FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHAEL R. RATTAGAN, *Plaintiff-Appellant,* v. UBER TECHNOLOGIES, INC., *Defendant-Appellee.*	No. 20-16796 D.C. No. 3:19-CV-01988-EMC ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF CALIFORNIA

Filed December 6, 2021

Before: Mary H. Murguia, Chief Judge, and J. Clifford
Wallace and Morgan Christen, Circuit Judges.

SUMMARY[*]

California Law

The panel certified to the Supreme Court of California the following question:

> Under California law, are claims for fraudulent concealment exempted from the economic loss rule?

ORDER

We are asked to determine whether fraudulent concealment claims are exempt from the economic loss rule under California law. This central question of state law is determinative of the instant case, and there is no controlling precedent in the California Supreme Court's decisions. Cal. R. Ct. 8.548(a). Therefore, we respectfully certify this question of law to the California Supreme Court pursuant to California Rule of Court 8.548.

I. Factual Background

This case arises out of Uber Technologies, Inc.'s ("Uber") launch of its ridesharing platform in Argentina. In 2013, two of Uber's wholly owned Dutch subsidiaries retained Plaintiff-Appellant, Michael Rattagan, a corporate attorney in Argentina, to provide certain legal services and

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

serve as the Dutch entities' legal representative in Buenos Aires. These Dutch entities would be the shareholders of a new Uber subsidiary in Argentina.   In 2015, Uber representatives from the company's headquarters in San Francisco allegedly assumed responsibility for communicating with Mr. Rattagan about the launch.

In April 2016, Uber launched its platform in Argentina. According to Mr. Rattagan, however, Uber did so before its Argentine subsidiary was fully formed or registered with the proper tax authority. Mr. Rattagan alleges that despite knowing that Mr. Rattagan, as the Dutch entities' legal representative, could be subject to personal liability for Uber's violations of Argentine law, Uber concealed its launch plans from him.

Within days of the launch, law enforcement authorities raided Mr. Rattagan's office and the homes of his business colleagues. The raids occurred in connection with a charge that Mr. Rattagan, as an Uber representative, was illegally using public space for commercial gain. Mr. Rattagan also alleges that his offices were surrounded by protestors and that he and his firm received negative press in the news. Mr. Rattagan promptly requested that the Dutch entities remove him as legal representative, but the change did not occur until at least two months after the launch. He contends that, by this time, the damage to his reputation already was done. Mr. Rattagan later was charged with aggravated tax evasion for his perceived involvement with the Uber launch. The investigation received significant media attention, which Mr. Rattagan asserts harmed his reputation in his community.

In the operative complaint, Mr. Rattagan alleged claims of negligence, breach of the implied covenant of good faith and fair dealing, fraudulent concealment, and aiding and

abetting fraudulent concealment. Applying California law, the district court concluded that Mr. Rattagan's negligence and breach of the implied covenant claims were time barred. The district court also held that the fraudulent concealment claims were foreclosed by the economic loss rule—a doctrine that prevents a party to a contract from recovering economic damages resulting from breach of contract under tort theories of liability. Accordingly, the district court dismissed Rattagan's complaint.

On appeal, Mr. Rattagan challenges only the district court's conclusion that his fraudulent concealment claims were foreclosed by the economic loss rule. Two of Mr. Rattagan's arguments fail: Mr. Rattagan waived the argument that his claim is shielded by the special relationship exception, and he has not plausibly alleged that his relationship with Uber was non-contractual. This case therefore turns on Mr. Rattagan's remaining argument: fraudulent concealment claims are exempt from California's economic loss rule. Because the fraudulent concealment issue is dispositive in Mr. Rattagan's case, because there are no California Supreme Court or appellate court decisions on point, and because federal district courts are divided on the issue, we certify Mr. Rattagan's question to the California Supreme Court.

II. Explanation of Certification

Federal courts sitting in diversity, as here, apply state substantive law and federal procedural law. *In re County of Orange*, 784 F.3d 520, 527 (9th Cir. 2015) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996)). Application of the economic loss rule is substantive and thus governed by California law. *See City of Pomona v. SOM N. Am. Corp.*, 750 F.3d 1036, 1050

(9th Cir. 2014). When determining state law in the absence of a decision from the relevant state's high court, this court may look to the state's courts of appeal for guidance. *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 865 (9th Cir. 1996).

The economic loss rule limits a party to a contract "to recover[ing] in contract for purely economic loss due to disappointed expectations," rather than in tort, "unless he can demonstrate harm above and beyond a broken contractual promise." *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 272 (Cal. 2004). Stated differently, a party to a contract generally cannot recover for pure economic loss—*i.e.*, damages that are solely monetary—that resulted from a breach of contract unless he can show a violation of some independent duty arising in tort. *See Erlich v. Menezes*, 981 P.2d 978, 983 (Cal. 1999) ("[C]ourts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies." (quoting *Freeman & Mills, Inc. v. Belcher Oil Co.*, 44 Cal. Rptr. 2d 420, 434 (1995))). The rule "prevent[s] the law of contract and the law of tort from dissolving one into the other." *Robinson*, 102 P.3d at 273 (alteration in original) (quoting *Rich Products Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937, 969 (E.D. Wis. 1999)).

In *Robinson*, the California Supreme Court held that the economic loss rule does not bar fraud claims premised on affirmative misrepresentations. *Id.* at 274–75. The California Supreme Court reasoned that this species of fraud constitutes tortious conduct separate from a breach of the contract. *Id.* at 274. Because the affirmative misrepresentations were "dispositive fraudulent conduct," the Court expressly declined to address whether another type

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