

# *Nova Law Review*

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*Volume 35, Issue 3*

2011

*Article 6*

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## Lessons From BP: Deepwater Oil Drilling is an Abnormally Dangerous Activity

Valerio Spinaci\*

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## LESSONS FROM BP: DEEPWATER OIL DRILLING IS AN ABNORMALLY DANGEROUS ACTIVITY

VALERIO SPINACI\*

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\* J.D. *summa cum laude*, 2011, Nova Southeastern University; Italian J.D., *summa cum laude*, 2010, Università degli Studi “Roma Tre”. Dr. Valerio Spinaci is a member of the Florida Bar and is a teacher of communication and learning techniques. A former actor and scriptwriter, he also produced and contributed writings for numerous books on theater and role-playing.

My deepest gratitude goes to Professor Michael Flynn, one of the most entertaining professors on earth, for his invaluable supervision and contribution to this article and for teaching me all I know about torts law and much more. A special thanks to Christine Whited and Mario Giommoni, who helped me with the final editing of this article. Finally, thanks to the *Nova Law Review* staff for their constant dedication and companionship and for producing this polished final version that you, the reader, can enjoy.

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I. INTRODUCTION

On April 20, 2010, while drilling oil from the outer Continental Shelf, the Deepwater Horizon oil rig exploded, killing eleven people and spilling more than five million gallons of oil into the Gulf of Mexico.<sup>1</sup> Deepwater Horizon held the record as the deepest oil rig in history, and the oil spill it produced is one of the largest ever.<sup>2</sup>

Fortunately, catastrophic spills like the Deepwater Horizon are not the rule.<sup>3</sup> Offshore operators spill millions of gallons of oil, fuel, and other chemicals into federal waters each year.<sup>4</sup> According to the United States Minerals Management Service, approximately forty spills were greater than one thousand barrels since 1964, and thirteen within the last ten years.<sup>5</sup> Off-shore oil extraction operations have produced some of the largest oil spills in the world’s history.<sup>6</sup> The numbers become higher when considering oil spills from tankers, carriers, and barges.<sup>7</sup> As estimated by the United States Coast Guard, 1.3 million gallons of petroleum are spilled into United States waters

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1. Sheila Pulham et al., *BP Oil Spill: An Interactive Timeline*, GUARDIAN (Sept. 28, 2010, 11:09 AM), <http://www.guardian.co.uk/environment/interactive/2010/jul/08/bp-oil-spill-timeline-interactive>.

2. *BP Oil Spill Is Now the Largest Ever in Gulf*, CBS NEWS (July 1, 2010, 11:53 AM), <http://www.cbsnews.com/stories/2010/07/01/national/main6636406.shtml>; Dan Shapley, *So How Big Was the BP Oil Spill?*, DAILYGREEN (Sept. 21, 2010, 2:00 PM), <http://www.thedailygreen.com/environmental-news/latest/bp-oil-spill-size-0528>. “An independent analysis . . . puts the total spilled” at more than 180 million gallons. *Id.*

3. David Ivanovich & Kristen Hays, *Offshore Drilling Safer, but Small Spills Routine: Hurricanes Can Pose Particular Risks*, HOUS. CHRON., July 20, 2008, at A1.

4. *Id.*

5. *Id.*

6. JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R.L. 33705, OIL SPILLS IN U.S. COASTAL WATERS: BACKGROUND, GOVERNANCE, AND ISSUES FOR CONGRESS 32 (2007), available at [http://assets.opencrs.com/rpts/RL33705\\_20070823.pdf](http://assets.opencrs.com/rpts/RL33705_20070823.pdf). Before the Deepwater Horizon, “[t]he largest accidental oil spill in world history—the IXTOC I, estimated at 140 million gallons—was due to an oil well blowout in Mexican Gulf Coast waters in 1979.” *Id.* at 32–33.

7. INT’L TANKER OWNERS POLLUTION FED’N, OIL TANKER SPILL STATISTICS: 2009, 5 (2009), available at <http://www.itopf.com/information-services/data-and-statistics/statistics/documents/Statspack2009-FINAL.pdf>.

from vessels and pipelines in a typical year.<sup>8</sup> In addition, spill statistics are often misleading because some incidents are not reported in the Coast Guard's database.<sup>9</sup>

Moreover, statistics are no better when considering the rest of the world. For example, while the Deepwater Horizon spill was still ongoing, China experienced its largest oil spill.<sup>10</sup> There are also many oil spills that go largely unnoticed, and the numbers seem to be increasing.<sup>11</sup> Even if the United States and other countries suspended deepwater drilling as a result of the spill, East Timor, Australia and others continue to pursue "ultra-deep" exploration.<sup>12</sup> Despite the experience and the moratorium that followed the spill, deep water drilling is resuming in other wells in the Gulf of Mexico.<sup>13</sup> Further, British Petroleum will start drilling soon in the Mediterranean<sup>14</sup> and in the Arctic Ocean.<sup>15</sup> Finally, the worst has yet to come: Brazil is drilling deeper than the BP Deepwater Horizon oil rig and with fewer precautions.<sup>16</sup>

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8. *Oil Spills*, FUEL ECONOMY.GOV, <http://www.fueleconomy.gov/feg/oilspills.shtml> (last visited Oct. 1, 2011).

9. RAMSEUR, *supra* note 6, at 32.

10. Cara Anna, *China Oil Spill Doubles in Size, Called 'Severe Threat,'* ASSOCIATED PRESS, (July 21, 2010, 4:02 PM), <http://www.msnbc.msn.com/id/38337393/>.

11. See Joe Brock, *Africa's Oil Spills are Far from U.S. Media Glare*, REUTERS (May 18, 2010, 1:49 PM), <http://www.reuters.com/article/idUSLDE64G12X>. "[I]nternational media has largely ignored the latest incidents . . . in Nigeria, where the public can only guess how much oil might have been leaked." *Id.*

12. *East Timor Considers Deep Oil Drilling*, PERTH NOW (July 26, 2010, 9:09 AM), <http://www.perthnow.com.au/business/east-timor-considers-deep-oil-drilling/story-e6frg2r3-1225896947807>.

13. *US Clears More Deepwater Oil Drilling in Gulf*, SEATTLE TIMES, (Mar. 12, 2011, 9:24 AM), [http://seattletimes.nwsources.com/html/business/technology/20110312us\\_clears\\_more\\_deepwater\\_oil\\_drilling\\_in\\_gulf.html](http://seattletimes.nwsources.com/html/business/technology/20110312us_clears_more_deepwater_oil_drilling_in_gulf.html).

14. Monica Ricci Sargentini, *La Bp Trivellerà in Libia a 600 km dalla Sicilia*, CORRIERE DELLA SERA, July, 25, 2010 at 13 (It.), available at [http://archiviostorico.corriere.it/2010/luglio/25/trivellera\\_Libia\\_600\\_dalla\\_Sicilia\\_co\\_9\\_100725006.shtml](http://archiviostorico.corriere.it/2010/luglio/25/trivellera_Libia_600_dalla_Sicilia_co_9_100725006.shtml).

15. Andrew E. Kramer & Clifford Krauss, *Russia Embraces Offshore Arctic Drilling*, N.Y. TIMES, Feb. 16, 2011, at B1.

16. John Vidal, *UK Backing Loans for 'Risky' Offshore Oil Drilling in Brazil*, GUARDIAN (June 30, 2010, 11:34 AM) <http://www.guardian.co.uk/environment/2010/jun/30/uk-loans-brazil-offshore-drilling>.

The platform is now operating 125km off the coast of Brazil in 1,798 metres (5,900 feet) of water—deeper than BP's Deepwater rig that exploded in April and led to the disastrous oil spill in the Gulf of Mexico. . . . [T]he 14-page environment report prepared by the [bank financing the drilling operations] makes no mention of blowouts or the equipment needed to prevent them. Ministers have edited out all ECDG's comments assessing the risks involved in deep-sea drilling in the Atlantic.

*Id.*; see also Editorial, *Obama Underwrites Offshore Drilling*, WALL ST. J., Aug. 18, 2009, at A16.

In other words, the problem is more than compelling. The risk is that the environmental damage will be irreversible. Oil has played, and still plays, a fundamental role in the world's economy.<sup>17</sup> But times are changing.<sup>18</sup> Alternative feasible sources of energy exist<sup>19</sup>—renewable, less dangerous, and, most importantly, environment-friendly energy sources.<sup>20</sup> Still, oil maintains its supremacy mainly because of its low cost.<sup>21</sup> However, oil's low cost depends on nobody being held accountable for the environmental damages produced by oil drilling.<sup>22</sup> Nowadays, different theories are raised to support the petroleum companies' liability.<sup>23</sup> Still, the United States system owns in its arsenal one of the most powerful weapons to fight the oil plague.<sup>24</sup>

This article will show that the common law doctrine of strict liability for abnormally dangerous activities constitutes the best way to remedy and to prevent further oil spills from occurring. Part II will analyze the issue of whether federal preemption thwarts the application of state tort law. Part III will generally describe the doctrine of abnormally dangerous activities and its application in Florida. Finally, Part IV will argue that offshore oil drilling is an abnormally dangerous activity.

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17. See John W. Schoen, *BP Spill Clouds Future of U.S. Drilling*, MSNBC.COM (May 28, 2010, 9:36 AM), [http://www.msnbc.msn.com/id/37389981/ns/business-oil\\_and\\_energy/](http://www.msnbc.msn.com/id/37389981/ns/business-oil_and_energy/).

18. See *id.*

19. Sharon Begley, *How Quickly We Forget*, NEWSWEEK (May 7, 2010), <http://www.newsweek.com/2010/05/07/how-quickly-we-forget.html>.

20. *Id.*

21. See *id.*

22. See David Rosenberg, *The Judicial Posner on Negligence Versus Strict Liability: Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 120 HARV. L. REV. 1210, 1216 (2007) ("Under strict liability, firms price their products to include not only the costs of production and reasonable care, as they would under the negligence rule, but also the cost of accidents from unavoidable residual risk."); see also Ruwantissa Abeyratne, *The Deepwater Horizon Disaster—Some Liability Issues*, 5 TUL. MAR. L.J. 125, 127 (2010).

23. Abeyratne, *supra* note 22, at 127. "At the time of writing, questions continued to emerge as to who was liable for the spill, and it was reported that the United States Department of Justice opened both civil and criminal investigations into the occurrence." *Id.*

24. See *id.* at 128, 149 (starting the analysis on oil spill liability with the acknowledgment that "[t]he United States is a common law jurisdiction," and then concluding that a defendant's liability "could be determined on the basis of fault liability or strict liability.").

## II. A VALID COMMON LAW CLAIM

### A. A Preliminary Issue: Why Common Law Should Not Be Preempted

An issue preliminary to the present discussion concerns federal preemption. The Supremacy Clause of the Constitution states that federal law “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”<sup>25</sup> Thus, pursuant to the Constitution, federal law could preempt the application of the state common law, frustrating any chance to establish tort liability.<sup>26</sup> Historically, federal and state laws have supplemented the common law standards of liability in many instances.<sup>27</sup> Congress has regulated oil pollution through piecemeal legislation,<sup>28</sup> and entrusted federal agencies have enacted a large body of regulations to supplement those rules.<sup>29</sup>

However, even when federal law regulates harmful activity through extensive and comprehensive prohibitions, state common law can maintain its fundamental role of “gap filler.”<sup>30</sup> In particular, there are compelling reasons why the common law of torts should not be preempted.<sup>31</sup> First, tort law provides an alternative basis to recover both compensatory and punitive damages, even when relief would be unavailable under statutory law.<sup>32</sup> Moreover, common tort law operates to protect different—but complementary—

25. U.S. CONST. art. VI, cl. 2.

26. CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 917-21 (1st Sess. 1992). Article VI states that the federal law “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” *Id.*

27. William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1742 (1992). “For example, the Federal Water Pollution Control Act provides for strict liability for clean-up costs . . .” *Id.* (footnote omitted).

