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RECONCEPTUALIZING THE BP OIL SPILL AS *PARENS PATRIAE* PRODUCTS LIABILITY*

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ABSTRACT

The April 20, 2010 explosion and sinking of the *Deepwater Horizon* created an immense environmental catastrophe in the Gulf of Mexico. This Article examines the products liability litigation by Gulf States attorneys general (AGs) against British Petroleum (BP) and BP's products-related cross claims. Alabama's and Louisiana's multidistrict litigation claims for

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products liability, negligence, and punitive damages will be pursuant to their *parens patriae* sovereign powers.

This complex products defect case involves all the big issues in products liability: risk–utility design tests, cause in fact, proximate cause, defenses such as state of the art, the economic loss rule, caps on damages, and punitive damages under federal maritime law. The state AGs bear the burden of demonstrating that Cameron International's blowout preventer (BOP) was defectively designed or contained a manufacturing defect that led to their consequential damages, rather than a superseding cause such as operational errors by BP, Transocean, Halliburton, or some other oil industry defendant supplying equipment or expertise.

This will be the first test of the U.S. Supreme Court's de facto cap that it placed on punitive damages in maritime cases in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). The BOP, possibly the largest moveable object ever implicated in products liability litigation, will be at the center of an epic legal struggle between oil industry defendants over the limits of tort law to supplement deficient federal regulation. Our argument is that the states' *parens patriae* products liability action against BP and other oil industry defendants is necessary so that BP and the other codefendants pay the true costs of deploying allegedly defective products in the perilous subsea drilling and oil exploration industry. Even if the state attorney generals' litigation ultimately settles, Judge Barbier should be praised for creating a legal pathway for future governmental lawsuits to recover public welfare damages based upon products liability rather than the amorphous and ill-fitting nuisance paradigm.

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I. INTRODUCTION

British Petroleum (BP) contracted with Transocean and Halliburton to operate the *Deepwater Horizon* mobile offshore drilling unit (MODU) to drill the Macondo well, which was a deep-sea oil well located in Mississippi Canyon, Block 252, in the Gulf of Mexico.[1] On April 20, 2010, a "blowout of the BP Macondo well and the explosion on the Deepwater Horizon killed 11 workers and resulted in . . . America's largest oil spill ever, with substantial environmental and economic impacts."[2]

> For nearly three months, oil gushed uncontrollably into the Gulf of Mexico. By the time the well was capped in July 2010, the government estimates that nearly 5 million barrels of oil—more than 200 million gallons—had spewed from the well, coating migratory birds, destroying pristine marshes, sullying beaches, and inflicting incalculable damage to the ecosystem of the Gulf.[3]

This enormous environmental disaster is a products liability action, assuming the failure of the blowout preventer (BOP) was due to a design or manufacturing defect. The state attorneys general must prove that a BOP manufacturing or design defect was a substantial cause of the environmental, economic, and other harms caused by the blowout of the Macondo well.[4]

The BP spill rekindles debates about the appropriate role of products litigation in supplementing weak federal regulation of the oil industry. This drilling disaster, the largest in U.S.

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1. John M. Broder, *U.S. Acts to Fine BP and Top Contractors for Gulf Oil Spill*, N.Y. TIMES, Oct. 13, 2011, at A18 (reporting that the Interior Department cited Transocean and Halliburton, BP's two chief contractors, for safety and environmental violations arising out of the operation of the *Deepwater Horizon*).

2. Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf, 75 Fed. Reg. 63,346, 63,354 (Oct. 14, 2010).

3. David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1414 (2011) (footnote omitted).

4. *See* CURRY L. HAGERTY & JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41262, DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 1 (2010), *available at* http://www.fas.org/sgp/crs/misc/R41262.pdf (discussing how the oil spill has opened up a number of congressional investigations into the causes of the blowout, impacts of the spill, and potential liability for damages).

history,[5] was enabled by the failures of a U.S. oil industry that was literally, as well as figuratively, in bed with some of its federal regulators.[6] The catastrophic damage to the "property, livelihoods, wildlife, and a vast array of other interests across the entire Gulf Coast region"[7] has focused public attention on the inadequacies of federal regulation of offshore oil leases.[8]

The regulatory gap that contributed to the BP oil spill was the abyss between the law in the books and the law in action. The Outer Continental Shelf Lands Act (OCSLA), the federal statute governing offshore oil and gas exploration and leasing, provides specific regulations and safety standards for subsea

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5. Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf, 75 Fed. Reg. at 63,354. "The size of the Deepwater Horizon oil plume has eclipsed ExxonValdez to become the largest oil spill in United States history." Complaint at 5, Vo v. BP, P.L.C., No. 4:10-cv-02622 (S.D. Tex. July 23, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 3498, at *7.

