

## KEYNOTE SYMPOSIUM PRESENTATION OF BRIAN PANISH AND JESSE CREED

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Brian Panish\* and Jesse Creed\*\*

ATTORNEY BRIAN PANISH:

Good afternoon. Thank you for all you do here, and what a great job you have been doing since you have come on to be the Dean here at Southwestern, Dean Darby Dickerson. I want to thank all the distinguished speakers for being here today. A special nod to Justice [Goodwin] Liu. I know you are very busy. It is very important to Southwestern to create a forum for discussions. Thank you for giving us the time to be here. Thank you all so much—it is greatly appreciated.

With me here today is a lawyer from my firm, Jesse Creed. He graduated Phi Beta Kappa from Princeton, served on the Columbia Law Review, clerked for judges on the United States Courts of Appeals for the Fourth and Ninth Circuits, and previously worked for Munger Tolles. He also served as executive director of a public interest group that brought a pro bono lawsuit representing veterans and homeless with the Veterans Administration and secured a billion-dollar settlement. He became the executive director so that he could allocate the group's funds, which was good practice for him when it came time to work with a third-party claims administrator to allocate the settlement. Jesse is really the brains around the operation at the firm.

We are about to discuss a case with you on which Jesse and I worked incredibly hard, along with a great many lawyers. We will refer to the case as “the Porter Ranch case.”<sup>1</sup> One of the judges, Judge Carolyn B. Kuhl, who presided over the case supports the American Law Institute, and she

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1. *See generally* S. Cal. Gas Leak Cases, No. BC601844 (Cal. Super. Ct. Apr. 29, 2022).

would often discuss aggregate settlements because it is one of her areas of interest, which makes our discussion quite timely.

The case involved a gas well blowout in Porter Ranch, California that resulted in the largest natural leak in United States history.<sup>2</sup> We represented 36,000 people who had suffered personal injury and property damage as a result of the catastrophic gas leak.<sup>3</sup> The Porter Ranch gas leak released over 108,000 cubic metric tons of chemicals released in this neighborhood.<sup>4</sup> Approximately 8,000 people had to be relocated from their homes.<sup>5</sup> The Los Angeles County Department of Public Health declared a public health emergency and issued an order that Southern California Gas (SoCalGas) pay to relocate these people to the tune of about \$600 million.<sup>6</sup> Eight thousand families were displaced from their homes for months as a result of the blowout. Public schools were shut down for a similar time period. The families brought negligence and nuisance claims against SoCalGas and its parent Sempra Energy. I have been a lawyer almost forty years, and I spent the first thirty-seven years trying individual cases one after another across every conceivable context. As the mass tort litigation practice has evolved, we all have seen the rise of cases involving many, many plaintiffs.

Before, we would deal with, for example, a \$1 million policy, and four claimants. You are trying to allocate settlement money amongst them. But allocation on a scale even this small presents challenges. And when a suit includes as many as 36,000 claimants, those challenges multiply and require substantially more work to identify and resolve. The question becomes: What are the best practices for lawyers trying to achieve a global resolution in these cases?

In many other kinds of mass torts cases in which I have been involved—such as those involving pharmaceuticals, drugs, and medical devices—there is generally a specific settlement amount offered for each case. In this case, we had to negotiate a global settlement, then go through

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2. See generally *SoCalGas Negligence Found to be Cause of Porter Ranch Gas Leak, Study Shows*, PANISH | SHEA | RAVIPUDI LLP (May 17, 2019), <https://www.panish.law/2019/05/socialgas-negligence-found-to-be-cause-of-porter-ranch-gas-leak-study-shows/> [https://perma.cc/X8AH-DBQN].

3. See *id.*

4. *Id.*

5. Bethany Brown, *Seven Years Since Aliso Canyon Gas Blowout: What's Happened?*, NBC L.A. (Nov. 1, 2022), [https://www.nbclosangeles.com/news/local/seven-years-since-aliso-canyon-gas-blowout-whats-happened/3022395/?\\_osource=db\\_npd\\_nbc\\_knbc\\_eml\\_shr](https://www.nbclosangeles.com/news/local/seven-years-since-aliso-canyon-gas-blowout-whats-happened/3022395/?_osource=db_npd_nbc_knbc_eml_shr) [https://perma.cc/EZZ8-PDDW].

6. See Associated Press, *Emergency Declaration for Gas Leak in Los Angeles County*, THE SAN DIEGO UNION-TRIBUNE (Dec. 16, 2015, 12:31 PM), <https://www.sandiegouniontribune.com/sdut-emergency-declaration-for-gas-leak-2015dec16-story.html> [https://perma.cc/AVB2-PGQQ].

the allocation process, all the while dealing with the numerous, complex legal and ethical hurdles that arose.