28. See Ambrose O. O. Ekpu, *Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria*, 24 DENV. J. INT’L L. & POL’Y 55, 65 (1995). The author lists several federal statutes: the Resource Conservation and Recovery Act (RCRA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Clean Water Act (CWA); Outer Continental Shelf Lands Act (OCSLA); Oil Pollution Act (OPA); Safe Drinking Water Act (SDWA); Coastal Zone Management Act (CZMA); Trans-Alaska Pipeline Authorization Act (TAPAA); Migratory Bird Treaty Act (MBTA); Deepwater Port Act (DPA); and the Ports and Waterways Safety Act (PWSA). *Id.* at 65 n.51.

29. *Id.* At a federal level, a non-exclusive list includes the Environmental Protection Agency, the Department of Transportation (including the Coast Guard), the Army Corps of Engineers, the Department of Interior, and the Minerals Management Service. *Id.* at 65 n.54.

30. Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1673 (2009).

31. See *id.*

32. *Id.*

interests than public law, such as morality, reciprocity, and most importantly, distributive justice.<sup>33</sup>

Finally, preserving common law remedies may promote economic efficiency.<sup>34</sup> Tort liability forces the purveyors of risky activities to bear the cost of harm caused by the activity.<sup>35</sup> The companies engaged in abnormally dangerous activities will spread such costs by raising the prices of their products.<sup>36</sup> That would make the consumers aware of the true costs of production, including the environmental costs, and enable them to make informed purchasing decisions.<sup>37</sup> When damage awards make the existing practice too expensive, the producer is motivated either to improve the product or take the product off the market.<sup>38</sup> Considering the importance of petroleum in our society, it is unlikely that oil companies would choose the latter option; it is more than fair, however, to force such companies to pay for the harm caused while pursuing their profits.<sup>39</sup>

The foregoing was underlined in *United States v. Tex-Tow, Inc.*,<sup>40</sup> where the Court of Appeals for the Seventh Circuit, upholding a penalty for an oil spill, observed:

[T]he party engaged in the potentially polluting enterprise is in the best position to estimate the risk of accidental pollution and plan accordingly, as by raising its prices or purchasing insurance. Economically, it makes sense to place the cost of pollution on the enterprise . . . which statistically will cause pollution and in fact does cause pollution.<sup>41</sup>

Accordingly, imposing common law strict liability has the collateral effect of requiring oil companies to account for the harm produced by their

33. *Id.* (stating that “[s]ocietal norms of reciprocity, distributive justice, morality, and punishment for careless or malicious deeds undergird tort law”) (footnote omitted).

34. Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 194 (1985).

35. Zellmer, *supra* note 30, at 1673.

36. *See id.*; *see also* David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95, 101 (2005) (identifying the threat of liability as an important source of market discipline).

37. Glicksman, *supra* note 34, at 194; Zellmer, *supra* note 30, at 1673–74.

38. Zellmer, *supra* note 30, at 1674.

39. *See* Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 718 (1965). “Activities are made more expensive, and thereby less attractive, to the extent of the accidents they cause. In the extreme cases they are priced out of the market.” *Id.*

40. 589 F.2d 1310 (7th Cir. 1978).

41. *Id.* at 1314–15 (footnotes omitted).

activities, with the final, auspicious result of rendering the alternative energy sources more feasible.<sup>42</sup> Based on the foregoing, the applicability of the common law should not be preempted.

### B. *The Rules for Preemption*

It is a well-established principle of constitutional law that “any state law . . . which interferes with or is contrary to federal law, must yield.”<sup>43</sup> This principle makes no distinction between federal statutes and federal regulation by a government agency; federal regulations have the same preemptive effect as federal statutes when they are enacted according to the congressional mandate.<sup>44</sup> However, under preemption principles it appears crystal clear that neither federal law nor federal regulation would preempt Florida tort law in this case.

Federal pre-emption may be either expressed or implied.<sup>45</sup> Express preemption results when the federal legislation contains explicit pre-emptive language.<sup>46</sup> In the absence of such express language, the Supreme Court of the United States has distinguished two types of implied preemption.<sup>47</sup> Field preemption—when the “federal regulation is ‘so pervasive . . . that Congress left no room for the States to supplement it,’”<sup>48</sup> and conflict preemption—when compliance with both the federal and the state regulation would be physically impossible,<sup>49</sup> or when application of the state law would interfere with the realization of the full purpose and objectives of Congress.<sup>50</sup>

The congressional purpose, then, is the “ultimate touchstone.”<sup>51</sup> Where there is an overlap between federal and state law, however, the latter is presumed valid “unless [preemption] was the clear and manifest purpose of Congress.”<sup>52</sup> Thus, this presumption must be rebutted to preempt a state

42. See Calabresi, *supra* note 39, at 716 (“Treating the problems of accident law in terms of activities rather than in terms of careless conduct is the first step toward a rational system of resource allocation.”).

43. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

44. *Fid. Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153–54 (1982).

45. *Gade*, 505 U.S. at 98.

46. See *id.*

47. *Id.*

48. *Id.* (citing *De La Cuesta*, 458 U.S. at 153).

49. *Id.* (citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

50. *Gade*, 505 U.S. at 98 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

51. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

52. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).



law.<sup>53</sup> Preempting a common law theory of recovery is usually more difficult.<sup>54</sup> Finally, the result seems easier when the federal law contains an express savings clause, designed to leave to the states the power to regulate the matter.<sup>55</sup>

Oil polluters invoked the foregoing principles as a protection from liability for oil spills in interstate waters; however, courts have correctly chosen to preserve state law remedies.<sup>56</sup>

### C. *No Federal Statutes Overcome the Presumption Against Preemption*

#### 1. Clean Water Act

The first statute to consider is the Clean Water Act (CWA). Section 1321(b)(3) of CWA prohibits any person from discharging into or upon waters of the United States any harmful quantity of oil.<sup>57</sup> Violation of the prohibition or failure to comply with the federal government's directives regarding cleanup operations triggers liability for civil penalties.<sup>58</sup> However, nothing in the Act expressly preempts state law; in fact, the contrary is true. CWA contains an explicit saving clause that prevents any interpretation precluding state authority.<sup>59</sup> As written, CWA is only an alternative channel to seek recovery.<sup>60</sup> Express preemption, then, has to be excluded.

53. *See id.*

54. *See United States v. Texas*, 507 U.S. 529, 534 (1993). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

55. *See Zellmer*, *supra* note 30, at 1660.

56. *Id.* at 1678.

57. *See* 33 U.S.C. § 1321(b)(3) (2006).

58. *Id.* § 1321(b)(6)(A)(i)–(ii).

59. *Id.* § 1321(o)(2). This section specifically addresses oil spills; under the title "[L]ocal authority not preempted" states:

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel . . . onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil . . . or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State . . . from imposing any requirement or liability with respect to the discharge of oil . . . into any waters within such State, or with respect to any removal activities related to such discharge.

*Id.*

60. *In re Complaint of Allied Towing Corp.*, 478 F. Supp. 398, 403 (E.D. Va. 1979) (concluding that nothing in CWA "conflicts with or otherwise preempts any state statute . . . imposing liability" nor "limit the amount of that liability," but "merely provides the states with an alternative federal remedy" assuring the preservation of "the natural resources of this country"); *accord Baker v. Hazelwood (In re Exxon Valdez)*, 270 F.3d 1215, 1231 (9th Cir.

Any attempt to imply preemption will lead to a similar conclusion. Congress did not intend CWA penalties for water pollution to occupy the entire field of pollution remedies.<sup>61</sup> Through its saving clause, CWA was designed to maintain the common law theories.<sup>62</sup> Thus, there is no field preemption.<sup>63</sup> Moreover, the common law does not conflict with the federal regulation, the former providing an easier way to punish the same harmful conduct.<sup>64</sup> First, it is not physically impossible to comply with both.<sup>65</sup> In fact, strict liability under common law will enter into play only when the statute is already violated by an unlawful oil spill. Second, applying the doctrine of abnormally dangerous activities to oil spills aims at the same purpose that CWA tries to obtain.<sup>66</sup> The principal purpose of this section is to deter harmful oil spills.<sup>67</sup> Such a goal will be accomplished, rather than obstructed, by considering deepwater oil drilling an abnormally dangerous activity.<sup>68</sup> Finally, the legislative history indicates a lack of congressional intent to preempt state law.<sup>69</sup> Accordingly, CWA should not preempt the state common law.

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2001) (“[T]he Clean Water Act does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights.”).

61. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2619 (2008).

62. See *id.* (CWA is “expressly geared to protecting ‘water,’ ‘shorelines,’ and ‘natural resources’” and was not intended to “eliminate *sub silentio* oil companies’ common law duties to refrain from injuring the bodies and livelihoods of private individuals.”).

63. *Id.*

64. See *In re Complaint of Allied Towing Corp.*, 478 F. Supp. 398, 403 (E.D. Va. 1979).

65. See *id.*

66. See *infra* Part III.

67. Puerto Rico v. S.S. Zoe Colocotroni, 456 F. Supp. 1327, 1350 (D.P.R. 1978), *aff’d in part and vacated in part* by 628 F.2d 652 (1st Cir. 1980) (citing United States v. Atl. Richfield Co., 429 F. Supp. 830 (E.D. Pa. 1977) *aff’d sub nom.* United States v. Gulf Oil Corp., 573 F.2d 1303 (3d Cir. 1978)); *Atl. Richfield Co.*, 429 F. Supp. at 837 (“Congressional purpose . . . was to impose a standard of conduct higher than that related just to economic efficiency”); see 33 U.S.C. § 1321(b)(1) (2006); see also United States v. Oswego Barge Corp. (*In re Complaint of Oswego Barge Corp.*), 673 F.2d 47, 48 (2d Cir. 1982) (The “only purpose [of the oil spill cleanup provisions of this section] is to create a precise remedy solely for the United States to recover specified damages pursuant to a carefully devised formula.”).

68. See Wash. Suburban Sanitary Comm’n v. Cae-Link Corp., 622 A.2d 745, 758 (Md. 1993). “To the extent that the action does not otherwise thwart the goal of the [CWA], the savings clause does preserve state law remedies.” *Id.* at 756.

69. For instance, the Senate Report of the 1977 CWA amendments, in the relevant part, contains the following comments:

The committee considered amendments to section 311 to establish liability for damages occurring outside the jurisdiction of any State as a result [of] an oilspill, including compensation for income loss due to damages to property or natural resources. A related amendment creating a new compensation fund . . . was also considered. The committee deferred action on these proposals and will consider them as part of the comprehensive oilspill liability legisla-

This rationale was followed by the appellate court in the Exxon Valdez oil spill.<sup>70</sup> The jury awarded compensatory and punitive damages to fishermen and landowners injured by the oil spill under Alaskan law.<sup>71</sup> Since OPA does not retroactively apply to spills before 1990, Exxon argued that CWA and federal admiralty law preempted common law damages awards.<sup>72</sup> The Ninth Circuit considered CWA savings clause and left the private tort claims intact.<sup>73</sup> The Supreme Court affirmed.<sup>74</sup> Some of the same reasons apply when considering the next statute.

