess. (Sept. 8, 2003); ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 6 (June 2, 2016).

55. CAL. CIV. PROC. § 340.8(a) (West 2016).

56. *Id.* § 340.8(b).

57. *See, e.g., Mangini v. Aerojet-General Corp.*, 230 Cal.App.3d 1125, 1150 (1991) (asserting that whether the discovery rule applies is a matter of sufficient pleading of facts).

58. CAL. CIV. PROC. § 1021 (West 2016); ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 7 (June 2, 2016).

59. CAL. CIV. PROC. § 1032(a)(4) (West 2016) (defining “prevailing party” as the party with a net monetary recovery, including a defendant in whose favor a dismissal is entered, a defendant where neither

may stipulate to alternative procedures for awarding costs in litigation.⁶¹ Under existing law, attorney's fees may be recovered as costs when a contract, statute, or law authorizes it.⁶²

D. The Causation Challenge of Toxic Tort Litigation

Causation is a significant challenge for toxic tort plaintiffs.⁶³ A plaintiff carries the burden in establishing a causal relationship between the defendant's conduct and the plaintiff's injury.⁶⁴ To show general causation in a toxic tort claim, a plaintiff must show that the pollutant can cause the injury.⁶⁵ "To prove specific causation, the plaintiff must show that the exposure *in fact* caused the plaintiff's injury."⁶⁶ A court has discretion to examine the evidence it deems appropriate for causation: statistical data, expert testimony, or both.⁶⁷ Plaintiffs cannot predict what a court will rely on.⁶⁸ This uncertainty may lead to summary judgment in favor of the defendant, thereby dismissing plaintiff's case altogether.⁶⁹

Two California appellate decisions set the overarching rules for causation in toxic tort litigation.⁷⁰ First, causation in toxic tort cases must be established by competent expert testimony rendered to a degree of reasonable medical probability.⁷¹ Second, the plaintiff needs to produce enough evidence to

plaintiff or defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant).

60. *Id.* §§ 1021, 1032(b); *see generally id.* § 1033.5 (listing items allowed to be recovered as costs: filing costs, motions, jury fees, juror food and lodging, depositions, court reporters, travel expenses, service of process, premiums and surety bonds, witness fees, expert witness fees, transcripts).

61. *Id.* § 1032(c).

62. *Id.* § 1033.5(a)(10)(A)–(C); *see, e.g., id.* at § 1021.9 (allowing the prevailing party in a trespass action to recover reasonable attorney's fees).

63. Shelley Brinker, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, 46 UCLA L. REV. 1289, 1298 (1999); Joseph Sanders & Julie Machal-Fulks, *The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law*, 64-AUT LAW & CONTEMP. PROBS. 107, 110 (2001); Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1446–1452 (2005); Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 73 CORNELL L. REV. 469, 499 (1988).

64. Brinker, *supra* note 63, at 1297.

65. *In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1134 (9th Cir. 2002); Lin, *supra* note 63, at 1446–47.

66. Lin, *supra* note 63, at 1447.

67. Brennan, *supra* note 63, at 499.

68. *Id.*

69. *See, e.g., Akins v. Sacramento Mun. Util. Dist.*, 8 Cal.Rptr.2d 785, 809–10 (1992) (finding that plaintiff has not raised any triable issues of material fact for personal injury and property damage, therefore entitling defendant to judgment as a matter of law).

70. 2 Toxic Torts Prac. Guide § 36:2 (2016) (*referring to Cottle v. Super. Ct.*, 3 Cal.App.4th 1367, 1384 (1992); *Akins*, 8 Cal. Rptr. 2d at 809).

71. *Cottle*, 3 Cal.App.4th at 1384.

demonstrate a triable issue of material fact linking defendant's allegedly wrongful conduct to the plaintiff's injury to survive summary judgment.⁷² The plaintiff often has a difficult time gathering enough evidence to get past this pre-trial stage of litigation as plaintiff's injuries may have multiple causes in between defendant's alleged wrongdoing and plaintiff's injury.⁷³ Thus, the plaintiff's burden to show causation is often "insurmountable."⁷⁴

III. AB 2748

The California Legislature considered AB 2748 a "special law" within the definition of the California Constitution⁷⁵ to specifically help the victims of the Exide and SoCalGas environmental disasters, and not victims of similar situations.⁷⁶ Specifically, the purpose of the bill is to address the "lack of sufficient legal remedies to help victims [of Exide and SoCalGas environmental disasters] deal with the ramifications of environmental disaster" by increasing "better access to remedies available to them through our judicial system."⁷⁷ Had the Governor not vetoed the bill, AB 2748 would have added Civil Code § 1544⁷⁸ and Code of Civil Procedure §§ 340.85⁷⁹ and 1021.3⁸⁰ to specifically aid victims—each proposed code section being discussed in turn.

A. *Cal. Civ. Code § 1544*

If enacted, Civil Code § 1544 would have provided that a payment made by the responsible polluter "in connection with an environmental disaster" would "not release the polluter from liability" for any claim or future claim.⁸¹ However, a payment made by the responsible polluter may be "credited against the liability of the polluter" for any current or future claim that is related to the environmental

72. *Akins*, 8 Cal.Rptr.2d at 809–10.

73. *Sanders & Machal-Fulks*, *supra* note 63, at 110.

74. *Lin*, *supra* note 63, at 1447.

75. See CAL. CONST. art. 4, § 16 (providing that all general laws have a uniform operation, and a specific law is only invalid if a general statute could be made applicable).

76. ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 2 (June 2, 2016); *Hearing on AB 2748 before the Sen. Judiciary Comm.* 2015 Leg., 2015–2016 Sess. (Cal. 2015), available at <https://www.youtube.com/watch?v=o6leD2Oejno> (on file with *The University of the Pacific Law Review*). See AB 2748 § 4, 2016 Leg., 2015–2016 Sess. (Cal. 2016) ("The Legislature finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution to achieve just and efficient results in civil litigation involving the unique circumstances of damages resulting from specific environmental disasters.")

77. See SEN. COMM. ON ENV. QUALITY, COMM. REPORT OF AB 2748, at 4 (June 28, 2016).

78. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 1544).

79. *Id.* (adding CAL. CIV. PROC. § 340.85).

80. *Id.* (adding CAL. CIV. CODE § 1021.3).

81. *Id.* (adding CAL. CIV. CODE § 1544(a)).

disaster.⁸² A settlement “made in connection with an environmental disaster by the responsible polluter” would have released the responsible polluter from liability only for acts or injuries, which are believed to have occurred prior to the settlement.⁸³ Section 1544 would have rendered any agreements made on or before February 1, 2017, void as a matter of law and public policy.”⁸⁴

B. Cal. Civ. Proc. Code § 340.85

If enacted, Code of Civil Procedure § 340.85 would have provided a new statute of limitations for filing a civil action arising out of injury, illness, or wrongful death arising from the lead contamination at Exide or the methane pollution at Porter Ranch.⁸⁵ A lawsuit for injury and illness would have had to commence within three years from the date of injury or three years after the plaintiff becomes aware, or reasonably should have become aware (1) of an injury, (2) of the physical cause of the injury, and (3) of “sufficient facts to put a reasonable person on inquiry notice” of the injury and cause.⁸⁶ A wrongful death action would have had to commence within three years from the date of the decedent’s death or three years from the first date on which the plaintiff is aware “or reasonably should have been aware of the physical cause of death.”⁸⁷ The proposed statute of limitations of three years does not apply to an action based on exposure to asbestos under Section 340.2⁸⁸ or an action against a health care provider under Section 340.5.⁸⁹

Additionally, Section 340.85(c)(2) incorporates the discovery rule set forth in *Jolly v. Eli Lilly & Co.* by declaring that “media reports regarding the hazardous material or toxic substance contamination are not enough” to put a person on inquiry notice that injury or death is caused by the lead contamination or gas leak.⁹⁰

C. Cal. Civ. Proc. Code § 1021.3

Section 1021.3 would have permitted the court to “award reasonable attorneys’ fees to a prevailing plaintiff” against the polluter-defendant in any private nuisance action the defendant has been “adjudged civilly liable.”⁹¹

82. *Id.* (adding CAL. CIV. CODE § 1544(b)).

83. *Id.* (adding CAL. CIV. CODE § 1544(c)).

84. *Id.* (adding CAL. CIV. CODE § 1544(d)).

85. *Id.* (adding CAL. CIV. PROC. § 340.85(a)).

86. *Id.* (adding CAL. CIV. PROC. § 340.85(a)).

87. *Id.* (adding CAL. CIV. PROC. § 340.85(b)).

88. *Id.* (adding CAL. CIV. PROC. § 340.85(c)(1) (referring to CAL. CIV. PROC. § 340.2 (West 2016))).

89. *Id.* (adding CAL. CIV. PROC. § 340.85(c)(1) (referring to CAL. CIV. PROC. § 340.5 (West 2016))).

90. *Id.* (adding CAL. CIV. PROC. § 340.85(c)(2)).

91. *Id.* (adding CAL. CIV. PROC. § 1021.3(a)).

IV. ANALYSIS

The legislative intent behind AB 2748 was to assist victims of these environmental disasters with prosecuting their tort actions.⁹² The extent to which AB 2748 would have assisted the victims is questionable.⁹³ Part A elaborates on public policy issues of AB 2748.⁹⁴ Part B briefly discusses the benefits of having an attorney's fees provision in the Code of Civil Procedure.⁹⁵ Part C discusses the legal hurdles plaintiffs would still encounter even if AB 2748 were successfully enacted.⁹⁶ Part D looks at previously proposed replacements for the current causation model.⁹⁷ Part E discusses the reasons why California Governor Jerry Brown vetoed AB 2748.⁹⁸

A. *Leaving the Litigation Window Wide Open*

AB 2748 allows more time for litigation to commence and more claims to be filed.⁹⁹ Generally, it is permissible for victims of environmental toxic torts to enter into agreements and waive any claims they may have for injuries by settling with the polluter.¹⁰⁰ AB 2748 would have rendered any agreements made by the parties that would waive the polluters' liability ineffective.¹⁰¹ Thus, AB 2748 preserves any claims the plaintiff may have for future litigation.¹⁰² AB 2748 also

92. *Id.* (adding CAL. CIV. CODE § 1544; CAL. CIV. PROC. §§ 340.85, 1023); *Hearing on AB 2748 Before the Sen. Judiciary Comm.* 2015 Leg., 2015–2016 Sess. (Cal. 2015), available at <https://www.youtube.com/watch?v=o6leD2Oejno> (on file with *The University of the Pacific Law Review*).

93. *See infra* Part IV.A (explaining how AB 2748 treads on the freedom to contract between parties and the purposes of statutes of limitations); *infra* Part IV.B (commending AB 2748 for encouraging settlement in private nuisance actions); *infra* Part IV.C (discussing how causation hurdles remain and lurk, especially after lengthening the statute of limitation period for filing toxic tort suits); *infra* Part IV.D (exploring other options of causation models that can help plaintiffs prevail in toxic tort litigation).