6. *Rolling Stone* described the relationship between the Minerals Management Service (MMS) and the oil industry in evocative prose: "When agency staffers weren't joining industry employees for coke parties or trips to corporate ski chalets, they were having sex with oil-company officials." Tim Dickinson, *The Spill, The Scandal, and the President: The Inside Story of How Obama Failed to Crack Down on the Corruption of the Bush Years—and Let the World's Most Dangerous Oil Company Get Away with Murder*, ROLLING STONE (June 8, 2010), *available at* http://www.rollingstone.com/politics/news/the-spill-the-scandal-and-the-president-20100608 ("[President Obama] permitted [the MMS] to rubber-stamp dangerous drilling operations by BP—a firm with the worst safety record of any oil company—with virtually no environmental safeguards, using industry-friendly regulations drafted during the Bush years. [Obama] calibrated his response to the Gulf spill based on flawed and misleading estimates from BP—and then deployed his top aides to lowball the flow rate at a laughable 5,000 barrels a day, long after the best science made clear this catastrophe would eclipse the *Exxon Valdez*."). The industry-friendly MMS and its culture of corruption "rubber-stamp[ed] dangerous drilling operations by BP" that led to the worst environmental disaster in U.S. history on April 10, 2011. *Id.*

7. Fishburn v. BP, PLC, No. 10-0248-WS-C, 2010 WL 2104624, at *1 (S.D. Ala. May 25, 2010) (describing the potential impact of the *Deepwater Horizon* explosion that affected the entire Gulf Coast region).

8. *See* Hari M. Osofsky, *Multidimensional Governance and the BP* Deepwater Horizon *Oil Spill*, 63 FLA. L. REV. 1077, 1097–98 (2011) (observing that the MMS's level of environmental review for the oil well that produced the BP oil spill "has resulted in much public criticism of the regulatory process").

> Following the BP Deepwater Horizon drilling rig blowout and oil spill disaster of April 20, 2010 on the Outer Continental Shelf in the Gulf of Mexico, the [Department of the Interior] began to investigate the disaster's causes and effects, including BP's shocking inability to stop or control the oil eruption that fouled Gulf waters, shores, bays and marshes. These events raised grave concerns about heretofore unrecognized and perhaps currently irremediable dangers involved in deepwater oil and gas drilling. Pending its inquiry, examination and research, the [Department of the Interior], on May 28, 2010, acting under the authority vested in it by the Outer Continental Shelf Lands Act, suspended all deepwater offshore drilling operations in sea depths of more than 500 feet for six months because of their evident threat to the environment.

Hornbeck Offshore Servs., L.L.C. v. Salazar, 396 F. App'x 147, 149 (5th Cir. 2010) (Dennis, J., dissenting).

deep oil drilling and exploration.[9] Congress placed the OCSLA under the jurisdiction of the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), formerly known as the Minerals Management Service (MMS).[10] Congress reorganized BOEMRE into new subagencies[11] "as part of a series of fundamental changes made by the Obama Administration to reform the government's regulation of offshore energy development and the agency responsible for it—while ensuring that responsible oil and gas drilling and production continues on the U.S. Outer Continental Shelf."[12]

President Barack Obama "acknowledged that his administration had failed to reform the Minerals Management Service, the scandal-ridden federal agency that for years had essentially allowed the oil industry to self-regulate."[13] "Instead of cracking down on MMS, as he had vowed to do even before taking office, Obama left in place many of the top officials who oversaw the agency's culture of corruption."[14] An auditor who reviewed the MMS decisions concluded that "[w]hatever [the oil industry] wanted, [it] got. Nothing was being enforced across the board at MMS."[15] President Obama regrets his misplaced faith that the oil giants "had their act together when it came to worst-case scenarios."[16] Litigation against government entities for inadequate regulatory oversight is unlikely to provide any compensation for the victims of the BP oil spill since "[i]t is axiomatic that the United States may not be sued without its consent."[17] Sovereign immunity shields the U.S. President, as well as federal agencies, unless Congress expressly waives immunity, which is improbable. The *Deepwater Horizon* tragedy is a case study of failed federal

9. *See* 43 U.S.C. §§ 1331–1349 (2006).