## 2. Oil Pollution Act

As a response to the Exxon Valdez wreck in 1989, which caused an oil spill of eleven million gallons into the coastal waters of Alaska, Congress enacted the Oil Pollution Act (OPA) in 1990.<sup>75</sup> OPA substantially expanded the existing regulation concerning oil spills.<sup>76</sup> It also imposed strict liability for parties responsible for oil spills.<sup>77</sup> In enacting OPA, preemption was the most discussed point.<sup>78</sup> In the last version of the OPA, Congress included two savings clauses almost identical to those contained in CWA.<sup>79</sup> Thus,

Nothing in [the OPA] shall . . . be construed . . . as preempting the authority of any State . . . from imposing any additional liability or requirements with respect to the discharge of oil or . . . any removal activities in connection with such a discharge,<sup>80</sup>

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tion. In that context, the provision of liability for damages and a compensation fund which does not preempt [s]tate liability requirement would be appropriate.

S. REP. No. 95-370, at 65 (1977), *reprinted in* 1997 U.S.C.C.A.N. 4326.

70. *See Zellmer, supra* note 30, at 1679.

71. *Baker v. Hazelwood (In re Exxon Valdez)*, 270 F.3d 1215, 1225 (9th Cir. 2001).

72. *In re Exxon Valdez*, 270 F.3d at 1226, 1228.

73. *See id.* at 1231.

74. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633–34 (2008). The Court remanded the case to remit the award to the “punitive-to-compensatory ratio of 1:1.” *Id.* at 2634.

75. 33 U.S.C. §§ 2701–2720 (2006); *Exxon Shipping Co.*, 128 S. Ct. at 2613.

76. Michael D. Driscoll, Note, United States v. Massachusetts: *Federal Preemption of State Oil Spill Statutes*, 32 TUL. MAR. L.J. 607, 611 (2008).

77. 33 U.S.C. § 1321(b)(7)(A); *see Driscoll, supra* note 76, at 611.

78. S. REP. No. 101-94, at 17 (1989). Preemption was discussed “more than any other single issue” by the Senate Environment and Public Works Committee. *Id.*; *see also Russell v. Randle, The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects*, 21 ENVTL. L. REP. 10119, 10133 (1991).

79. *See* 33 U.S.C. § 2718(a), (c).

80. *Id.* § 2718(a).

And,

Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or any State . . . to impose additional liability or additional requirements; or to impose, or to determine the amount of, any fine or penalty . . . for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.<sup>81</sup>

Since its enactment, federal courts have rejected OPA preemption of common law tort claims for damages to natural resources.<sup>82</sup> In *United States v. Locke*,<sup>83</sup> the Supreme Court ultimately interpreted the scope of the savings clauses.<sup>84</sup> The unanimous Court limited the state power to regulations imposing additional liability relating to oil spills.<sup>85</sup> The Court reasoned:

Placement of the saving clauses in Title I of OPA suggests that Congress intended to preserve state laws of a scope similar to the matters contained in Title I of OPA, not all state laws similar to the matters covered by the whole of OPA or to the whole subject of maritime oil transport. The evident purpose of the saving clauses is to preserve state laws which, rather than imposing substantive regulation of a vessel's primary conduct, establish liability rules and financial requirements relating to oil spills.<sup>86</sup>

Finally, the Court also acknowledged that it has “upheld state laws imposing liability for pollution caused by oil spills” and specified that the decision “preserves this important role for the States, which is unchallenged here.”<sup>87</sup> By coincidence, the cite was to a Florida case: *Askew v. American*

81. *Id.* § 2718(c).

82. *See, e.g.*, *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127, 1133 (D. Or. 2001); *Williams v. Potomac Elec. Power Co.*, 115 F. Supp. 2d 561, 565 (D. Md. 2000); *Dostie Dev., Inc. v. Arctic Peace Shipping Co.*, No. 95-808-CIV-J-MMP, 1996 WL 866119, at \*3 (M.D. Fla. Aug. 14, 1996); *Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436, 1447–48 (E.D. Va. 1996) (rejecting plaintiff's argument that the OPA allowed recovery in excess of the statutory limit and concluding that the OPA preserves state law claims for those damaged by the spill but not for other responsible parties seeking contribution claims from third parties).

83. 529 U.S. 89 (2000).

84. *Id.* at 105–06.

85. *Id.* at 106.

86. *Id.* at 105.

87. *Id.* at 106 (citing *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 332 (1973)).

*Waterways Operators, Inc.*,<sup>88</sup> in which the Supreme Court of the United States held that the Federal Water Quality Improvement Act did not preempt state law, because of two similar saving clauses.<sup>89</sup> The court explained that:

[T]here need be no collision between the Federal Act and the Florida Act because . . . the Federal Act presupposes a coordinated effort with the States, and any federal limitation of liability runs to 'vessels,' not to shore 'facilities.' That is one of the reasons why the Congress decided that the Federal Act does not pre-empt the States from establishing either 'any requirement or liability' respecting oil spills.<sup>90</sup>

At the time of the *Askew* decision, OPA had not been enacted yet; however, the Court applied the same rationale in *Locke* and refused implied preemption.<sup>91</sup> In sum, the Court's view of OPA's saving clauses does allow state law—including state common law—as a supplemental source of liability for oil spills.<sup>92</sup> Accordingly, although it is worth noting that British Petroleum is facing, among others, a lawsuit filed under CWA by three environmental groups of citizens for the Deepwater Horizon oil spill,<sup>93</sup> neither CWA nor OPA preempts state common law.<sup>94</sup>

### III. THE DOCTRINE OF ABNORMALLY DANGEROUS ACTIVITY

#### A. *Ultrahazardous Strict Liability in the United States*

##### 1. *Rylands v. Fletcher*: The Seminal Case

Strict liability for ultrahazardous activities was first established in the English case *Rylands v. Fletcher*.<sup>95</sup> The idea set forth in *Rylands* is simple: Someone conducting an activity on his own property, "which he knows will be mischievous if it gets on his neighbour's," must pay for the damage

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88. 411 U.S. 325 (1973).

89. *Id.* at 328–29.

90. *Id.* at 336.

91. *See* United States v. Locke, 529 U.S. 89, 105–06 (2000); *Askew*, 411 U.S. at 336.

92. *Locke*, 529 U.S. at 105.

93. *Environmental Groups Sue BP Under Clean Water Act*, CIRCLE OF BLUE (June 7, 2010), <http://www.circleofblue.org/waternews/2010/world/north-america/environmental-groups-sue-bp-under-clean-water-act/>.

94. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008); *see also* *Locke*, 529 U.S. at 105.

95. *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (H.L.) (appeal taken from England).

“which ensues if he does not succeed in confining it to his own property.”<sup>96</sup> In other words, some activities are so risky that those who engage in them will be liable for the consequences of loss of control over the activities, regardless of whether they were carried on without wrongful conduct.<sup>97</sup>

Ironically, *Rylands* itself involved a spill; the defendant’s reservoir flooded on to the plaintiff’s adjoining land.<sup>98</sup> The defendant was not negligent, but the Court found the defendant strictly liable, stating:

[T]he true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.<sup>99</sup>

After an initial hostility to the *Rylands* principle, American courts began to adopt the doctrine, imposing strict liability even in absence of negligence.<sup>100</sup> In the earliest cases applying *Rylands*, strict liability involved two components: first, the abnormal danger of certain activities;<sup>101</sup> and second, the fairness of imposing the cost for the harm resulting from the activity on the actor rather than on unrelated parties.<sup>102</sup>

Those components were still more evident in the first decision applying strict liability for oil drilling.<sup>103</sup> In *Green v. General Petroleum Corp.*,<sup>104</sup>

96. *Id.* at 340.

97. See Kevin Case, Note, *Tanks in the Streets: SUVs, Design Defects, and Ultra-hazardous Strict Liability*, 81 CHI.-KENT L. REV. 149, 177 (2006).

98. *Rylands*, 3 L.R.E. & I. App. at 332.

99. *Fletcher v. Rylands*, (1866) 1 L.R. Exch. 265, 279. On appeal, the opinion was affirmed, with additional language referring to the defendant’s “non-natural use” of his land. See *Rylands*, 3 L.R.E. & I. App. at 339.

100. Compare *Brown v. Collins*, 53 N.H. 442, 448 (1873) (holding that no “legal principle can throw so serious an obstacle in the way of progress and improvement”), with *Green v. Gen. Petroleum Corp.*, 270 P. 952, 956 (Cal. 1928) (holding “in all fairness” that oil drilling was an inherently hazardous activity). “Typical early cases involved the storing of nitroglycerin, exploding oil wells, and blasting operations.” Case, *supra* note 97, at 178.

101. See, e.g., *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 54 N.E. 528, 531 (Ohio 1899) (considering the dangerousness of storing nitroglycerine).

102. See, e.g., *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510, 514 (2d Cir. 1931). In *Exner*, the court stated:

When . . . the defendant, though without fault, has engaged in the perilous activity of storing . . . explosive[s] for use in his business . . . there is no justification for relieving it of liability, and . . . the owner of the business, rather than a third person who has no relation to the explosion, other than that of injury, should bear the loss.

*Id.*

103. See Case, *supra* note 97, at 179; see also Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 264 (1987) (sug-

where the plaintiff's injury was caused by the defendant's exploding oil well, the Supreme Court of California imposed liability on the defendant, stating:

Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act . . . and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done.<sup>105</sup>

Several years later, in *Luthringer v. Moore*,<sup>106</sup> the same court explained its holding in *Green* stating, "The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy."<sup>107</sup>

Accordingly, both components were present in the court's analysis, and the court eventually held in favor of the plaintiff.<sup>108</sup> The fairness component was more explicit in *Green* than in the previous cases.<sup>109</sup> However, the First Restatement of Torts and the Second Restatement of Torts apparently restrained the breadth of the doctrine, making its application more unpredictable.<sup>110</sup>

## 2. The Restatement (First) of Torts: Common Activities

The First Restatement of Torts embraced strict liability for ultrahazardous activity.<sup>111</sup> An activity was "ultrahazardous" when it "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which

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gesting a theory of enterprise liability: "[S]trict liability properly applies to business enterprises that benefit from hazardous activities and can spread losses among the whole community.").

104. 270 P. 952 (Cal. 1928).

105. *Green*, 270 P. at 955.

106. 190 P.2d 1 (Cal. 1948).

107. *Id.* at 8.

108. *Green*, 270 P. at 956.

109. *See Case*, *supra* note 97, at 179.

110. *See id.*; *see also* Nolan & Ursin, *supra* note 103, at 265.