So, there is a little bit of background. I know Professor [Catherine] Sharkey was talking about the economic loss incurred by the gas leak, which is the issue that the California Supreme Court addressed in this case. We were not responsible for that part of the case, but it illustrates the many facets of contemporary mass tort litigation that make it so complex.

For many of the claimants, their biggest problem was the need to relocate. They had young children. The schools were closed. The parks were closed. They had pets. It was a very difficult process, so they made claims that captured those difficulties; they brought claims for loss of their enjoyment of their property, as well as various personal injury claims where the injuries would manifest physical symptoms such as headaches, nose bleeds, and ailments of that nature. Nobody claimed more substantial injuries to their health, such as claiming that they had incurred cancer from the gas leak.

So, for about two years or three years, we engaged in repeated negotiations with the Defendants, SoCalGas and Sempra Energy. We eventually secured court orders that were helpful, and reached the position where we believed a global settlement was achievable. But that prospect created huge problems, and there was a paucity of published guidance as to the best practices for handling a case of this scale and magnitude. For example, one pervasive question was: What are all the conflict issues that arise? Normally, in allocation procedures, the defendant wants to have some control over who the allocator is, but there could also be in an allocation agreement where Defendants have no say. Normally, they want to approve or know who the allocation team special master is going to be, and we were able to agree on that in this case. We agreed on the figure, and then spent approximately three days negotiating the terms of settlement. It resembled a merger and acquisition procedure, which is something with which we were not familiar. Once we had this agreement—the \$1.8 billion offer—we needed to both fully inform the 36,000 claimants (which is an issue), and to allocate the money amongst all these people in a fair manner, taking notice of all the ethical dilemmas that exist and the various Model Rules of Professional Conduct. We had to retain both ethics counsel for the allocation issues and specific California counsel for the conflicts of interest.

ATTORNEY JESSE CREED:

The title of our talk came when Brian called me and said that we are giving a talk at the Southwestern symposium about the ALI. I asked: What

is our talk about? He said: Let us talk about what we did in Porter Ranch with the aggregate settlements.

So, I went to the Restatements of Torts to see if there is anything in there about this topic to help guide whatever we were going to discuss, and sure enough, there really was not. There was a section on settlement and a section on remedies which did not quite apply. Obviously, there is an interplay with aggregate litigation, professional responsibility, and tort remedies, because so much is happening behind the scenes to give a remedy to clients that is not taking place in the courtroom. The reason why there is not a lot there is probably pretty obvious: because there is not really any law about this, even if there should be, given some of the challenges that have come forward recently, particularly in California with what is going on with the Tom Girardi scandal.<sup>7</sup> So that is why and how we arrived at this presentation title.

ATTORNEY BRIAN PANISH:

And the judge in our case pushed us to clarify how we planned to address these issues. I think the courts are looking for guidance, too. When they see lawyers bring these various allocation proposals in front of them, they are not really sure how best to determine whether a proposal sufficiently addresses these issues. In the Porter Ranch case, the judge and the lawyers involved were quite concerned about potential ethical issues that may arise.

ATTORNEY JESSE CREED:

So, this is what I was talking about when I briefly raised the issue with the lack of guidance in the Restatements. I found a section on settlements in the apportionment of liability section,<sup>8</sup> which gives a pretty obvious definition of settlement. I think what is interesting about settlements in the mass tort context is that usually plaintiffs are agreeing to settle their claim before they even know how much money they are going to get, which is typically unheard of in a single plaintiff case.

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7. See Matt Hamilton & Harriet Ryan, *Tom Girardi, Disgraced L.A. Lawyer and 'Real Housewives' Spouse Indicted on Fraud Charges*, L.A. TIMES (Feb. 1, 2023), <https://www.latimes.com/california/story/2023-02-01/tom-girardi-indictment-la-lawyer> [<https://perma.cc/73D8-FQ6L>].

8. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 24 (AM. L. INST. 2000).

ATTORNEY BRIAN PANISH:

And having a plaintiff sign a release without knowing the exact amount of money they will receive is part of this difficult process.

ATTORNEY JESSE CREED:

The deal is that the plaintiff signs the release and effectively relinquishes his or her claims in exchange for being able to participate in a process to allocate the global amount among all plaintiffs. So, I thought this definition still would apply, and then I went to the question of remedies,<sup>9</sup> because when you have global settlements, you assign allocators or special masters, and they come up with a claims protocol. The question is what should guide them in figuring out how to allocate global sums to individual players. There were 36,000 plaintiffs, and each of them had a wide-varying degree of damages, both in nature and in scope. So, I went to the remedy section, and the discussion there was all about what a plaintiff gets if they establish a defendant's liability—which is not quite exactly what is going on with a global settlement, so that was not fully applicable to our case either.