10. HAGERTY & RAMSEUR, *supra* note 4, at 1, 7.

11. *See* BUREAU OF OCEAN ENERGY MGMT., REG. & ENFORCEMENT, http://www.boemre.gov/ (last visited Apr. 14, 2012) ("On October 1, 2011, the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), formerly the Minerals Management Service (MMS), was replaced by the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) as part of a major reorganization.").

12. Press Release, U.S. Dep't of the Interior, Interior Department Completes Reorganization of the Former MMS (Sept. 30, 2011), http://www.doi.gov/news/pressreleases/Interior-Department-Completes-Reorganization-of-the-Former-MMS.cfm#.

13. Dickinson, *supra* note 6.

14. *Id.*

15. *Id.* (quoting Bobby Maxwell, former auditor of the MMS).

16. *Id*. (quoting President Barack Obama) (internal quotation marks omitted).

17. United States v. Mitchell, 463 U.S. 206, 212 (1983); *see also* Whittle v. United States, 7 F.3d 1259, 1262 (6th Cir. 1993) (noting that federal agencies are immune from tort liability absent an express waiver of sovereign immunity).

regulation and an example of the aphorism that immunity breeds irresponsibility.

The failure of federal oversight leaves the Gulf States attorneys general (AGs) and private claimants with only one avenue of civil recourse against BP and other oil industry defendants. The state governmental entities seek civil recourse on behalf of the countless victims of environmental degradation caused in part by a defective BOP.[18] The out-of-control oil well and the toxic chemical dispersants used to scatter the spilled petroleum[19] created a defective product-related environmental disaster.[20] The BP oil spill released as much oil every four or five days as the "Exxon Valdez spill in 1989, which spewed 10.8 million gallons of crude into Prince William Sound in Alaska."[21]

The BP oil spill has been the subject of a large number of commissioned reports, which concluded that culpability must be shared between numerous oil industry defendants responsible for a variety of failures such as deficient pressure tests, substandard cementing in the capping stage, and operational errors in the face of a profile of developing danger.[22] The 2011 Final Report of

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18. *See infra* text accompanying notes 41–42 (discussing the environmental injuries for which the states of Louisiana and Alabama are seeking compensation from BP).

19. Kate Sheppard, *Bad Breakup*, MOTHER JONES, Sept.–Oct. 2010, at 41, 41 (stating that BP "applied a record 1.8 million gallons of dispersants, spraying them on the sea's surface and injecting them directly at the well site, a technique never tried before").

20. Complaint at 2, Alabama *ex rel.* King v. BP, PLC, No. 2:10-cv-690-MEF-SRW (M.D. Ala. Aug. 12, 2010). The Plaintiffs' Steering Committee's (PSC) product liability claims assert "personal injury claims on behalf of persons 'exposed to harmful chemicals, odors and emissions' found within or emanating from oil, dispersants (chemicals used break up an oil slick by making oil more soluble in water), or a mixture of oil and dispersants," which are beyond the scope of this article. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179, 2011 WL 4575696, at *1 (E.D. La. Sept. 30, 2011) (discussing products liability and toxic torts claims from use of chemical dispersants).