111. RESTATEMENT OF TORTS § 519 (1938). This section provided:

[O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

*Id.*

cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.”<sup>112</sup>

By excluding the activities of “common usage” from strict liability, even when ultrahazardous, the Restatement limited the expansion of the doctrine to new areas, such as driving cars and operating railroads.<sup>113</sup> The doctrine’s practical significance was reduced to a minimum.<sup>114</sup> However, in the decades after the promulgation of the Restatement, courts revitalized the strict liability principle, circumventing the “common usage” restraint.<sup>115</sup>

The courts did so by narrowly defining the activity under adjudication and considering the overall circumstances in such a way as to make it “uncommon.”<sup>116</sup> An example of the former is *Luthringer v. Moore*,<sup>117</sup> where the Supreme Court of California imposed strict liability on a defendant who engaged in pest control.<sup>118</sup> The plaintiff was harmed during the fumigation activities as a result of a gas leak.<sup>119</sup> The court applied the First Restatement in defining fumigation as a “specialized activity” and considered the fact that professional fumigators were “few in number.”<sup>120</sup>

Similarly, a “common usage” activity becomes abnormally dangerous in particular circumstances.<sup>121</sup> For example, in *Koos v. Roth*,<sup>122</sup> the Supreme Court of Oregon distinguished agricultural field burning from everyday backyard burning.<sup>123</sup> Both fire related activities involved “destruction of raw material by oxidation,” but the “scale” and the “location” made the basic act of burning leaves ultrahazardous; field burning was found abnormally dangerous because it created hazards “beyond the ordinary risks associated with common uses of fire.”<sup>124</sup> Thus, an otherwise ordinary activity may be deemed abnormally dangerous when it is carried out in an ultrahazardous manner.<sup>125</sup> Thus, in *In re Tutu Wells Contamination Litigation*,<sup>126</sup> strict liability was proper even though service stations were considered a matter of common usage; the District Court of the Virgin Islands stated:

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112. *Id.* § 520.

113. *See* Nolan & Ursin, *supra* note 103, at 266.

114. *See* Case, *supra* note 97, at 180.

115. *See* Nolan & Ursin, *supra* note 103, at 270.

116. *See* Case, *supra* note 97, at 193.

117. 190 P.2d 1 (Cal. 1948).

118. *Id.* at 9.

119. *Id.* at 3.

120. *Id.* at 8.

121. Case, *supra* note 97, at 193.

122. 652 P.2d 1255 (Or. 1982).

123. *Id.* at 1265.

124. *Id.*

125. *See* Case, *supra* note 97, at 193.

126. 846 F. Supp. 1243 (D.V.I. 1993).



It may well be, as Defendants contend, that operation and ownership of service stations is a matter of common usage and that it is not unusual today to find service stations in residential areas. But where, as here, the risk of seepage is contamination of the area's precious and limited water supply, locating the storage tanks above the aquifer created an abnormally dangerous and inappropriate use of the land.<sup>127</sup>

The court considered, but ultimately ignored, the commonality of the activity in light of the surrounding circumstances.<sup>128</sup> The "common usage" limitation, then, was emptied of its substantial significance.<sup>129</sup>

### 3. The Restatement (Second) of Torts: Confusion with Negligence

Finally, the Second Restatement of Torts modified the doctrine at least in its formal aspects.<sup>130</sup> First, it labeled the activities "abnormally dangerous," as opposed to the older "ultrahazardous."<sup>131</sup> Second, under the reformulation, strict liability must be imposed after considering six factors that determine whether the activity is abnormally dangerous.<sup>132</sup> An activity is abnormally dangerous when some of the following factors exist:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;

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127. *Id.* at 1269.

128. *See id.*

129. *See Case, supra* note 97, at 180; *see also* Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 615 (1999). "[T]aken literally, the provision rarely limits the range of activity qualifying as ultrahazardous." *Id.*

130. RESTATEMENT (SECOND) OF TORTS §§ 519–520 (1977). *See Boston, supra* note 129, at 616–24.

131. RESTATEMENT (SECOND) OF TORTS § 520 (1977). According to the drafters, "A combination of the factors . . . is commonly expressed by saying that the activity is 'ultrahazardous,' or 'extra-hazardous.'" *Id.* § 520 cmt. h. The American Law Institute modified the name of the doctrine, but the substance remained the same. *See Cities Serv. Co. v. State*, 312 So. 2d 799, 802 (Fla. 2d Dist. Ct. App. 1975). In this article, however, the three terms are used interchangeably.

132. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.<sup>133</sup>

The first four clauses are generally derived from the First Restatement; only factors (e) and (f) seem to be new.<sup>134</sup> But while the restyling appears to restrict the application of strict liability because of the two additional factors, the test is substantially unchanged.<sup>135</sup> The fulfillment of just a few of the factors is still enough to find an activity abnormally dangerous.<sup>136</sup> Additionally, the Second Restatement reduced the burden on the plaintiff to prove a risky activity by using “reasonable care” in factor (c) instead of the previous “utmost care” and requiring the courts to consider the “extent to which” the activity is not a matter of common usage, “rather than categorically excluding common activities.”<sup>137</sup>

Moreover, as both courts and commentators have noted, the new factors (e) and (f) suggest a theory more similar to negligence than to strict liability.<sup>138</sup> While not expressly rejecting the Restatement, some courts and commentators have shown hostility toward this approach ignoring those two factors when engaging in an abnormally dangerous activity analysis.<sup>139</sup>

For instance, in *Koos v. Roth*,<sup>140</sup> the Supreme Court of Oregon held that a farmer burning his fields was strictly liable for the harm caused to a neighbor by the fire.<sup>141</sup> Acknowledging the “appropriateness” of agricultural field burning to its location, the court expressly declined to consider factor (e), stating that “an activity is not otherwise immune from strict liability because

133. *Id.*

134. Compare RESTATEMENT (SECOND) OF TORTS §§ 519–20 (1977), with RESTATEMENT (FIRST) OF TORTS §§ 519–20 (1938).

135. See Case, *supra* note 97, at 180.

136. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977). The Restatement explains that “the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. . . . [I]t is not necessary that each of them be present, especially if others weigh heavily.” *Id.*

137. Case, *supra* note 97, at 181–82; see also Nolan & Ursin, *supra* note 103, at 272.

138. See Nolan & Ursin, *supra* note 103, at 272–73; Boston, *supra* note 129, at 624; Case, *supra* note 97, at 182.

139. See, e.g., *Koos v. Roth*, 652 P.2d 1255 (Or. 1982); *Yukon Equip., Inc. v. Fireman’s Fund Ins. Co.*, 585 P.2d 1206 (Alaska 1978); see also Boston, *supra* note 129, at 662.

140. 652 P.2d 1255 (Or. 1982).

141. *Id.* at 1261, 1263.

it is ‘appropriate’ in its place.”<sup>142</sup> Likewise, the “value of the dangerous activity to the community” was irrelevant to the court’s decision.<sup>143</sup> The court emphasized that the proper inquiry was “who shall pay for harm that has been done”<sup>144</sup> and further noted that “the person conducting the activity can choose whether or not to chance the potentially costly consequences . . . [but] [t]he potential victim cannot make that choice.”<sup>145</sup> Accordingly, factor (f) was ignored, and the touchstone was again the fairness of requiring a person who engages in the risky activity to pay the costs.<sup>146</sup>

Further illustrating this approach, in *Enos Coal Mining Co. v. Schuchart*,<sup>147</sup> the Supreme Court of Indiana rejected the argument that the defendant’s blasting activity was “necessary” and stated, “A business should bear its own costs, burdens, and expenses of operation, and these should be distributed by means of the price of the resulting product and not shifted, particularly, to small neighboring property owners for them to bear alone.”<sup>148</sup>

In *Siegler v. Kuhlman*,<sup>149</sup> the Supreme Court of Washington considered the transportation of gasoline abnormally dangerous.<sup>150</sup> The court focused on the nature of risks created by the tanker, referring to its “uniquely hazardous characteristics” and “extraordinary dangers deriving from sheer quantity, bulk, and weight, which enormously multiply its hazardous properties.”<sup>151</sup> The court also considered fairness, “putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible.”<sup>152</sup> As it appears, the two components of the original doctrine as established in *Rylands* were present in each of these cases.<sup>153</sup>

Further, the Supreme Court of Washington in *Langan v. Valicopters, Inc.*,<sup>154</sup> expressly criticized factor (f), writing:

As a criterion for determining strict liability, this factor has received some criticism among legal writers. . . . § 520(f) is not a

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142. *Id.* at 1263.

143. *Id.* at 1261.

144. *Id.*

145. *Koos*, 652 P.2d at 1262–63.

146. *See id.*, at 1262.

147. 188 N.E.2d 406 (Ind. 1963).

148. *Id.* at 408.

149. 502 P.2d 1181 (Wash. 1972) (en banc).

150. *Id.* at 1184.

151. *Id.*

152. *Id.* at 1185.

153. *See Case*, *supra* note 97, at 184.

154. 567 P.2d 218 (Wash. 1977) (en banc).

true element of strict liability: “The justification for strict liability, in other words, is that useful but dangerous activities must pay their own way.”

There is no doubt that pesticides are socially valuable in the control of insects, weeds and other pests. They may benefit society by increasing production. Whether strict liability or negligence principles should be applied amounts to a balancing of conflicting social interest [of] the risk of harm versus the utility of the activity. In balancing these interests, we must ask who should bear the loss caused by the pesticides.

In the present case, the Langans were eliminated from the organic food market for 1973 through no fault of their own. If crop dusting continues on the adjoining property, the Langans may never be able to sell their crops to organic food buyers. Appellants, on the other hand, will all profit from the continued application of pesticides. Under these circumstances, there can be an equitable balancing of social interests only if appellants are made to pay for the consequences of their acts.<sup>155</sup>

The *Langan* court declared that the test of the Restatement, as adopted in *Siegler*, was met; it listed all six factors, but substantially disregarded them.<sup>156</sup> Fairness, then, was still determinative.

Finally, before turning to the adoption of the doctrine in Florida, the confusion created by the application of factor (c) of the Restatement deserves some clarifying words. Factor (c) requires the “inability to eliminate the risk of the activity by exercising reasonable care.”<sup>157</sup> Apparently, following the rationale set forth in *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*,<sup>158</sup> some argued that factor (c) should be interpreted as depriving the doctrine of abnormally dangerous activities of any significance.<sup>159</sup>

155. *Langan*, 567 P.2d at 223 (citations omitted).

156. *Id.* at 222.

157. See RESTATEMENT (SECOND) OF TORTS § 520 (c) (1977). The Restatement requires the “inability to eliminate the risk by the exercise of reasonable care,” but this proposition is doubtful. See *id.* Every activity creates at least some minimal risk. This is recognized in the change from “utmost care” in the First Restatement to “reasonable care” in the Second Restatement and by the stated rationale that “probably no activity, unless . . . perhaps the use of atomic energy, from which all risks of harm could not be eliminated by the taking of all conceivable precautions” *Id.* cmt. h. Thus, as discussed below, the standard of care is immaterial. The proper focus then is on the dangerousness of the activity carried on.

158. 916 F.2d 1174 (7th Cir. 1990).

159. See generally Boston, *supra* note 129; Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFFALO L. REV. 245 (2008).

In *Indiana Harbor Belt*, a railroad tank car containing acrylonitrile leaked and spilled the dangerous chemical.<sup>160</sup> The Court of Appeals for the Seventh Circuit had to decide whether a spill of dangerous chemicals occurring during transportation should be subject to strict liability.<sup>161</sup> Writing for the court, Judge Posner reversed the district court's decision; finding strict liability,<sup>162</sup> Posner stated the now famous principle: "The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being . . . nonnegligent, there is no need to switch to strict liability."<sup>163</sup> Then, Posner suggested that the six factors be analyzed in the following order of importance: (c), (e), (f), (a), (b), and finally (d).<sup>164</sup> Ultimately, the Court concluded in favor of a finding of negligence, because the plaintiff offered "no reason . . . for believing that a negligence regime [was] not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars."<sup>165</sup> Subsequent to this decision, at least one commentator argued that factor (c) requires the impossibility of proving negligence.<sup>166</sup>

However, considering as the first issue whether the defendant could have eliminated the risk by using reasonable care should not automatically end the analysis and preclude strict liability.<sup>167</sup> On the contrary, as several authors have pointed out, "the unavoidability of the danger may suggest that those conducting the activities are better situated than victims to spread, avoid, and internalize this type of loss."<sup>168</sup> Explaining the importance of the six factors, the Court in *Indiana Harbor Belt* also recognized that some accidents could be avoided merely by using care and that these situations require moving the activity to another location or reducing its scale:

By making the actor strictly liable-by denying him in other words an excuse based on his inability to avoid accidents by being more

160. *Ind. Harbor Belt R.R.*, 916 F.2d at 1175 (7th Cir. 1990).