94. *Infra* Part IV.A (explaining how AB 2748 treads on the freedom to contract between parties and the purposes of statutes of limitations).

95. *Infra* Part IV.B (commending AB 2748 for encouraging settlement in private nuisance actions).

96. *Infra* Part IV.C (discussing how causation hurdles remain and lurk, especially after lengthening the statute of limitations period for filing toxic tort suits).

97. *Infra* Part IV.D (exploring other options of causation models that can help plaintiffs prevail in toxic tort litigation).

98. *Infra* Part IV.E (discussing Governor Brown's reasons for vetoing AB 2748).

99. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 1544(c) and CAL. CIV. PROC. § 340.85) (the un-waived claims means more issues to litigate, and an extended statute of limitations means more time to file the un-waived claims); *supra* Part III.A (analyzing the effect AB 2748 would have had on the ability of plaintiffs to bring these claims).

100. *C.f.* CAL. CIV. CODE §§ 1542, 1668 (West 2016) (suggesting that agreements to waive any claims would likely be enforceable as long as they do not violate law or public policy).

101. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE §§ 1544(a) & (c)); *supra* Part III.A. (discussing the effect that AB 2748 would have had on any release of a polluter's liability).

102. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE §§ 1544(a) & (c)); *supra* Part III.A. (finding that AB 2748 would have protected a plaintiff's ability to bring currently unknown claims when they are discovered in the future).

extends the statute of limitations to three years.¹⁰³ The combination of these two new provisions preserves potential claims and extends the time for plaintiffs to bring these claims—keeping the litigation window open for plaintiffs.¹⁰⁴ AB 2748 favors plaintiffs by preserving their rights to bring a claim to court with a lengthier statute of limitations and rendering any waivers of liability ineffective.¹⁰⁵ Keeping this window open for future litigation potentially interferes with two fundamental public policies: the freedom for parties to contract¹⁰⁶ and the purpose of statute of limitations.¹⁰⁷

1. Violating the Freedom to Contract?

It is widely accepted that the freedom to contract is fundamental in American law.¹⁰⁸ Public policy encourages settlement, vis-à-vis the entering into contracts, in lieu of litigation in the interest of judicial efficiency and economy for the courts and the parties involved.¹⁰⁹ It is not uncommon for parties who settle to include “release” clauses within agreements.¹¹⁰ Prohibiting the use of release clauses in settlement agreements between the victims and their respective polluters would encourage additional, if not excessive amounts of, litigation and would be contrary to the policy of promoting contractual settlements.¹¹¹ SoCalGas and Exide will have likely argued that AB 2748, which would have

103. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. PROC. §§ 340.85(a) & (b)); *supra* Part III.A. (analyzing how AB 2748 would have extended the statute of limitations).

104. *See supra* Parts III.A. & III.B. (explaining that AB 2748 procedurally benefits the plaintiff by allowing more time to file claims and making any waivers of liability void, thus preserving potentially viable claims for a longer period of time); *infra* Parts IV.A.1. & IV.A.2. (same).

105. *See generally supra* Parts III.A. & III.B. (discussing the procedural benefits AB 2748 would have provided to plaintiffs); *infra* Parts IV.A.1 & IV.A.2 (same).

106. *Infra* Part IV.A.1 (explaining why AB 2748 may have violated the freedom to contract).

107. *Infra* Part IV.A.2 (explaining why AB 2748 may have undermined the purpose of statutes of limitations).

108. *See* CAL. CIV. CODE § 1668 (West 2016) (implying that a contract not contrary to policy of law is enforceable); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 406 (1937) (affirming that the freedom of contract is a general rule and that the freedom to contract can be restrained in exceptional circumstances); *VL Systems, Inc. v. Unisen, Inc.*, 152 Cal.App.4th 708, 713 (2007) (affirming that the freedom of contract is an important principle, and courts should not blithely apply public policy reasons to void contract provisions).

109. *Kaufman v. Goldman*, 195 Cal.App.4th 734, 745 (2011) (citing *Zhou v. Unisource Worldwide*, 157 Cal.App.4th 1471, 1475 (2007); quoting *Nicholson v. Barab*, 233 Cal.App.3d 1671, 1683 (1991) (“[W]e note that there is a well-established policy in the law to discourage litigation and favor settlement. Pretrial settlements are highly favored because they diminish the expense of litigation.”)).

110. CALIFORNIA CHAMBER OF COMMERCE, *Letter from California Chamber of Commerce to Senate Judiciary Committee*, CALIFORNIA CHAMBER OF COMMERCE (June 14, 2016); *see generally* *City of Santa Barbara v. Super. Ct.*, 41 Cal.4th 747, 759 (2007) (finding that lower courts have consistently upheld release of liability in cases of ordinary negligence related to gymnasiums, fitness clubs, auto and motorcycle events, ski resorts, bicycle races, hypnotism, and scuba diving).