21. Joe Nocera, *BP Ignored the Omens of Disaster*, N.Y. TIMES, June 19, 2010, at B1.

22. *See, e.g.*, BUREAU OF OCEAN ENERGY MGMT., REGULATION & ENFORCEMENT (BOEMRE), REPORT REGARDING THE CAUSES OF THE APRIL 20, 2010 MACONDO WELL BLOWOUT 191 (2011), *available at* http://www.boemre.gov/pdfs/maps/dwhfinal.pdf (blaming the disaster on failures of the rig crew and BP's failed risk management system); 1 TRANSOCEAN, MACONDO WELL INCIDENT: TRANSOCEAN INVESTIGATION REPORT 10 (2011), *available at* http://www.deepwater.com/_filelib/FileCabinet/pdfs/00_TRANSOCEAN_Vol_1.pdf (blaming the disaster on BP and Transocean failing to "properly require or confirm critical cement tests or conduct adequate risk assessments"); DET NORSKE VERITAS, ADDENDUM TO FINAL REPORT FOR UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, AND ENFORCEMENT WASHINGTON, DC 20240: FORENSIC EXAMINATION OF DEEPWATER HORIZON BLOWOUT PREVENTER 5, 8, 11 (2011), *available at* http://boemre.gov/pdfs/maps/AddendumFinal.pdf (blaming the disaster on the technical failures of the blind shear rams); 1 DET NORSKE VERITAS, FINAL REPORT FOR UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, AND ENFORCEMENT WASHINGTON, DC 20240: FORENSIC EXAMINATION OF DEEPWATER HORIZON BLOWOUT PREVENTER 5 (2011), *available at* http://www.boemre.gov/pdfs/maps/

the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (National Commission) described how "[t]he explosion that tore through the *Deepwater Horizon* drilling rig last April 20, as the rig's crew completed drilling the exploratory Macondo well deep under the waters of the Gulf of Mexico, began a human, economic, and environmental disaster."[23] "As the blast

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DNVReportVolI.pdf (finding that the "primary cause of failure" was that the blind shear rams did not properly close and seal); UNIV. OF CAL., DEEPWATER HORIZON STUDY GRP., FINAL REPORT ON THE INVESTIGATION OF THE MACONDO WELL BLOWOUT 73 (2011), *available at* http://ccrm.berkeley.edu/pdfs_papers/bea_pdfs/DHSGFinalReport-March2011-tag.pdf (attributing the blowout to a "series of compounding failures"); NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 115 (2011) [hereinafter DEEP WATER], *available at* http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf (laying the blame at the feet of BP, Halliburton, and Transocean); NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, CHIEF COUNSEL'S REPORT, MACONDO: THE GULF OIL DISASTER 225 (2011) [hereinafter MACONDO], *available at* http://www.oilspillcommission.gov/sites/default/files/documents/C21462-408_CCR_for_web_0.pdf (refuting the contention that the disaster was simply a result of coincidental "technical failures"); 1 U.S. COAST GUARD, REPORT OF INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE EXPLOSION, FIRE, SINKING AND LOSS OF ELEVEN CREW MEMBERS ABOARD THE MOBILE OFFSHORE DRILLING UNIT DEEPWATER HORIZON IN THE GULF OF MEXICO APRIL 20–22, 2010 111 (2011), *available at* https://www.hsdl.org/?view&did=6700 (blaming the poor safety culture at Transocean); BOEMRE, INCREASED SAFETY MEASURES FOR ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF, FOR 30 CFR PART 250: ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT 2–3 (2010), *available at* http://www.boemre.gov/eppd/PDF/EAInterimSafetyRule.pdf (discussing a rule passed in response to the BP oil spill that "introduces new well control requirements to ensure that there are adequate physical barriers in the well to prevent oil and gas from escaping into the environment"; and specifying that the rule's "well control requirements address casing and cementing design and installation, tighter cementing practices, the displacement of kill-weight fluids, and the testing of independent well barriers"); OFFICE OF THE MAR. ADMINISTRATOR, REPUBLIC OF THE MARSHALL ISLANDS, OFFICIAL DEEPWATER HORIZON MARINE CASUALTY INVESTIGATION REPORT 49–51 (2011), *available at* http://www.register-iri.com/forms/upload/Republic_of_the_Marshall_Islands_DEEPWATER_HORIZON_Marine_Casualty_Investigation_Report-Low_Resolution.pdf (blaming a loss of well control).

23. DEEP WATER, *supra* note 22, at vi.

> Eleven crew members died, and others were seriously injured, as fire engulfed and ultimately destroyed the rig. And, although the nation would not know the full scope of the disaster for weeks, the first of more than four million barrels of oil began gushing uncontrolled into the Gulf—threatening livelihoods, precious habitats, and even a unique way of life. A treasured American landscape, already battered and degraded from years of mismanagement, faced yet another blow as the oil spread and washed ashore. Five years after Hurricane Katrina, the nation was again transfixed, seemingly helpless, as this new tragedy unfolded in the Gulf. The costs from this one industrial accident are not yet fully counted, but it is already clear that the impacts on the region's natural systems and people were enormous, and that economic losses total tens of billions of dollars.