161. *Id.* at 1177.

162. *Id.* at 1183.

163. *Id.* at 1179.

164. *See id.*

165. *Ind. Harbor Belt R.R.*, 916 F.2d at 1179.

166. *See, e.g.*, Boston, *supra* note 129, at 632–33.

167. Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 366 (1996) ("The imposition of strict liability should be driven by the central goals of this doctrine. If the defendant is a suitable party from the standpoint of loss-spreading, loss reduction, and loss allocation, then strict liability may be appropriate. Moreover, even when the materialization of a risk may have been reasonably preventable, that fact may not be readily provable by the victim, especially in violent occurrences or highly unusual activities.").

168. *Id.* at 366; *see also* Jones, *supra* note 27, at 1752; Rosenberg, *supra* note 22, at 1216.

careful—we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.<sup>169</sup>

Thus, Judge Posner himself centered the analysis on the extent to which an activity, even when undertaken with all reasonable care, maintains an unavoidable residual risk requiring the recourse to strict liability.<sup>170</sup> Now, an activity can be risky either because it is hard to control or because the effects threatened by a loss of control are extremely dangerous.<sup>171</sup> Focusing on the level of care the defendant might have used can be misleading and lead to absurd outcomes.<sup>172</sup> How can an activity that is abnormally dangerous in the absence of negligence become less dangerous when the defendant is negligent? Thus, the emphasis must be on the magnitude of the damages that may ensue if the activity goes wrong, which generally remains equal regardless of the defendant's conduct.<sup>173</sup>

Further, another deficiency of the negligence regime is that the proof is generally unavailable to the injured party.<sup>174</sup> The *Indiana Harbor Belt* court itself was unable to identify whose carelessness caused the spill.<sup>175</sup> Requiring a casual plaintiff to wait for each defendant “to point a finger at the others in an effort to shift the blame for an accident” would be profoundly un-

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169. *Indiana Harbor Belt R.R.*, 916 F.2d at 1177.

170. Rosenberg, *supra* note 22, at 1213.

171. *See Case*, *supra* note 97, at 188.

172. *Id.*

173. *See id.* at 189. As characterized by the district court, the spill in Indiana Harbor Belt “forced the temporary evacuation of about 3000 people” and “contaminated not only the ground, but also the water beneath it, thus threatening the water supply” of several communities. *Ind. Harbor Belt R.R. v. American Cyanamid Co.*, 662 F. Supp. 637 (N.D. Ill. 1987), *rev'd*, 916 F.2d 1174 (7th Cir. 1990).

174. Jones, *supra* note 27, at 1752 (noting that “[i]f a bystander had been injured in *Indiana Harbor*, she would have had to trace this carload of acrylonitrile from the supply of the railroad car by North American Car Corporation, to the loading of the car in Louisiana by American Cyanamid, to the movement of the car to Chicago by the Missouri Pacific Railroad, to the handling of the car in the yard of the switching road, Indiana Harbor.”).

175. *Id.* at 1752–53 (“The court was of the opinion that the leak of acrylonitrile ‘was caused by carelessness—whether that of the North American Car Corporation in failing to maintain or inspect the car properly, or that of Cyanamid in failing to maintain or inspect it, or that of the Missouri Pacific when it had custody of the car, or that of the switching line itself in failing to notice the ruptured lid, or some combination of these possible failures of care.’”).

fair.<sup>176</sup> Rather, strict liability provides incentives for reducing the risks at the outset, resulting in more certain accountability in case of an accident.<sup>177</sup>

Several courts have understood and applied this interpretation, properly focusing the analysis on the dangers imposed by the activity, coupled with the victim's lack of relation with such activity.<sup>178</sup> This also seems to be consistent with the spirit of the Restatement, that explained with admittedly unclear language, "The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care."<sup>179</sup>

In short, the doctrine of abnormally dangerous activities—as reformulated by the Restatement—can be, and was in fact construed by the great majority of jurisdictions, as reduced to two basic themes.<sup>180</sup> First, the dangers created to the community by engaging in the risky activity under particular circumstances; and second, the fairness of imposing liability on those engaged in such risky activity for their own benefit.<sup>181</sup> Florida courts have followed this approach.

#### B. *Abnormally Dangerous Activities in Florida*

The Supreme Court of Florida adopted the *Rylands* doctrine in the case of *Pensacola Gas Co. v. Pebley*.<sup>182</sup> In *Pebley*, the defendant gas company

176. *Id.* at 1753.

177. As suggested by one author:

Cases might of course arise in which the negligence rule would eliminate all risk. But there is no need to choose between strict liability and negligence in such cases because both would produce identical deterrent effects: the defendant would invest in reasonable care to avoid all risk of accident. At the other extreme, cases might arise in which the negligence rule would not eliminate all risk, but the defendant lacks options to reduce activity level, even by raising price. The two rules again produce the same deterrent effect: the defendant would invest in reasonable care, leaving a residuary of unavoidable risk. In short, courts do not need to choose between rule regimes because strict liability works in all cases: it will be effective when it is needed and do no harm when it is not.

Rosenberg, *supra* note 22, at 1217.

178. *See, e.g.*, *United States v. Stevens*, 994 So. 2d 1062, 1066 (Fla. 2008) ("Strict liability does not concern itself with whether the actor exercised reasonable care."); *Laterra v. Treaster*, 844 P.2d 724, 731 (Kan. Ct. App. 1992) (considering suicide with gas an abnormally dangerous activity even if the defendant-suicidal was negligent); *Siegler v. Kulhman*, 502 P.2d 1181, 1185 (Wash. 1972) (en banc) (disregarding anyone's negligence in light of the extreme danger posed by hauling gas on the highway).

179. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977).

180. *See Case, supra* note 97, at 187.

181. *See id.*

182. 5 So. 593 (Fla. 1889).

polluted the plaintiff's water as a result of its operations.<sup>183</sup> The court indirectly applied the *Rylands* principles to solve the case, stating that:

The appellant gas company had the right to use the water in and about the gas-works as they pleased, but they had no right to allow the filthy water to escape from their premises, and to enter the land of their neighbors. It was the duty of the company to confine the refuse from their works so that it could not enter upon and injure their neighbors, and if they did so it was done at their peril; the escape of the refuse filthy water being in itself an evidence of negligence on the part of the gas company.<sup>184</sup>

Even if the court imposed a sort of strict liability, the negligence language used by the court blurred the extent of the two components revealed in the English case.<sup>185</sup> Eighty-six years later, however, in *Cities Service Co. v. State*,<sup>186</sup> the Florida's Second District Court of Appeal imposed strict liability over a defendant that caused vast damages by accidentally discharging phosphate lime into the Peace River.<sup>187</sup> The court held, "The doctrine of *Rylands v. Fletcher* should be applied in Florida."<sup>188</sup> Expressly adopting *Rylands*, the court applied the doctrine as reformulated by the Restatement of Torts, section 519 and 520.<sup>189</sup> Before reaching the six factors analysis, the court stated:

[E]ven the non-negligent use of one's land can cause extensive damages to a neighbor's property. Though there are still many hazardous activities which are socially desirable, it now seems reasonable that they pay their own way. It is too much to ask an innocent neighbor to bear the burden thrust upon him as a consequence of an abnormal use of the land next door.<sup>190</sup>

Thus, the court first perceived that an innocent person should not suffer the consequences of the abnormally dangerous activity.<sup>191</sup> After briefly balancing the six factors, the court further admitted its reliance on one factor in particular: the great risk of harm.<sup>192</sup> In its words, the court was "impressed

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183. *Id.* at 595.

184. *Id.*

185. *See id.*

186. 312 So. 2d 799 (Fla. 2d Dist. Ct. App. 1975).

187. *Id.* at 800.

188. *Id.* at 801.

189. *Id.* at 802-03.

190. *Id.* at 801.

191. *Cities Serv. Co.*, 312 So. 2d at 801.

192. *Id.* at 803.



by the magnitude of the activity and the attendant risk of enormous damage.”<sup>193</sup> Additionally, the Florida court reasoned that one who carries on the risky activity should bear the loss, rather than the victim, who had no relation to the activity other than being injured by it.<sup>194</sup> Thus, the court seemed to recognize the importance of the two elements: dangerousness of the activity and fairness of accounting the carrier for the risks.<sup>195</sup>

The fairness component was also considered in *Bunyak v. Clyde J. Yancey and Sons Dairy, Inc.*,<sup>196</sup> where the court applied the Restatement analysis.<sup>197</sup> In *Bunyak*, liquefied cow manure flowed from defendant’s farm onto plaintiff’s land.<sup>198</sup> The trial court refused to impose strict liability, and the Florida’s Second District Court of Appeal reversed.<sup>199</sup> Remarkably, after discussing the six factors and finding strict liability proper, the court returned to emphasize the fairness component, writing at the very end of its decision: “The conclusion is inescapable that no matter what theory is invoked by a plaintiff whose property is damaged by the lawful activities conducted upon or conditions existing on the land of another, the key consideration will always be that useful but dangerous activities must pay their own way.”<sup>200</sup>

In *Great Lakes Dredging and Dock Co. v. Sea Gull Operating Corp.*,<sup>201</sup> although rejecting plaintiff’s contention that strict liability was proper, the Florida court focused its analysis again on the magnitude of harm, considering that it was “[c]entral to [the abnormally dangerous activity] doctrine . . . that the ultrahazardous or abnormally dangerous activity poses some physical . . . danger to persons or property in the area, which danger must be of a certain magnitude and nature.”<sup>202</sup> Other decisions followed the same rationale.<sup>203</sup> Further, in *United States v. Stevens*,<sup>204</sup> the Supreme Court of Florida recently reaffirmed the immateriality of the standard of reasonable care in the abnormally dangerous activity analysis.<sup>205</sup> The court expressly stated that

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193. *Id.*

194. *See id.*

195. *See id.*

196. 438 So. 2d 891 (Fla. 2d Dist. Ct. App. 1983).

197. *Id.* at 894–95.

198. *Id.* at 893.

199. *Id.* at 893, 896.

200. *Id.* at 896.

201. 460 So. 2d 510 (Fla. 3d Dist. Ct. App. 1984).

202. *Id.* at 513.

203. *See, e.g., Old Island Fumigation, Inc. v. Barbee*, 604 So. 2d 1246, 1248 (Fla. 3d Dist. Ct. App. 1992) (per curiam) (holding that fumigation was an “ultrahazardous activity”).

204. 994 So. 2d 1062 (Fla. 2008).

205. *Id.* at 1066 n.2.