111. CALIFORNIA CHAMBER OF COMMERCE, *supra* note 110; *see also* *Tunkl v. Regents of the University of California*, 60 Cal.2d 92, 94 (1963) (providing a classic example of an invalid releases of liability that as a matter of policy would further litigation).

denied them the right to contractually waive liability, is contrary to public policy supporting private settlement of matters outside of court.¹¹²

On the other hand, the State has a competing interest in ensuring plaintiffs bring their claims to court so they can recover damages to compensate their injuries.¹¹³ Generally, toxic tort victims, like the victims of the SoCalGas methane gas leak and the Exide lead contamination, do not know they have an action for legal recourse because they have no immediate harm for which to seek damages.¹¹⁴ If all Exide and Porter Ranch victims were able to contractually waive their claims for liability, polluters would try to expeditiously settle with every single victim to lower their own litigation costs as much as possible.¹¹⁵ Doing so would not advance the goal of tort law to fully compensate these victims.¹¹⁶ In large-scale environmental toxic torts, there are competing goals of preserving the polluters right to contract a waiver of liability and of making a plaintiff whole again.¹¹⁷ AB 2748 advanced the latter goal for plaintiffs; but almost certainly, an argument could be made that AB 2748 treaded on the polluters' right to freely enter into contracts and support the policy of settlement.¹¹⁸

2. *Defeating the Purpose of the Statute of Limitations?*

Statutes of limitations provide defendants with reasonable repose to protect them from defending stale claims and to require plaintiffs to diligently pursue

112. CALIFORNIA CHAMBER OF COMMERCE, *supra* note 110; *see* CAL. CIV. CODE § 1668 (West 2016) (potentially allowing for the argument that AB 2748 violates the public policy of the freedom to contract); *see also* *Kaufman*, 195 Cal.App.4th at 745 (establishing that public policy favors settlements in lieu of litigation)).

113. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 516 (1994).

114. *See, e.g.*, Susan Abram, *Two Months In, Porter Ranch Gas Leak Compared to BP Gulf Oil Spill*, L.A. DAILY NEWS (Dec. 19, 2015), available at <http://www.dailynews.com/general-news/20151219/two-months-in-porter-ranch-gas-leak-compared-to-bp-gulf-oil-spill> (on file with *The University of the Pacific Law Review*) (citing that the Department of Public Health has stated that the trace levels of methane can produce significant long-term health effects, but is unsure whether the additive mercaptan is deadly); *see also* ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 3 (June 2, 2016) (stating that it is difficult to know what the long-term effects of the methane exposure would be and that additional research will be conducted by the University of Southern California).

115. *Kaufman*, 195 Cal.App.4th at 745 (citing *Zhou*, 157 Cal.App.4th at 1475; quoting *Nicholson v. Barab*, 233 Cal.App.3d 1671, 1683 (1991) (“[W]e note that there is a well-established policy in the law to discourage litigation and favor settlement. Pretrial settlements are highly favored because they diminish the expense of litigation.”)).

116. *Alejandro v. Bull*, 159 Wash.2d 674, 682 (2007); *Applied Equipment Corp.*, 7 Cal.4th at 516.

117. *Compare Kaufman*, 195 Cal.App.4th at 745 (finding a state interest in privately settling disputes), with *Applied Equipment Corp.*, 7 Cal.4th at 516 (finding a state interest in fully compensating plaintiffs for injuries sustained as a result of tortious conduct).

118. *Supra* Part III.A. (discussing that argument regarding pollutants' right to freedom of contract); *see generally* ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 2 (June 2, 2016) (stating that the bill proposes several remedies to assist persons living near Aliso Canyon gas well or the Exide Technologies Plant who are injured or killed by toxic chemicals).

their claims upon suspicion of wrongdoing.¹¹⁹ AB 2748 would have provided victims with an extra year to file a tort claim when they know or have reason to know that the polluter potentially caused their injury.¹²⁰ Extending the statute of limitations benefits plaintiffs procedurally by ensuring their legal claims are not dismissed on the technicality that they failed to timely file their causes of action.¹²¹

The extension of the statute of limitations prolongs the time to resolve a claim through litigation and does not offer the repose to the tortfeasor after the usual two-year statute of limitations for filing a tort claim.¹²² AB 2748's extension of the statute of limitations would thus be inconsistent with the traditional two-year statute of limitations.¹²³ This adds another year to consider when the plaintiff was put on reasonable notice to investigate injuries.¹²⁴ A plaintiff would have had more time to file suit from the discovery of the injury.¹²⁵ This is partly due to the California State Legislature recognizing the fact that victims generally do not have knowledge of the legal actions they could take when they suffer a toxic substance exposure injury.¹²⁶ Extending the statute of limitations for the victims of the Exide and Porter Ranch pollution would give victims the more time and opportunity to consider their options.¹²⁷

However, in consideration of advancing the goal of tort law, the California State Legislature believed AB 2748 would assist plaintiffs in successfully

119. *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1112 (1988).

120. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. PROC. § 340.85); *supra* Part III.A. (discussing the effect the bill would have had on the time period when plaintiffs may file claims).

121. *Cf. Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board*, 19 Cal.3d 329, 332 (1977) (supporting that a longer statute of limitations would benefit a plaintiff by allowing more time to file a claim against a defendant).

122. *Jolly*, 44 Cal.3d at 1112.

123. *Compare* AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. PROC. § 340.85) (proposing a three year statute of limitations for Porter Ranch and Exide pollution victims of injury and wrongful death), *with* CAL. CIV. PROC. §§ 335.1, 340.8 (West 2016) (providing a two-year statute of limitations for negligence actions for injury and death of an individual and injury and death as a result of hazardous materials or toxic substances).

124. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. PROC. §§ 340.85(a) & (b)); *supra* Part III.A. (discussing the effect AB 2748 would have had on the statute of limitations).

125. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. PROC. §§ 340.85(a) & (b)); *supra* Part III.A. (analyzing how AB 2748 would have given procedural benefits to plaintiffs).

126. *See generally* Abram, *supra* note 114 (citing that the Department of Public Health has stated that the trace levels of methane can produce significant long-term health effects); *see also* ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 3 (June 2, 2016) (stating that it is difficult to know what the long-term effects of the methane exposure would be and that additional research will be conducted by the University of Southern California).