Id. The National Commission on the BP Deepwater Horizon Oil Spill also cited an MMS investigation into a 1989 oil platform explosion, which "concluded that poor management of a repair operation was to blame: not only was there an 'absence of detailed and coordinated planning for the project,' there was a dearth of much-needed 'oversight over contractor activities.'" *Id.* at 70 (quoting E.P. DANENBERGER ET AL., U.S. DEP'T OF THE

rocked the *Deepwater Horizon*, the 'blind shear ram' on the blowout preventer should have closed off the gushing well."[24] "When a rig worker pressed an emergency button immediately after the explosion, however, the blind shear ram failed to fully deploy."[25]

The BP oil spill, the National Commission concluded, was a consequence of "identifiable mistakes made by BP, Halliburton, and Transocean that reveal such systematic failures in risk management that they place in doubt the safety culture of the entire industry."[26] The National Commission called for new regulations to attend to the catastrophic "risks associated with deepwater drilling into large, high-pressure reservoirs of oil and gas located far offshore and thousands of feet below the ocean's surface."[27] It found that poor training, inadequate communication, and deficient regulatory oversight all contributed to the blowout, but went unnoticed as common industry practices.[28] The National Commission laid blame on BP's lax corporate culture, a failing shared by many firms in the deep-sea drilling industry.[29] Despite this stinging indictment of these past corporate practices, in October of 2011, the Obama Administration approved BP to bid on new leases in the Gulf of Mexico.[30]

The *Deepwater Horizon* disaster has produced a rapidly evolving legal landscape that is only slowly becoming less "confused and uncertain."[31] The BP oil spill litigation spawned numerous claimants and cross-claimants, as well as complex

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INTERIOR, OCS REPORT MMS 90-0016, INVESTIGATION OF MARCH 19, 1989, FIRE, SOUTH PASS BLOCK 60 PLATFORM B, LEASE OCS-G 1608, at 15 (1990), *available at* http://www.gomr.boemre.gov/PDFs/1990/90-0016.pdf.).

24. Uhlmann, *supra* note 3, at 1423.

> A blowout preventer is a casing head control which is "designed to prevent the uncontrolled flow of fluids from the well bore by closing around the drill pipe or completely sealing the hole in the absence of drill pipe." An annular blowout preventer is designed to securely close off the space between the casing and the drill stem, called the annulus, by applying hydraulic pressure to the interior rubber packing unit—a collar-like gasket. The packing unit seals around the drill pipe and prevents the escape of gas and drilling fluid from the well bore.

Cities Serv. Co. v. Ocean Drilling & Exploration Co. (*In re* Incident Aboard the D/B Ocean King on Aug. 30, 1980), 813 F.2d 679, 681 n.1 (5th Cir. 1987) (citation omitted).

25. Uhlmann, *supra* note 3, at 1423.

26. DEEP WATER, *supra* note 22, at vii.

27. *Id.*

28. *Id.* at 122.

29. *Id.* at 223.

30. *U.S. Allowing BP to Bid on Leases in the Gulf*, J. CONNOR CONSULTING, INC. (Oct. 14, 2011), http://www.jccteam.com/RegAlerts/DeepwaterHorizon/#754.

31. Stephen Gidiere, Mike Freeman & Mary Samuels, *The Coming Wave of Gulf Coast Oil Spill Litigation*, 71 ALA. LAW. 374, 374 (2010).

insurance and maritime law issues.[32] BP and its related entities were lessees of Transocean's *Deepwater Horizon* drilling platform.[33] Halliburton Energy Services is a named defendant because of the failure of its nitrogen-foamed cement used in the top kill operation to seal the well and well cap.[34] Cameron International supplied the *Deepwater Horizon*'s BOP that failed to close the wellbore.[35]

The Obama Administration has entered into an agreement with BP to "fund an 'independent' claims process administrated by former federal pay czar and 9/11 fund administrator Ken Feinberg."[36] The federal government has proposed $45.7 million in fines on BP, Transocean, and Halliburton for unsafe practices that led to their inability to control the Macondo well.[37] The agencies will remit the proceeds to the Gulf States to settle up costs resulting from future spills.[38] Hundreds of class actions and individual lawsuits have been filed, approximately 400 of which are currently consolidated in multidistrict litigation (MDL), pending in the Eastern District of Louisiana.[39] The court will