“[s]trict liability does not concern itself with whether the actor exercised reasonable care.”<sup>206</sup>

### C. *Defenses*

Finally, we have to direct some of our attention to an issue common to each jurisdiction: defenses that might exclude strict liability.<sup>207</sup> The modern statutory trend is to set aside those defenses.<sup>208</sup> Even when imposing strict liability, federal statutes limit the defenses available to the plaintiff.<sup>209</sup> State statutes are even more rigid and disallow all or most defenses.<sup>210</sup> According to the Restatement, one who engages in an abnormally dangerous activity “is subject to strict liability for the resulting harm although it is caused by the unexpected (a) innocent, negligent or reckless conduct of a third person, or (b) action of an animal, or (c) operation of a force of nature.”<sup>211</sup> Following this trend, in *Old Island Fumigation, Inc. v. Barbee*,<sup>212</sup> Florida’s Third District Court of Appeal stated:

Any alleged negligence by a third party does not free the fumigation company from liability. In a case involving . . . an ultra-hazardous activity, this court held that “[u]nder Florida law, a defendant is still liable for the consequences of his conduct even though some other cause contributed to the same damage.”<sup>213</sup>

Still applying the Restatement, the court agreed that when the risk results in an injury, “it is immaterial that the harm occurs through the unexpected action of a human being, an animal or a force of nature . . . irrespective of whether the action of the human being [who partakes in] the abnormally dangerous activity harmful is innocent, negligent or even reckless.”<sup>214</sup> The modern trend, and especially the Second Restatement approach, seems correct.<sup>215</sup> In the absence of some fault on the part of the victim, strict liability

206. *Id.*

207. *See Jones, supra* note 27, at 1743.

208. *Id.*

209. *See* Christopher B. Kende, *Development And Presentation Of The Pollution Victims' Claim*, 5 U.S.F. MAR. L.J. 203, 210 (1993) (“The [contributory] negligence of the United States . . . is no longer available under OPA.”).

210. *Jones, supra* note 27, at 1743.

211. RESTATEMENT (SECOND) OF TORTS § 522 (1977).

212. 604 So. 2d 1246 (Fla. 2d Dist. Ct. App. 1992) (per curium).

213. *Id.* at 1248 (citations omitted).

214. RESTATEMENT (SECOND) OF TORTS § 522 cmt. a (1977). However, the Restatement expressed no opinion on deliberately harmful behavior by third parties. *See id.*

215. *Jones, supra* note 27, at 1744.

ty justly requires anyone conducting an abnormally dangerous activity to bear the burden of the resulting accident.<sup>216</sup>

At this point, the groundwork has been laid to show that offshore oil drilling is an abnormally dangerous activity, especially because it is performed in circumstances that render it extremely dangerous, such as drilling in deep water without sufficient technology.

#### IV. DEEPWATER OIL DRILLING IS ABNORMALLY DANGEROUS

When considering oil related activities, jurisdictions are split.<sup>217</sup> On one end of the spectrum, some courts have refused to consider mere transportation of petroleum an abnormally dangerous activity.<sup>218</sup> However, at least one jurisdiction deemed the danger created by an oil spill during such transportation an “extraordinary” risk of harm.<sup>219</sup>

On the other end, strict liability was found appropriate in oil drilling situations similar to blasting activities.<sup>220</sup> As noted in *Green v. General Petroleum Co.*, an oil well exploded during drilling operations, causing damages to the plaintiff.<sup>221</sup> The Supreme Court of California found strict liability “regardless of any element of negligence either in the doing of the act or in the construction, use, or maintenance of the object or instrumentality that may have caused the injury.”<sup>222</sup> Of course, accidents like the one in the Gulf of Mexico are comparable to this kind of conduct.

In the middle category, very few courts have yet to decide whether oil drilling—regardless of the location—is an abnormally dangerous activity.<sup>223</sup>

216. *See id.* at 1755.

217. *See Smith v. Mid-Valley Pipeline Co.*, No. 3:07-CV-13-KKC, 2007 WL 1309612, at \*3 (E.D. Ky. May 4, 2007). “[N]o Kentucky case has extended strict liability to the transmission of oil through pipelines.” *Id.* (quoting *Cantrell v. Marathon Ashland Pipe Line, LLC*, No. 03-298, 2005 WL 1570652, at \*3 (E.D. Ky. June 30, 2005)).

218. *Smith*, 2007 WL 1309612 at \*3.

219. *See, e.g., In re Complaint of Weeks Marine, Inc.*, No. 04-494, 2005 WL 2290283, at \*6 (D. N.J. Sep. 20, 2005). “The Court does not find that [plaintiff] has demonstrated that the risk of harm imposed on the community by [operating a crane] is ‘extraordinary,’ in contrast, for example, to the danger posed by oil spills or the transporting of hazardous substances.” *Id.*

220. *Green v. General Petroleum Co.*, 270 P. 952, 956 (Cal. 1928).

221. *Id.* at 953.

222. *Id.* at 955.

223. *See EOG Resources, Inc. v. Badlands Power Fuels, LLC*, 673 F. Supp. 2d 882, 900 n.3 (D. N.D. 2009). “Only the Tenth Circuit Court of Appeals has squarely answered the question of whether oil well drilling is an ultrahazardous activity.” *Id.* (citing *Hull v. Chevron U.S.A., Inc.*, 812 F.2d 584, 586 (10th Cir. 1987) (finding “that oil well drilling is an ultrahazardous activity”). *Cf. Union Oil Co. v. Oppen*, 501 F.2d 558, 563 n.3 (9th Cir. 1974) (“We decline to reach the issue of whether defendants’ oil drilling operations constitute an

It is time, then, to consider each of the six factors' applicability to deep water oil drilling. At the end of the analysis—which will keep an eye on Florida law—it will appear both logical and just to consider the petroleum companies accountable for such a remunerative, yet dangerous, activity. Under Florida law, oil drilling performed in deepwater must be subject to strict liability as matter of law.<sup>224</sup> And such conclusion is supported by those decisions that have already considered oil drilling as an ultra hazardous activity—regardless the location.<sup>225</sup>

A. *It Is Likely to Produce Great Harm: Factors (a) and (b)*

“The greater the risk of an accident . . . the stronger is the case for strict liability.”<sup>226</sup> Factors (a) and (b) can be considered together.<sup>227</sup> In conjunction, these two factors represent the dangerousness of the activity—probably the most relevant part.<sup>228</sup> In *Cities Service Company v. State*,<sup>229</sup> Florida's Second District Court of Appeal dwarfed all the other factors, emphasizing “the magnitude of the activity and the attendant risk” of harm and explained why such magnitude was great:

The impounding of billions of gallons of phosphatic slimes behind earthen walls which are subject to breaking even with the exercise of the best of care strikes us as being both ‘ultrahazardous’ and ‘abnormally dangerous,’ as the case may be.

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‘ultrahazardous activity’ and express no opinion as to the applicability of this doctrine to the facts presently before us.”)

224. See RESTATEMENT (SECOND) OF TORTS § 520, cmt. f (1977). When the activity's “dangers and inappropriateness for the locality” are great enough, “[the carrier] should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.” *Id.* But see *SKF Farms v. Superior Court*, 200 Cal. Rptr. 497, 499 (Cal. Ct. App. 1984) (“[B]y its very nature, the issue of whether an activity is ultrahazardous cannot be decided on demurrer.”); *Travelers Indemnity Co. v. City of Redondo Beach*, 34 Cal. Rptr. 2d 337, 344 (Cal. Ct. App. 1994) (“Given the peculiar facts . . . the location of the drilling activity and the importance of the breakwater to the safety . . . we cannot say, as a matter of law, that respondents' drilling was not ultrahazardous.”).

225. See, e.g., *Franks v. Indep. Prod. Co.*, 96 P.3d 484, 492 (Wyo. 2004) (citing *Pan American Petroleum Corp. v. Like*, 381 P.2d 70 (Wyo. 1963) (Wyoming law recognizes that the drilling of an oil and gas well is an ultrahazardous activity, a dangerous agency); *But see Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548, 550 (5th Cir. 1987) (concluding that drilling operations are not ultrahazardous).

226. *Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990).

227. See *Boston*, *supra* note 129, at 655.

228. See *Case*, *supra* note 97, at 186.

229. 312 So. 2d 799 (Fla. 2d Dist. Ct. App. 1975)

This is not clear water which is being impounded. Here, Cities Service introduced water into its mining operation which when combined with phosphatic wastes produced a phosphatic slime which had a *high potential for damage to the environment*. If a break occurred, it was to be expected that extensive damage would be visited upon property many miles away. In this case, the damage, in fact, extended almost to the mouth of the Peace River, which is far beyond the phosphate mining area described in the Cities Service affidavit. We conclude that the Cities Service slime reservoir constituted a non-natural use of the land such as to invoke the doctrine of strict liability.<sup>230</sup>

Considering the potential dangerousness of the activity as the main point of the analysis, the court focused on the environmental damage.<sup>231</sup> The other factors appeared almost irrelevant once the risk of harm resulting from the activity was on a large enough scale.<sup>232</sup> However, strict liability is proper either when there is little chance of great harm or when such a risk is high but the magnitude of harm threatened is low.<sup>233</sup>

In the case of oil drilling, both the risk that an oil spill will occur and the magnitude of the harm that results once it occurs are gigantic. As to the risk that some damage will result, as previously discussed, oil spills are more than common.<sup>234</sup> As to the severity of harm, during an interview with the Financial Times, Tony Hayward, British Petroleum's Chief Executive Officer, acknowledged that the company considered the blowout a "low probability, high impact event."<sup>235</sup> Thus, the magnitude of harm in the case of an oil spill may be monumental, and often irreparable.<sup>236</sup> Indeed, BP spilled more than one hundred and forty million gallons into the Gulf waters and killed eleven people as a result of the rig's explosion.<sup>237</sup>

230. *Id.* at 803 (emphasis added).

231. *See id.*

232. Boston, *supra* note 129, at 656.

233. *See id.*

234. *See* Ivanovich & Hays, *supra* note 3 and accompanying text.

235. Sean Alfano, *BP CEO Tony Hayward Admits Company Didn't Have The Right Tools to Stop Gulf Oil Spill*, N.Y. DAILY NEWS, June 3, 2010, [http://www.nydailynews.com/news/national/2010/06/03/2010-06-03\\_bp\\_ceo\\_tony\\_hayward\\_admits\\_company\\_didnt\\_have\\_the\\_right\\_tools\\_to\\_stop\\_gulf\\_oil\\_s.html](http://www.nydailynews.com/news/national/2010/06/03/2010-06-03_bp_ceo_tony_hayward_admits_company_didnt_have_the_right_tools_to_stop_gulf_oil_s.html).

236. *See generally* Bruce B. Weyhrauch, *Oil Spill Litigation: Private Party Lawsuits and Limitations*, 27 LAND & WATER L. REV. 363 (1992); Ekpu, *supra* note 28, at 61.

237. *See Tracking the Oil Spill in the Gulf*, N.Y. TIMES, Aug. 2, 2010, <http://www.nytimes.com/interactive/2010/05/01/us/20100501-oil-spill-tracker.html>.

"The total amount spilled was estimated to be 140 million gallons . . . of crude oil." *Id.*

In particular, deepwater oil drilling creates a risk upon the environment, human health, and some economic activities that are water related.