127. *Compare* AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. PROC. § 340.85(a), (b)) (extending a statute of limitations by another year), *with* *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1112 (Cal. 1988) (affirming that extending statute of limitations does not grant defendant with repose in a timely manner).

bringing their claims to court.¹²⁸ Victims occasionally fail to receive compensation for their injuries because statutes of limitations and waivers prevent them from gaining access to the courts.¹²⁹ The California State Legislature concentrated on the fundamental tort law principles to compensate victims of injuries and to make their lives whole again when they proposed AB 2748's new statute of limitation for the Exide and SoCalGas victims.¹³⁰ Despite the public policy of enforcing consistent statute of limitations to grant the defendants repose, AB 2748 would have helped victims bring their claims to court by leaving a window of opportunity open to bring their claims and eliminating potential procedural bars in favor of these victims.¹³¹

B. Statutory Attorney's Fees Encourage Settlement

California utilizes the "American Rule" for calculating attorney's fees.¹³² The American Rule provides that each party is to bear their own costs for litigation unless otherwise negotiated.¹³³ Contrary to the American Rule, AB 2748 would have provided that plaintiff's counsel is statutorily entitled to attorney's fees if a victim of Exide lead contamination or SoCalGas methane exposure prevails in a

128. See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 516 (1994) (citing 6 Witkin, Summary of Cal. Law, Torts § 1319) (stating that tort damages are awarded to compensate the victim for injury suffered); *Alejandro v. Bull*, 159 Wash.2d 674, 682 (2007) (stating that "tort law protects society's interests in freedom from harm, with the goal of restoring the plaintiff to the position he or she was in prior to the defendant's harmful conduct"); see also ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 2 (June 2, 2016) (stating that the bill proposes several remedies to assist persons living near Aliso Canyon gas well or the Exide Technologies Plant who are injured or killed by toxic chemicals).

129. *Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board*, 19 Cal.3d 329, 336 (1977) (finding that the plaintiff's claim was barred because the claim was filed more than one year after the plaintiff received notice to file a claim); *Mangini v. Aerojet-General Corp.* 230 Cal.App.3d 1125, 1149–50, 1152–53 (1991) (finding that plaintiff's causes of action for negligence, negligence per se, and strict liability had expired as a result of being on notice of injury for more than three years prior to the commencement of a lawsuit).

130. See generally AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. PROC. § 340.85); ASSEMB. COMM. ON JUDICIARY, COMM. REPORT OF AB 2748, at 2 (June 2, 2016) (stating that the bill proposes several remedies to assist persons living near Aliso Canyon gas well or the Exide Technologies Plant who are injured or killed by toxic chemicals); see also *Applied Equipment*, 7 Cal.4th at 516 (citing 6 Witkin, Summary of Cal. Law, Torts § 1319) (stating that tort damages are awarded to compensate the victim for injury suffered); *Alejandro*, 159 Wash.2d at 682 (stating that "tort law protects society's interests in freedom from harm, with the goal of restoring the plaintiff to the position he or she was in prior to the defendant's harmful conduct.")

131. See AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 1544) (fully disregarding the freedom of contract as an important principle and allowing courts to void contract provisions, which is contrary to the policy set forth in *VL Systems, Inc. v. Unisen, Inc.*, 152 Cal.App.4th 708, 713 (2007)); see also *id.* (adding CAL. CIV. PROC. § 340.85) (disregarding the principle that statutes of limitations are meant to protect defendants by granting repose, and to stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion, as set forth in *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1110–11 (1988)).

132. CAL. CIV. PROC. § 1021 (West 2016); *Trope v. Katz*, 11 Cal.4th 274, 278 (1995).

133. CAL. CIV. PROC. § 1021 (West 2016); *Trope*, 11 Cal.4th at 278.

private nuisance action.¹³⁴ Since attorney's fees in nuisance actions arising out of the Exide lead contamination and SoCalGas gas leak would be mandatorily awarded by statute pursuant to AB 2748, plaintiffs' counsel would not need to negotiate with defense counsel who bears the litigation costs.¹³⁵ AB 2748 would have automatically pushed the burden of attorney's fees on the defendant if a plaintiff prevails.¹³⁶ Thus, defense counsel is more encouraged to settle nuisance disputes quickly to lower fees that would be owed to plaintiff's counsel if plaintiff ultimately prevails.¹³⁷

C. No Help With Causation

At the outset, AB 2748 would have helped plaintiffs *procedurally* in successfully bringing their claims to court by preventing any waivers of liability and extending the statute of limitations.¹³⁸ AB 2748 also encouraged settlement by statutorily mandating defendants to pay attorney's fees for a prevailing plaintiff in private nuisance actions—another *procedural benefit*.¹³⁹ However, AB 2748 lacked any *substantive benefit*—namely, failing to provide any support to plaintiffs in proving causation in their toxic tort cases.¹⁴⁰

Recall, the “insurmountable” problem in toxic tort litigation is the element of causation in a *prima facie* case.¹⁴¹ There are “extraordinary and unique burdens facing plaintiffs who seek to prove causation in toxic-tort litigation.”¹⁴² Plaintiffs must demonstrate their injuries are more likely than not the result of defendant's wrongdoing.¹⁴³ It is challenging for plaintiffs to meet this causation burden when

134. CAL. CIV. PROC. § 1021 (West 2016); compare *Trope*, 11 Cal.4th at 278 (affirming that each party bears their own costs to litigation), with AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. PROC. § 1021.3(a)) (awarding plaintiff's counsel with attorney's fees when plaintiff prevails).

135. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. PROC. § 1021.3(a)) (statutorily awarding plaintiffs' counsel with attorney's fees when plaintiff prevails).

136. *Id.*

137. See generally *Kaufman v. Goldman*, 195 Cal.App.4th 734, 745 (2011) (citing *Zhou v. Unisource Worldwide*, 157 Cal.App.4th 1471, 1475 (2007); quoting *Nicholson v. Barab*, 233 Cal.App.3d 1671, 1683 (1991) (“[W]e note that there is a well-established policy in the law to discourage litigation and favor settlement. Pretrial settlements are highly favored because they diminish the expense of litigation.”)).

138. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 1544) (affecting contracts for waivers of liability); *id.* (adding CAL. CIV. CODE § 340.85) (affecting the statute of limitations for filing tort actions).

139. *Id.* (adding CAL. CIV. PROC. § 1021.3(a)).

140. See *id.* (adding CAL. CIV. CODE § 1544; CAL. CIV. CODE §§ 340.85, 1021.3) (all proposed code sections failing to discuss the elements of a toxic tort, specifically failing to mention the element of causation).

141. *Ayers v. Township of Jackson*, 106 N.J. 557, 585 (1987) (“By far the most difficult problem for plaintiffs to overcome in toxic tort litigation is the burden of proving causation.”) (citing *Developments in the Law-Toxic Waste Litigation*, 99 HARV. L. REV. 1602, 1617–30 (1986)); Lin, *supra* note 63, at 1447.

142. *Rubanick v. Witco Chemical Corp.*, 125 N.J. 421, 433 (1991).

143. *Whiteley v. Philip Morris Inc.*, 117 Cal.App.4th 635, 696 (2004) (holding that the burden falls on the plaintiff to prove causation and that California has adopted the substantial factors test to prove causation); *Brinker*, *supra* note 63, at 1297 (discussing that the substantial factors test is “satisfied when two forces are

the injuries they sustain in the future can be caused by other factors aside from defendant's conduct.¹⁴⁴ When plaintiffs do not submit evidence to support the causation element, courts may exclude the evidence and even dismiss the plaintiffs' case.¹⁴⁵

Not once does AB 2748 address the issue of causation for the victims of Exide and SoCalGas.¹⁴⁶ The extension of the statute of limitations to an additional year would have prolonged litigation, which also prolongs the time between the injury and the time litigation commences.¹⁴⁷ By extending the time between litigation and the alleged wrongdoing, more uncertainty builds as to whether the defendant's actions or some other factor in fact caused the plaintiff's injuries.¹⁴⁸ Specifically, the "time lag between the act and an inference of causation *strains the notion of wrongdoing* by imposing an obligation to avoid an act whose adverse consequences may not become manifest for many years."¹⁴⁹ One scholar has described that:

the chief danger is not that a deadly substance [was] released. A far greater risk is that no one will notice when a substance causes injury years after an exposure, or causes disease at lower levels of exposure than were originally thought dangerous, or causes harm when it interacts with another product, or affects only certain groups of persons, or causes

actively operating, one because of the defendant's activity, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another"); *see also* Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2121 (1997) ("[P]laintiffs must therefore produce scientific evidence from which a probabilistically based inference can be drawn that the product in question was capable of causing the health effects in question (general causation), and then establish that the exposure to defendant's product was the specific cause of their injury (specific causation).")

144. *See, e.g.*, *Potter v. Firestone Tire & Rubber Co.* 6 Cal.4th 965, 1010–12 (1993) (holding plaintiffs' smoking habits may be considered for comparative fault in a toxic tort action against tire manufacturer for increasing risk of cancer); *see also* Sanders & Machal-Fulks, *supra* note 63, at 110 (discussing difficulties plaintiffs must overcome in proving causation).

145. Berger, *supra* note 143, at 2122, n.20 (1997) (indicating that the exclusion of evidence may be moved *in limine*, followed by a motion for summary judgment).

146. *See* AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 1544; CAL. CIV. CODE §§ 340.85, 1021.3) (all proposed code sections failing to discuss the elements of a toxic tort, specifically failing to mention the element of causation).

147. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 340.85).

148. *See generally* AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 340.85). (allowing additional time to pass during a statute of limitations would increase the risk of plaintiffs running into additional factors that can lead to the same injuries defendants caused, thereby raising additional issues in causation); Sanders & Machal-Fulks, *supra* note 63, at 110 (stating that an injury later in time may have multiple causes); Berger, *supra* note 143, at 2122 ("[I]t is impossible to tell whether any individual plaintiff's injury is attributable to the product or whether it would have manifested itself anyhow.")

149. Berger, *supra* note 143, at 2133 (emphasis added).

too many diverse symptoms for anyone to notice a pattern, especially if the symptoms are not life-threatening.¹⁵⁰

Therefore, leaving the window open for a longer period of time is a blessing in disguise; the extended period of time potentially raises causation issues in future litigation for the plaintiff.¹⁵¹

D. Rethinking the Causation Element

Replacing the current causation burden is not a new idea.¹⁵² A new model of proving causation in toxic tort litigation proposes to eliminate general causation altogether.¹⁵³ This camp of legal theorists suggests lessening or potentially eliminating the plaintiff's burden in proving general causation is viewed as a "logical extension" to the goals of tort law—deterring wrongful and negligent conduct and compensating victims for injuries caused by tortfeasors.¹⁵⁴ Even scholars who challenge the abolition of general causation in its entirety call the abolitionist stance "well intentioned."¹⁵⁵

This proposed causation model, articulated by Professor Margaret A. Berger, suggests that defendants should be liable if they fail to provide the public with substantial information relating to the potential risks of injuries.¹⁵⁶ The new model does not require proof that the failure to provide the public with adequate information caused the plaintiff's injury.¹⁵⁷ Defendants are not liable if they meet the required standard of care for developing and distributing information relevant to the potential risks for injury.¹⁵⁸ Once the plaintiff proves the defendant failed to provide information relevant to the risks of toxic exposure, a plaintiff has a prima facie case for liability.¹⁵⁹ Professor Berger's model affords the defendant two special defenses for fairness and future research purposes: (1) that certain health reactions could not arise from exposure to the toxic substance, and (2) that

150. *Id.* at 2118.