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32. Our narrow focus in this article is on products liability (and negligence) under federal maritime jurisdiction and we do not address the Oil Pollution Act of 1990, the Clean Water Act, federal criminal liability, or other common law causes of action central to the BP legal landscape. *See* Michael L. Rustad & Thomas H. Koenig, Parens Patriae *Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENVTL. L. & POL'Y 45 (2011) (detailing the multiple plaintiffs, defendants, and likely causes of action arising out of the Deepwater Horizon explosion and oil spill). This article examines the products liability issue under admiralty jurisdiction that:

> [E]xists in a tort case when (1) the tort occurs on navigable waters, (2) the type of incident causing the harm is potentially disruptive of maritime commerce, and (3) the general character of the activity giving rise to the accident bears a substantial relationship to traditional maritime activity. A tort that occurs on a vessel on navigable waters meets the first, or "locality," prong of the test. Therefore, an important issue in deciding whether there is admiralty jurisdiction is whether the Deepwater Horizon was a vessel.

John W. deGravelles & J. Neale deGravelles, *The Deepwater Horizon Rig Disaster: Issues of Personal Injury and Death*, 85 TUL. L. REV. 1075, 1078–79 (2011) (footnotes omitted).

33. U.S. COAST GUARD, *supra* note 22, at 90, C-1.

34. BP's contractor used nitrogen-foamed cement that had created problems in previous cementing jobs. JOEL ACHENBACH, A HOLE AT THE BOTTOM OF THE SEA: THE RACE TO KILL THE BP OIL GUSHER 133 (2011); *see also* MACONDO, *supra* note 22, at 111–25 (discussing Halliburton's involvement in the use of nitrogen-foamed cement in the *Deepwater Horizon* well).

35. MACONDO, *supra* note 22, at 34.

36. Gidiere, Freeman & Samuels, *supra* note 31, at 374.

37. Jennifer A. Dlouhy, *Feds Kick Off Oil Spill Sanctions Against BP, Transocean & Halliburton*, FUEL FIX (Oct. 6, 2011), http://fuelfix.com/blog/2011/10/12/feds-kick-off-oil-spill-sanctions-against-bp-transocean-halliburton/.

38. *Gulf Coast Lawmakers Reach Compromise on BP Oil-Spill Fine Money*, J. CONNOR CONSULTING, INC. (Oct. 6, 2011), http://www.jccteam.com/RegAlerts/DeepwaterHorizon/#754.

39. John Wyeth Griggs, *BP Gulf of Mexico Oil Spill*, 32 ENERGY L.J. 57, 58 & n.2

consider all local governmental claims as a combined pleading bundle, including "claims brought by governmental entities for, inter alia, loss of resources, loss of tax revenue, property damages, response or restoration costs, and civil penalties."[40]

Alabama and Louisiana have filed environmental lawsuits against BP and other affiliated oil industry defendants,[41] seeking recovery for having their coastlines polluted by "an ocean fouled with a toxic broth of oil, methane, chemical dispersants, and drilling mud."[42] The MDL encompasses the state AG actions by Alabama and Louisiana as well as claims by local governmental entities.[43] The two Gulf States contend that the BOP should have prevented the explosion and that its failure proximately caused societal damages that included lost tourism and stigma.[44] The district court described the Gulf States' amended complaints as follows:

> By and through their respective Attorneys General, the States of Alabama and Louisiana (sometimes referred to collectively as "the States") initiated individual actions that were consolidated with this MDL . . . and subsequently filed Amended Complaints. The States allege that the oil spill caused a variety of past, present, and future damages, including damage to natural

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(2011). The Judicial Panel on Multidistrict Litigation (the MDL Panel) transferred all of the federal actions arising out of the BP oil spill to a single district court in Louisiana. The MDL Panel coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 731 F. Supp. 2d 1352, 1356 (J.P.M.L. 2010) (ordering consolidation of BP oil spill class actions and individual actions).

40. Alabama v. BP P.L.C. (*In re* Oil Spill by Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010) (*In re Oil Spill I*), MDL No. 2179, 2011 WL 5520295, at *1 n.6 (E.D. La. Nov. 14, 2011).