### 1. Effect on Aquatic Life

Oil pollution affects the aquatic life in different ways. First, the consequences of large oil spills are directly lethal to marine organisms like corals,<sup>238</sup> shrimps,<sup>239</sup> and any other kind of animals including birds and mammals.<sup>240</sup> Second, even when life forms are not killed immediately, the oil can indirectly destroy the fauna by impairing fish “feeding efficiency, growth and reproductive rates, survival of offspring, and resistance to diseases.”<sup>241</sup>

Additional known effects are “disturbance of the food chain and ‘direct coating’ which impedes the vital processes of respiration . . . in animals, prevents sunlight penetration to plants, and increases temperature by absorbing solar radiation.”<sup>242</sup> In fact, oil itself can impact coastal plant species by the mere effects of touching and smothering.<sup>243</sup>

Finally, the long-term effects of oil on the marine ecosystem are still unknown.<sup>244</sup> In particular, the exact effects on the deep-sea life from the oil that dissolved below the surface—like the way with which such a dissolution takes place—are “still a mystery.”<sup>245</sup> Nonetheless, when discussing the extent of the environmental damages, scientists concur that oil in water is harmful.<sup>246</sup>

238. See John C. Rudolf, *Deep Underwater, Threatened Reefs*, N.Y. TIMES, June 2, 2010 at A16. “Studies on the effects of oil and chemicals on coral are limited to the shallow-water variety, however. Essentially no research has been conducted on their slow-growing deepwater cousins.” *Id.*

239. Bob Anderson, *Shrimpers Watch Winds; Crisis Persists \*\*\* Concerns Raised About Oil Spreading into Three Lakes*, BATON ROUGE ADVOC., June 15, 2010, at A1.

240. DISASTERS: OIL SPILLS, <http://www.pollutionissues.com/Co-Ea/Disasters-Oil-Spills.html#ixzz0uzKw6lko> (last visited Oct. 1, 2011). “900 bald eagles, 250,000 seabirds, 2,800 sea otters, and 300 harbor seals were killed directly by the Exxon Valdez spill . . . [however,] population-level consequences are difficult to measure.” *Id.*

241. *Id.*

242. Ekpu, *supra* note 28, at 63.

243. Rudolf, *supra* note 238, at A16.

244. *Id.*

245. Justin Gillis & Campbell Robertson, *On the Surface, Gulf Oil Spill Is Vanishing Fast; Concerns Stay*, N.Y. TIMES, July 28, 2010, at A1. See also <http://www.nytimes.com/gwire/2010/08/24/24greenwire-undersea-oil-plume-vanishes-in-gulf-degraded-b-87391.html?pagewanted=all>.

246. See Ekpu, *supra* note 28, at 61–62. “There has not always been a consensus . . . on the exact effects of oil pollution on water. . . . [I]t is generally agreed that petroleum in water is harmful, even though the extent of the harm may not be agreed upon.” *Id.*

## 2. Effect on Human Health

Likewise, there is some dispute about the potential effects of the spilled oil on human health.<sup>247</sup> However, some damages are evident.<sup>248</sup> First, for instance, a direct result of the spill: Eleven workers died on April 20, 2010, when the Deepwater Horizon went up in flames.<sup>249</sup> Second, the effects arising from the exposure to the oil spilled: Many of the chemicals extracted from crude oil are “carcinogenic, mutagenic and teratogenic.”<sup>250</sup> While brief contact with small quantities of light crude oil is not harmful, ingesting a minimal amount of oil will cause “upset stomach, vomiting, and diarrhea.”<sup>251</sup> Long-term exposures can affect the central nervous system.<sup>252</sup> A 2007 study following cleanup damages after the 2002 Prestige oil spill in Galicia, Spain, showed that respiratory symptoms might arise years after the exposure.<sup>253</sup> Skin and respiratory disorders were also common symptoms after the Exxon Valdez oil spill, in 1989.<sup>254</sup> Other potential long-term risks include lung, kidney, liver, and DNA damage.<sup>255</sup> Significant steps have been taken to increase the knowledge about the longer-term effects of oil exposure.<sup>256</sup> Finally, it is difficult to estimate the catastrophic impact—mental, physical, and emotional—that the spill will have on the people currently living in the Gulf, and on the generations to come.<sup>257</sup> Overall, few would disagree that the risks posed on the human health by oil spills are abnormally dangerous.

247. See Shari Roan, *Gulf Oil Spill: Human Health Effects Debated*, L.A. TIMES, June 4, 2010, 5:09 PM) <http://latimesblogs.latimes.com/greenspace/2010/06/experts-speculate-on-likely-human-health-effects-of-oil-spill.html>.

248. See generally Walsh & THE PETROLEUM INDUSTRY *infra*.

249. Brian Walsh, *Assessing the Health Effects of the Oil Spill*, TIME (June 25, 2010), <http://www.time.com/time/health/article/0,8599,1999479,00.html>.

250. Ekpu, *supra* note 28, at 64 n.47. Benzene, toluene, and butylene are three of the most dangerous.

251. Noaki Schwartz & Matthew Brown, *Gulf Oil Spill Sickness: Cleanup Workers Experience Health Problems, Complain of Flulike Symptoms*, HUFFINGTON POST, June 3, 2010, [http://www.huffingtonpost.com/2010/06/03/gulf-oil-spill-sickness-c\\_n\\_598816.html](http://www.huffingtonpost.com/2010/06/03/gulf-oil-spill-sickness-c_n_598816.html).

252. *Id.*

253. Melly Alazraki, *The Oil Spill and Human Health: More Questions Than Answers*, DAILY FIN., June 26, 2010, [http://www.dailyfinance.com/story/health-effects-of-oil-spills-on-humans-more-questions-than-an/19530364/?icid=sphere\\_copyright](http://www.dailyfinance.com/story/health-effects-of-oil-spills-on-humans-more-questions-than-an/19530364/?icid=sphere_copyright).

254. See *id.* “[O]nly seven spills have been studied of the hundreds around the world.” *Id.*

255. *Id.*

256. Alazraki, *supra* note 253. “[T]he Department of Health and Human Service has set aside \$10 million to track oil spill-related illnesses in states along the Gulf Coast and study cleanup workers.” *Id.*

257. Walsh, *supra* note 249. As a consequence of the catastrophe, “[t]hese are people in a serious crisis.” *Id.* For instance, an Alabama fisherman with an oil-spill cleanup job for BP, was recently found “dead from a self-inflicted gunshot wound.” *Id.*

### 3. Economic Loss

Finally, oil spills result in the impairment of large zones of water that were once used for recreation, navigation, or livelihood.<sup>258</sup> Thus, depending on its size, an oil spill may affect commercial fishermen, beach owners and users,<sup>259</sup> tourist booking agents, waterfowl guides and photographers,<sup>260</sup> fishing industry employees, and commercial fish processors.<sup>261</sup> Water contamination also impairs recreational activities like swimming or water surfing.<sup>262</sup> And the list is absolutely non-exhaustive.

Such economic interests were traditionally unprotected: Strict liability permitted only recovery for harm to persons, real property, or chattels.<sup>263</sup> Logically, these damages should have been included within the scope of strict liability because they directly result from the abnormally dangerous activity.<sup>264</sup> However, some courts limited the imposition of strict liability for recovering economic loss.<sup>265</sup>

In *Curd v. Mosaic Fertilizer, LLC*,<sup>266</sup> the Supreme Court of Florida solved the issue consistently with the letter of the Restatement.<sup>267</sup> In *Curd*, the defendant spilled pollutants into Tampa Bay.<sup>268</sup> The plaintiffs-fishermen sued for both negligence and strict liability, claiming loss of income or profit.<sup>269</sup> The court first explained the applicability of the economic loss rule, stating:

[T]he economic loss rule in Florida is applicable in only two situations: (1) where the parties are in contractual privity . . . or (2) where the defendant is a manufacturer or distributor of a defective

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258. See Ekpu, *supra* note 28, at 61.

259. *Id.*

260. *Id.*

261. See Weyhrauch, *supra* note 236, at 372–75.

262. *Id.* at 372.

263. David C. McIntyre, Note, *Tortfeasor Liability For Disaster Response Costs: Accounting For The True Cost of Accidents*, 55 *FORDHAM L. REV.* 1001, 1030–32 (1987).

264. *Id.* The Restatement apparently supports this conclusion, distinguishing between “harm” and “physical harm” and applying strict liability to “harm.” *Id.* Therefore, liability for economic loss should not be excluded by the rule. See *id.*

265. *In re TMI Litig. Gov'tl Entities Claims*, 544 F. Supp. 853, 857–58 (M.D. Pa. 1982), *vacated sub nom.* *Pennsylvania v. Gen. Pub. Utils. Corp.*, 710 F.2d 1171 (3d Cir. 1983) (holding that “purely economic losses” are not recoverable on a strict liability theory without a showing that the losses flowed from harm to persons, land or chattel).

266. 39 So. 3d 1216 (Fla. 2010).

267. *Id.* at 1228.

268. *Id.* at 1218.

269. *Id.* at 1219.



product which damages itself but does not cause personal injury or damage to any other property.

Clearly neither the contractual nor products liability economic loss rule is applicable to this situation. . . . Rather we have plaintiffs who have brought traditional negligence and strict liability claims against a defendant who has polluted Tampa Bay and allegedly caused them injury. . . . [T]he economic loss rule does not prevent the plaintiffs from bringing this cause. The plaintiffs' causes of action are controlled by traditional negligence law . . . and by strict liability principles.<sup>270</sup>

Then, the court went on to apply the principle to the plaintiffs' negligence claim and found "a protectable economic expectation in the marine life that qualifies as a property right."<sup>271</sup> Finally, the court held in favor of the plaintiffs, concluding:

[D]ischarge of the pollutants constituted a tortious invasion that interfered with *the special interest of the commercial fishermen to use those public waters to earn their livelihood*. We find this breach of duty has given rise to a cause of action sounding in negligence. We note, however, that in order to be entitled to compensation for any loss of profits, the commercial fishermen must prove all of the elements of their causes of action, including damages.<sup>272</sup>

It must be noted that although the court avoided the issue of strict liability, it cited to two oil spill cases in reaching its conclusion.<sup>273</sup> The court's holding, then, seems to be broader than it appears. Whether *Curd* would protect the special interest of surfers and swimmers—in addition to that of fisherman—is an issue beyond the scope of this article. Nevertheless, at this point, it seems clear that economic losses must be taken into account when considering the severity of the harm threatened by engaging in the activity.

Therefore, the magnitude of the risk that either an oil spill will occur or that irreparable damages will result in the event of a spill is enormous and sufficient to justify the enhanced protection provided by strict liability principles.

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270. *Id.* at 1223.

271. *Curd*, 39 So. 3d at 1224.

272. *Id.* at 1228 (emphasis added).

273. *See id.* at 1223–24. *Cf.* *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *Burgess v. M/V Tamano*, 370 F. Supp. 247 (S.D. Me. 1973).

B. *No Standard of Reasonable Care Can Be Exercised: Factor (c)*

Another factor to consider is whether the risk of injury can be avoided through the exercise of reasonable care.<sup>274</sup> One may argue that using reasonable care can eliminate the risks of oil drilling. However, as previously discussed, this is not the proper question because the defendant's conduct is irrelevant in a strict liability analysis.<sup>275</sup> The relevant inquiry is whether the magnitude of the danger is the same regardless of one's fault.<sup>276</sup> Oil drilling is dangerous regardless of whether or not negligence accompanies it. First, it is likely that an oil spill may occur; in fact, it is almost the rule.<sup>277</sup> Second, when such a spill does occur in the deep sea, the resulting harm to the environment—and not only the environment—is intolerable, regardless of any potential negligence. The difficulties in closing the spill increase with the depth.<sup>278</sup> Finally, even an accurate estimation of the real damage becomes hard.<sup>279</sup> Accordingly, the argument against strict liability will likely fail.

C. *The Activity Is Not a Matter of Common Usage: Factor (d)*

The more the activity is customary, the less it is abnormally dangerous. An activity is a matter of common usage when it is habitually “carried on by the great mass of mankind or by many people in the community.”<sup>280</sup> Oil drilling, even when conducted on land or in shallow waters, certainly does not fit within this definition. Thus, this factor also weighs in favor of strict liability.