151. *See generally* AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 340.85) (allowing additional time to pass during a statute of limitations would increase the risk of plaintiffs running into additional causes that can lead to the same injuries defendants caused, thereby raising additional issues in causation).

152. *See generally* Berger, *supra* note 143 (proposing to abolish the burden of proving general causation); Alani Golanski, *General Causation at a Crossroads in Toxic Tort Cases*, 107 PENN ST. L. REV. 479, 483 (2003) (suggesting to place more emphasis on epidemiological studies to help prove causation).

153. Berger, *supra* note 143, at 2143.

154. *Id.* at 2140 (citing *Sindell v. Abbott Lab.*, 607 P.2d 924, 936–37 (Cal. 1980); *Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948) (both cases relieving plaintiffs of the burdens of proving causation by shifting the burden to defendants who are more knowledgeable about the product)).

155. Golanski, *supra* note 152, at 483.

156. Berger, *supra* note 143, at 2143.

157. *Id.*

158. *Id.*

159. *Id.* at 2144.

other causes caused the plaintiff's injuries.¹⁶⁰ Under this model, causation essentially becomes a "burden-shifting mechanism."¹⁶¹

Professor Berger's "abolitionist" point of view for eliminating general causation and shifting the burden to defendants is not unchallenged.¹⁶² First, Berger's model presupposes risks exist with the product.¹⁶³ "[B]y assuming the existence of the very factual element that the abolitionist paradigm is committed to eliminating, that paradigm is rendered incoherent."¹⁶⁴

In support of the abolition of general causation, Professor Berger further argues that the new causation model eliminates the costs and time the plaintiff spends on establishing causation through expert witnesses.¹⁶⁵ While costs and time will be spent on showing that the defendant failed to warn, these costs are cheaper than hiring experts to prove causation under the traditional tort model.¹⁶⁶ The model also allows defendants to assess their own liability.¹⁶⁷ Overall, there would be more equitable compensation for victims, lower litigation and transaction fees, and less court congestion—all of which promote the goals of tort law.¹⁶⁸ The current system of causation fails to promote these goals, and is "antithetical to tort law objectives."¹⁶⁹ However, it is "not immediately apparent that transaction costs would ordinarily exceed the value of such trade-off, and it seems reasonable to suppose that, indeed, the latter would often far surpass the former."¹⁷⁰

Challengers to the abolitionist position "assume that the abolitionists' position will not withstand the test of time."¹⁷¹ Instead, these challengers recognize a causation issue and deem the current tort system "adaptable enough" to resolve complex and nonobvious causal mechanisms by "adopting case-specific epidemiological studies."¹⁷² Essentially, challengers of Professor Berger's position believe that it would be better to incorporate epidemiological studies "harmoniz[ing] with the current flow of tort jurisprudence than [the] outright abolition of the causal element of proof."¹⁷³ These anti-abolitionists

160. *Id.*

161. Golanski, *supra* note 152, at 482.

162. *Id.*

163. *Id.*

164. *Id.*

165. Berger, *supra* note 143, at 2149–50.

166. *Id.*

167. *Id.* at 2150.

168. *Id.*; *see generally* Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal.4th 503, 516 (1994) (finding that tort damages are awarded to compensate victims for injuries suffered from a defendant's tortious conduct).

169. Berger, *supra* note 143, at 2119.

170. Golanski, *supra* note 152, at 483.

171. *Id.* at 485.

172. *Id.*

173. *Id.* at 486.

suggest what is known as an epidemiological¹⁷⁴ alternative.¹⁷⁵ One issue is whether such epidemiological studies supporting general causation issues can be used as the “sole or predominant evidence” to prove specific causation.¹⁷⁶ The anti-abolitionists find that:

courts facing the issue [of whether an epidemiological study can prove specific causation] thus appeared willing to accept an epidemiological substitute for specific causal evidence if that statistical proof established a greater than *two-fold* relative risk, and thereby satisfied, in the judicial reckoning, the more-likely-than-not standard.¹⁷⁷

Unlike the model Professor Berger proposes, the epidemiological studies that have statistical proof greater than a two-fold relative risk has been adopted in narrow situations.¹⁷⁸

A notable example of how epidemiological studies played a significant role with the causation element is *In re Agent Orange Product Liability Litigation*.¹⁷⁹ There, a class of veteran plaintiffs brought suit for exposure to herbicides while serving in Vietnam.¹⁸⁰ “The [epidemiological] evidence provided by the plaintiffs to date on general causality, while supportive of the desirability of further studies, lack sufficient probative force.”¹⁸¹ The lower court found that at least a two-fold increase in incidence of the disease must attribute the injury as a result of the defendant’s use of chemicals to permit recovery “if epidemiological studies were relied on alone.”¹⁸² The United States Court of Appeal for the Second Circuit affirmed that the plaintiffs must prove at least a two-fold increase in the incidence of the disease allegedly caused by exposure to the suspected toxic substance.¹⁸³

Overall, courts are not moved to adopt newer models of causation.¹⁸⁴ Even though the courts recognize the causation hurdles that plaintiffs experience,

174. *Lesson 1: Introduction to Epidemiology, Section 1: Definition of Epidemiology, Centers of Disease Control and Prevention*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 2, 2016), available at <http://www.cdc.gov/ophss/csels/dsepd/ss1978/lesson1/section1.html> (on file with *The University of the Pacific Law Review*) (defining ‘epidemiology’ as the “study of the distribution and determinants of health-related states or events in specified populations, and the application of this study to the control of health problems”).