ATTORNEY BRIAN PANISH:

This is the best thing I did in the case: I told a consultant to obtain the FLIR cameras<sup>10</sup> that captured the incident and show the incident because a gas leak is not visible to the naked eye.<sup>11</sup> And then emails started flowing calling it a mini-Chernobyl and how those pictures should be taken down, etcetera.

We are going to discuss the allocation process further. Our ethics counsel was Charles Silver of University of Texas at Austin School of Law.<sup>12</sup> I had previously worked with him and one of his colleagues,

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9. *See generally* RESTATEMENT (THIRD) OF TORTS: REMEDIES (AM. L. INST., Tentative Draft No. 2, 2023).

10. FLIR cameras are equipped with thermal imaging, night vision, and infrared. *See About Teledyne FLIR*, TELEDYNE FLIR, <https://www.flir.com/about/about-flir/> [<https://perma.cc/GH4C-UD72>].

11. *See Aliso Canyon Methane Gas Well Blowout FLIR Video Over Porter Ranch*, PORTER RANCH LAWSUIT (Dec. 11, 2015), <https://porterranchlawsuit.com/aliso-canyon-methane-gas-well-blowout-flir-video-over-porter-ranch> [<https://perma.cc/8NWT-DZCC>].

12. *See Charles M. Silver: Biography*, U. TEX. L. SCH., <https://law.utexas.edu/faculty/charles-m-silver/> [<https://perma.cc/W2AB-NMY5>].

Professor Lynn Baker,<sup>13</sup> in a shooting case in Mandalay Bay, where there were, say, 1,000 claimants—wrongful deaths, shooting victims, and more.<sup>14</sup> I developed a sense of how the process would work. We then had the defendants agree to retain a legal services company called BrownGreer<sup>15</sup> to assist with the settlement. They are located in Virginia, and they have many lawyers. It is like a law firm, but they specialize in this process of allocating money, they deal with all the liens and claimant holders, and they ensure everyone receives their allocations.

Then, the clients must want to opt into the settlement, and they do not know really how much money they are going to get. First, you need an informed and, we believe, signed acknowledgement, that you have fully disclosed and obtained informed consent for everything. The disclosure must be comprehensive and specify the number of claimants, a range of recovery for each plaintiff, and forthcoming procedures. The ranges of what each plaintiff was going to recover between one amount and another gave them something concrete to base their decision on, other than what their lawyer is telling them is the best option. They should be part of this process. The defendants usually would like to have some type of participation levels for the different claims.

On the screen, you can see a map where everybody lived. In red is section twenty-five—the location of the failed well. This section expands over nine miles, and you can see the amount of chemicals in the different areas. The questions were: Should a person that is five miles away who suffered bloody noses and headaches and was forced to relocate with two small children receive the same amount as others? What would they receive compared to an eighty-year-old person who had preexisting asthma and who suffered aggravated health issues as a result of the gas leak? These questions are quite complicated, and most of their resolution is not done by the plaintiff's lawyer. The rules are pretty clear: *First*, the plaintiff's lawyer cannot be involved in the allocation process; they have a conflict, and they cannot really have an input on how the process is formulated and applied in the case. It is a little difficult, but you must have confidence in the people that are handling the allocation process. *Second*, you must secure the approval for your clients. So, imagine, we had a group

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13. See *Lynn A. Baker: Biography*, U. TEX. L. SCH., <https://law.utexas.edu/faculty/lynn-a-baker/> [<https://perma.cc/Z9P7-MU3N>].

14. See Bobby Allyn, *MGM Resorts to Pay Up to \$800 Million in Las Vegas Shooting Settlement*, NPR (Oct. 3, 2019), <https://www.npr.org/2019/10/03/766800480/mgm-resorts-to-pay-up-to-800-million-to-victims-of-las-vegas-shooting> [<https://perma.cc/QTD8-UX66>].

15. See *Who We Are*, BROWNGREER, <https://www.browngreer.com/who-we-are/> [<https://perma.cc/9WS3-WYPG>].

of approximately 8,000 people. We have town hall meetings and Zoom meetings in order to for the clients to participate in this procedure. We tried to explain this complicated process to the clients and to obtain the signed, informed consent by the clients confirming that all material information was fully disclosed. One thing that we did learn is that having a special master helped in that it gave the allocation a little more “blessing.” Plaintiffs were a little more inclined to agree to it because they believed there was an independent third person doing it, which there was, and that they were going to be treated fairly. So, Jesse will talk a bit more about the allocation process.