In any event, as we have seen before, the fact that an activity is a matter of common usage is rarely outcome determinative.<sup>281</sup> The significance of factor (d) can be limited by narrowly defining the activity involved.<sup>282</sup> Simi-

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274. RESTATEMENT (SECOND) OF TORTS § 520(c) (1977).

275. Calabresi, *supra* note 39, at 716.

276. Case, *supra* note 97, at 188.

277. See Ivanovich & Hays, *supra* note 3.

278. See Peter N. Spotts, *Gulf oil spill: Why Is It so Hard to Stop?*, CHRISTIAN SCI. MONITOR, June 8, 2010, <http://www.csmonitor.com/USA/2010/0608/Gulf-oil-spill-Why-is-it-so-hard-to-stop>. See also Kristen Hays, *BP to Test New Cap to Stem Oil Flow*, REUTERS, July 13, 2010, <http://www.reuters.com/article/idUSTRE65O5TA20100713>.

279. See John Collins Rudolf, *On the Surface, Gulf Oil Spill Is Vanishing Fast; Concerns Stay*, N.Y. TIMES, July 27, 2010, [http://www.nytimes.com/2010/07/28/us/28spill.html?\\_r=2&pagewanted=2&hp](http://www.nytimes.com/2010/07/28/us/28spill.html?_r=2&pagewanted=2&hp).

280. RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977).

281. See Boston, *supra* note 129, at 659; Case, *supra* note 97, at 193.

282. To recall, in *Koos v. Roth*, the court distinguished agricultural field burning from everyday backyard burning, applying strict liability to the latter. 652 P.2d 1255, 1265–66 (Or.

larly, an otherwise ordinary activity can be found abnormally dangerous when it is carried out in a dangerous manner.<sup>283</sup> Accordingly, even assuming that oil drilling could be considered an activity of common usage, deepwater oil drilling is certainly not. In fact, while oil is commonly drilled in-land or in coastal waters, offshore deepwater facilities have found their way only recently. In the Gulf of Mexico there are approximately three thousand and five hundred drilling wells and production platforms, yet few reach a depth of one thousand feet.<sup>284</sup> With a vertical depth of 35,050 feet (10,680 m) and a measured depth of 35,055 feet (10,685 m), the Deepwater Horizon is the deepest oil rig in history.<sup>285</sup> Not only was the activity not common, it was actually a world record of uncommonality.<sup>286</sup> This conclusion is completely consistent with the Restatement approach, adopted in Florida: “[A]bnormal dangers arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances.”<sup>287</sup>

It seems apparent that the overall risks produced by drilling in such deeper water are much greater than normal.<sup>288</sup>

#### D. *Off-Shore Oil Drilling Is Inappropriate for the Location*

Conducting an activity in the wrong place can render such activity abnormally dangerous.<sup>289</sup> In Florida, the proper inquiry is whether the activity is a “non-natural” use of the land.<sup>290</sup> However, a different community may turn a dangerous activity, such as oil drilling, into a natural use of the land; this situation occurred, for example, in a few cases of properly conducted operations of oil wells in Texas and Oklahoma.<sup>291</sup> However, even such cases

1982). In *Luthringer v. Moore*, pest control was considered professional fumigation and found abnormally dangerous. 190 P.2d 1, 6–7 (Cal. 1948).

283. See *Case*, *supra* note 97, at 193.

284. Ian Urbina, *In Gulf, It Was Unclear Who Was in Charge of Rig*, N.Y. TIMES, June 5, 2010, <http://www.nytimes.com/2010/06/06/us/06rig.html>.

285. Press Release, Transocean Ltd, Deepwater Horizon Drills World’s Deepest Oil & Gas Well (Sept. 2, 2009) (on file with Nova Law Review).

286. See *id.*

287. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977).

288. See Urbina, *supra* note 284.

289. See Boston, *supra* note 129, at 661; *Case*, *supra* note 97, at 193.

290. See *Cities Serv. Co. v. State*, 312 So. 2d 799, 803 (Fla. 2d Dist. Ct. App. 1975). “The conclusion is, in short, that the American decisions, like the English ones, have applied the principle of *Rylands v. Fletcher*, only to the thing out of place, the abnormally dangerous condition or activity which is not a ‘natural’ one where it is.” *Id.* at 802 (quoting W. PROSSER, THE LAW OF TORTS § 78 510 (4th ed. 1971)).

291. See *Turner v. Big Lake Oil Co.*, 96 S.W. 2d 221 (Tex. 1936); *Tidal Oil Co. v. Pease*, 5 P.2d 389 (Okla. 1931).

are distinguishable. In *Turner v. Big Lake Oil Co.*,<sup>292</sup> the Supreme Court of Texas held that oil drilling was a natural use of land in Texas and refused to impose strict liability for harm caused by the escape of salt water wastes from oil drilling operations.<sup>293</sup> Similarly, in *Tidal Oil Co. v. Pease*,<sup>294</sup> the Supreme Court of Oklahoma found the location for oil drilling operations appropriate.<sup>295</sup> However, the court in *Tidal* stressed that the touchstone for determining the appropriateness of the location is the possibility of injuring others or the land of others.<sup>296</sup> Although this possibility is reduced to a minimum in rural and isolated land areas, engaging in the very same conduct in places where it may affect other people can transform such conduct into an abnormally dangerous activity.<sup>297</sup>

If oil spills in the open sea the risk of harm to third parties is at its greatest; as discussed, the injury would reach a large number of different victims, from landowners to just users of the marine resources.<sup>298</sup> But the reasons why offshore deepwater is inappropriate for oil drilling are more compelling.<sup>299</sup> Not only is deepwater oil drilling more likely to cause accidents,<sup>300</sup> but also the depth of the sea makes solving problems that may arise more difficult.<sup>301</sup> Scientists have compared working in the deep sea to working in space: “It’s a hard place to get to, a tricky space in which to maneuver, and subject to daunting laws of physics.”<sup>302</sup>

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292. 96 S.W.2d 221 (Tex. 1936).

293. *See id.* at 226.

294. 5 P.2d 389 (Okla. 1931).

295. *Id.* at 392–93.

296. *Id.* at 391.

297. *Compare Turner*, 96 S.W.2d at 221 with *Green v. General Petroleum Co.*, 270 P. 952 (Cal. 1928).

The intent and purpose of the act is to prevent persons in the operation of oil and gas wells to deposit oil . . . in streams used by others for watering stock, and . . . from allowing salt water to escape from their wells and flow over the surface of the land of others. To hold that operators could not flow salt water over the surface of land owned by them . . . would result in depriving the owner of land of the right to use it to his own advantage, where such use would in no way harm or injure others.

*Tidal*, 5 P.2d at 392.

298. *See Weyhrauch*, *supra* note 236, at 372.

299. *See generally Oil Spill Casts Doubts on Deep Water Exploration*, *ECON. TIMES*, Jun 13, 2010, <http://economictimes.indiatimes.com/articleshow/6042891.cms>

300. *See id.* “In the future, it is inevitable that technology and risk will increase, not diminish, as ‘easy’ sources of oil are depleted and as the exploration effort moves into new and ever more challenging frontiers.” *Id.*

301. *See Spotts*, *supra* note 278. Siphoning systems used to remedy to the spill have “never been tested at such depths.” *Id.*

302. *Id.*

### E. *The Value of the Activity Does Not Outweigh its Risk: Factor (f)*

How desperate are we for oil? It is undisputed that oil has been the most important source of energy in the world.<sup>303</sup> The Restatement describes this factor as the prosperity the activity provides to the community.<sup>304</sup> However, as we have seen, a Florida court rejected the “value to the community” factor in *Cities Service Co.*, reasoning that one who carries on the risky activity should bear the loss, rather than the victim who had no relation to the activity other than being injured by it.<sup>305</sup> The conclusion is supported by the approach of other jurisdictions considering the issue; many recent cases suggest that the utility to the community is largely irrelevant.<sup>306</sup>

What seems clear is that even after weighing oil’s utility to the community, such utility is largely outweighed by the extraordinary dangers of deepwater oil drilling. BP and other petroleum companies will continue to profit by extracting oil in the deepwater; but the carriers of such risky oil drilling must bear any costs that may result when their activity goes wrong.

As discussed, the Restatement does not require the presence of all six factors;<sup>307</sup> the presence of three to four factors is generally sufficient for a court to impose strict liability.<sup>308</sup> Here, all six factors weigh in favor of considering deep water oil drilling an abnormally dangerous activity. In short, it is an easy case for strict liability.

## V. CONCLUSION

Both water contamination and oil pollution are among the worst threats to the environment that man can produce. Oil spills are almost always within the exclusive control of the companies that operate the wells, and victims can do little to guard against oil pollution or avoid damages resulting from it. When the oil drilling operations are conducted in deep water, the likelihood of harm increases, the resulting damages become monumental, and repairing such damage is arduous, when not impossible. The Deepwater Horizon alone has leaked into the water more than one hundred and forty million gal-

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303. Ekpu, *supra* note 28, at 55; see C. TUGENDGART & A. HAMILTON, OIL: THE BIG BUSINESS 1 (1975) in OPEC BULLETIN 55 (1994).

304. RESTATEMENT (SECOND) TORTS § 520 cmt. f (1977). For example, an oil well may not be considered abnormally dangerous in Texas or Oklahoma because of the importance the oil industry has to the local economy, whereas the same oil well in Indiana or California might be found abnormally dangerous because it is a lesser industry in those areas. *See id.*

305. *See id.*

306. Boston, *supra* note 129, at 665.

307. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977).

308. Case, *supra* note 97, at 194.

lons of oil, and scientists continue to discuss how many more similar spills our planet can endure.

Strict liability provides an incentive for oil companies to take appropriate precautions to avoid such catastrophic events; or, in the least, it requires them to bear the burden of the unavoidable accidents. Further, the doctrine of abnormally dangerous activities appears to be the easiest way to determine oil companies' strict liability—not requiring any showing of the defendant's negligence and disallowing almost every defense.

Consistently applied throughout the United States, the doctrine is applicable regardless of federal statutes that may already impose some sort of liability. Federal law is but one of the many tools that can be used to keep our waters clean. Additionally, state law must coexist and supplement federal law in order to effectively protect the rights of citizens of the United States—and more generally, those who receive a benefit from the sea.

Accordingly, a plaintiff may freely choose to recover under a common law strict liability theory as the simplest and safest way to redress the environmental damage caused by petroleum companies. Pursuant to the doctrine of abnormally dangerous activities, as first established in *Rylands v. Fletcher* and developed by the Restatements of Torts, deep water oil drilling qualifies as an activity that, because of its dangerousness, should be subject to a strict liability regimen.

This is especially true in Florida and in such jurisdictions where courts are willing to consider as primary factors the magnitude of the danger created by the activity and the fairness of making the carrier of the activity liable. In the event of litigation in Florida, the mission will be easier. The risks imposed on society as a result of offshore oil drilling are extreme, and the victims are powerless and faultless with respect to the control and prevention of the damages.

Finally, such a conclusion is strongly supported by those decisions that have already considered oil drilling—regardless of the location—an abnormally dangerous activity. Courts that have decided otherwise did not take into account the actual dangerousness of the enterprise, and they will likely reconsider the issue when faced with the additional risks imposed by the inappropriate location. The Deepwater Horizon oil spill may be the best place to start.