175. Golanski, *supra* note 152, at 496.

176. *Id.* at 488.

177. *Id.* at 490 (emphasis added).

178. *Id.* at 489–90 (citations omitted).

179. *In re Agent Orange Product Liab. Litig.*, 597 F.Supp. 740, 785 (E.D.N.Y. 1984), *aff’d*, 818 F.2d 145 (2d Cir. 1987).

180. *Id.* at 746.

181. *Id.* at 782–83.

182. *Id.* at 785.

183. *In re Agent Orange Product Liab. Litig.*, 818 F.2d 145, 174 (2d Cir. 1987).

184. *James v. Bessemer Processing Co., Inc.*, 155 N.J. 279, 300 (1998).

courts are satisfied with the current status of tort litigation.¹⁸⁵ If the California State Legislature’s goals intend to aid plaintiffs with their recovery, “justice requires a change in the substantive law” rather than procedural benefits afforded by AB 2748.¹⁸⁶ Instead of merely changing procedural grounds for plaintiffs to bring their claims, changing the causation model may do more to promote justice and deter wrongful conduct.¹⁸⁷

E. The Governor’s Veto

Prior to the Governor’s veto, AB 2748 received 23 “Ayes” and 13 “Noes” in the California State Senate on August 23, 2016.¹⁸⁸ AB 2748 received 54 “Ayes” to 23 “Noes” in the California State Assembly on August 30, 2016.¹⁸⁹ Despite the support from both houses of the California State Legislature, AB 2748 will not take effect because the Governor ultimately vetoed the bill on September 26, 2016.¹⁹⁰

In a letter containing his veto message to the Members of the California State Assembly, Governor Jerry Brown claimed that the bill restricts the use of release clauses and waivers, which “eliminates incentives for defendants to settle legal disputes stemming from these two unrelated incidents.”¹⁹¹ Second, “nothing has been shown to indicate current law is insufficient to hold polluters accountable.”¹⁹² The “many direct actions and lawsuits that have been filed on behalf of the state and affected communities” and the public interest in incentivizing defendants to settle legal disputes outside the courtroom led Governor Brown to veto AB 2748 altogether.¹⁹³ Perhaps AB 2748 would have been passed if these protections were expanded to “other communities that may be similarly affected by future environmental disasters.”¹⁹⁴

185. *Id.*; see generally *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 133 F.Supp.2d 162, 174 (E.D.N.Y. 2001) (exemplifying this tolerant attitude in the courts).

186. Berger, *supra* note 143, at 2152.

187. Compare AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 1544; CAL. CIV. CODE §§ 340.85, 1021.3) (all proposed code sections failing to discuss the elements of a toxic tort, specifically failing to mention the element of causation), with *Alejandre v. Bull*, 159 Wash.2d 674, 682 (2007) (stating that “tort law protects society’s interests in freedom from harm, with the goal of restoring the plaintiff to the position he or she was in prior to the defendant’s harmful conduct”).

188. ASSEMB. FLOOR, COMM. ANALYSIS OF AB 2748, at 1 (Sept. 30, 2016).

189. *Id.*

190. Brown, *supra* note 4.

191. *Id.*

192. *Id.*

193. *Id.*

194. SEN. COMM. ON ENV. QUALITY, COMM. REPORT OF AB 2748, at 5 (June 28, 2016).

V. CONCLUSION

AB 2748 was the California State Legislature's response to the lead contamination and methane gas leak environmental disasters in Southern California in 2015.¹⁹⁵ Although AB 2748 would have encouraged parties to settle cases by imposing statutorily mandated attorney's fees in private nuisance actions,¹⁹⁶ AB 2748 would have only provided procedural benefits—specifically, leaving litigation as an open route for recovery by rendering waivers of liability ineffective and extending a statute of limitations to three years.¹⁹⁷

AB 2748 does not offer substantive resolutions to the issues of causation arising in toxic tort litigation.¹⁹⁸ By leaving the window open to litigation for a longer period of time, causation would increasingly be harder to prove under the traditional causation model.¹⁹⁹ If the goal is to help injured plaintiffs recover and deter wrongful conduct, the California State Legislature should reexamine how plaintiffs can pass the causation hurdle in litigation, the “central, decisive factor” in toxic tort litigation.²⁰⁰

195. Brown, *supra* note 4.

196. *Supra* Part IV.B (discussing the impact AB 2748 would have had on the incentives for parties to settle).

197. *Supra* Parts III, IV.A.1 & IV.A.2 (analyzing the procedural benefits AB 2748 would have conferred on plaintiffs in such cases).

198. AB 2748, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (adding CAL. CIV. CODE § 1544; CAL. CIV. CODE §§ 340.85, 1021.3) (all proposed code sections failing to discuss the elements of a toxic tort, specifically failing to mention the element of causation).

199. Berger, *supra* note 143, at 2133.

200. *Id.* at 2144; *supra* Part IV.D (discussing how causation is the most difficult factor for plaintiffs to prove in tort litigation).