ATTORNEY JESSE CREED:

So, when we went through this process, we went through it with two different judges in the Los Angeles Superior Court: one was Judge Daniel J. Buckley, and when he retired, Judge Kuhl came back to handle the case. Judge Kuhl encouraged us to spread the word about the way that we did it in this case.

If you think about approvals of settlements, there are really three categories. I will put them in three buckets that we deal with on the plaintiff’s side.

First, there are minors’ compromises, where the courts review every settlement of a tort, and they determine that it is in the best interests of the minor or other incompetent or incapacitated person of all ages. There are types of class actions, which we are all familiar with, where a plaintiff must affirmatively opt out. A court approves it based on a fairness standard and approves the notice that goes out to each class member to make sure that each class member has full disclosure, and each class member was given informed consent as to whether to participate or opt out. And then finally in California there is a Code of Civil Procedure section 664.6 stipulation,<sup>16</sup> which basically requires—I am sure lots of jurisdictions have it—parties to go to court and stipulate to a settlement, and the court gets to enforce it. There is basically no review of what the parties agreed to. It is just another contract, but the court will agree to enforce whatever the parties ultimately agreed to do. So, the most rigorous review applies to a minor’s settlement, while the least rigorous would be the court’s agreement to enforce the settlement agreement between the parties. We wanted the court’s supervision like a class action for this mass tort. So, we submitted the claims protocol to the court. And one of the questions we, of course, had is what legal authority does the court have to approve this kind of settlement?

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16. Cal. Code Civ. Proc. § 664.6 (West 2023).

There is no statute that explicitly states it, but we put it in through section 664.6. The court was going to enforce it, and as part of the settlement, the court would approve it and review it for fairness. We got the court's guidance, and there were some adjustments made as a result of that.

The second thing we did was—and a lot of plaintiffs' lawyers do not like to do this, but I think it was something that we really wanted to do, and the court really embraced—we got the court to review our informed consent disclosures, what we were going to send out to our clients. A lot of plaintiffs' lawyers do not like to do that because it is a privileged communication, but we got the defendants to agree that it would be submitted under seal, and no one would be able to see it, but the court would be able to review it, and that was very effective, because we got comments and feedback, and we could make sure we, as lawyers, were properly navigating conflicts among clients and were being fair to everybody in how we disclose and describe the global settlement. It was a really effective process.

ATTORNEY BRIAN PANISH:

Jesse, let us talk about the minors. How many minor cases were there? How did that create difficulties in getting this settlement paid?

ATTORNEY JESSE CREED:

There were 5,000 minors involved in this case, and the minors were acutely impacted. That was another hook to get the court involved, because the court must oversee minor settlements and minor claims. This slide that you are seeing on the screen shows the people who were relocated relative to the well, the blowout. As you can see, there is a higher density the closer you are to the well. The minors were acutely impacted, because the schools were relocated as well, and there were only two schools in Porter Ranch. In addition, whenever a family was relocated, they were moving farther away from wherever the family worked or the school was. We had two review processes for the minors. The first step was to ensure that the court itself was satisfied that the minors were not being treated less unfavorably than the adults were, so there was, again, a dialogue with the court to make sure that the minors under the point system and the allocation protocol were treated as well or better than the adults. After the court reviewed everything, we secured the court's approval. The second step, of course—as is required in California and in many jurisdictions—was that the court must approve every single payment from a minor settlement. This step occurs after the allocation comes through and each minor is given an award.



This is the process we are in currently with the court. I joke around with the judicial assistant because we are about to file 5,000 minor compromises, which is very burdensome on the court. But I say in exchange that I am going to dismiss 36,000 cases for you, which is what happened in the settlement, and I also joke with the court that I think we reduced the pending filings in Los Angeles Superior Court because of this settlement by half, so the clerk can thank us later.

ATTORNEY BRIAN PANISH:

But what about issues related to the appointment of guardians ad litem? Normally in a case there is a parent, which we find there could be issues with that too. We try to avoid those issues because another potential conflict arises. But in this case, there are 110 law firms representing these plaintiffs, and it would have been impossible to get all these lawyers to do something the same way. You are going to have some percent of these attorneys, no matter how well you give them the direction, who were not going to do it right, and they were going to receive push back by the judge. And they would have been required to get a guardian appointed. So, we were able to talk to the judge and get a retired judge to serve as guardian ad litem for most of the minors, and that judge would then review every minor's petition, every allocation, and would approve it and be representative on behalf of the parties. Some plaintiffs wanted their own guardians ad litem, which we allowed. But most plaintiffs wanted to go with this judge. They thought this judge would be fair, and he was. The judge had no stake in the outcome, and he did a really good job.

I want to conclude our presentation by thanking everyone for coming. We appreciate the crucial work that you all do and all your work on the Restatements. Thank you so much.