41. In the *Deepwater Horizon* litigation, defendants include:

> BP Exploration & Production, Inc. and its related entities (collectively, 'BP'), Transocean Ltd. and its related entities (collectively, 'Transocean'), Halliburton Energy Services, Inc. and its related entities (collectively, 'Halliburton;'), M–I, LLC ('M–I'), Cameron International Corp. ('Cameron'), Weatherford U.S., L.P. ('Weatherford'), Anadarko Petroleum Corporation Co. and Anadarko E & P Company LP (collectively, 'Anadarko'), MOEX Offshore 2007 LLC and MOEX USA Corp. (collectively, 'MOEX'), and Mitsui Oil Exploration Co., Ltd. ('MOECO').

Id. at *1.

42. Julia Whitty, *BP's Deep Secrets*, MOTHER JONES, Sept.–Oct. 2010, at 31–32.

43. *In re Oil Spill I*, 2011 WL 5520295, at *1 & n.1.

44. *See* Joseph E. Aldy, *Real-Time Economic Analysis and Policy Development During the BP* Deepwater Horizon *Oil Spill*, 64 VAND. L. REV. 1795, 1799, 1815 (2011) ("[B]usinesses that relied on coastal tourism experienced significant losses from the fear of oil-covered beaches throughout the Gulf."). "BP's investigation concluded that the last-resort safety device hadn't been adequately maintained and failed when it was needed. . . . None of [the] layers of protection worked on April 20." STANLEY REED & ALISON FITZGERALD, IN TOO DEEP: BP AND THE DRILLING RACE THAT TOOK IT DOWN 168 (2011) (describing the consequences of the failure of the *Deepwater Horizon*'s blowout preventer).

> resources and property, economic losses (including lost revenues, such as taxes), costs associated with responding to the oil spill and performing removal actions, costs associated with providing increased or additional public services, and the long-term reputation damage or "stigma" associated with the oil spill.[45]

In these government-sponsored environmental lawsuits, the state AGs are in the role of "*parens patriae*, trustee, guardian or representative of all of her citizens."[46] These *parens patriae* actions have had a mixed record in the BP oil spill litigation. Judge Carl Barbier, the federal judge trying the MDL, observed that the Alabama and Louisiana (Gulf States) AG actions have "joint or aligned" interests with the Plaintiffs Steering Committee (PSC) that represents hundreds of thousands of private plaintiffs.[47] The court observed that Alabama has cooperated with the PSC, while Louisiana has "obstructed and frustrated the purpose of the litigation."[48]

These Gulf States' actions originally combined the obscure equitable doctrine of *parens patriae*[49] with the ancient tort of public nuisance.[50] The Alabama AG's initial complaint against

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45. *In re Oil Spill I*, 2011 WL 5520295, at *1–2 (footnote omitted) (citation omitted).

46. Louisiana v. Texas, 176 U.S. 1, 19 (1900) (explaining the role of the state AG in representing the public interest).

47. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010 (*In re Oil Spill II*), MDL No. 2179, 2011 WL 6817982, at *1 (E.D. La. Dec. 28, 2011), *amended and superseded by*, 2012 WL 161194 (E.D. La. Jan. 18, 2012).

48. *Id.* ("The Louisiana Attorney General has objected to the creation of a hold-back account insofar as it applies to the State of Louisiana. Louisiana is one of only two Gulf Coast states that have filed claims in this MDL, the other being Alabama. Notably, the Attorney General for the State of Alabama long ago reached agreement with the PSC to work cooperatively to further their joint or aligned interests. Largely for this reason, the Court appointed Alabama Attorney General Luther Strange as Coordinating Counsel for the Gulf Coast States. The Court has on multiple occasions encouraged the State of Louisiana to cooperate with the PSC and the State of Alabama insofar as their interests are aligned versus the Defendants in this complex MDL. Rather than cooperate or attempt to work collaboratively, the State of Louisiana, through its retained private counsel, has instead often obstructed and frustrated the progress of the litigation.").

49. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602 (1982) (explaining *parens patriae* standing based on "a set of interests that the State has in the well-being of its populace"). The common law doctrine of *parens patriae* gives the government the legal standing to protect the interests of the public by exercising its quasi-sovereign authority. "Originally the doctrine of *parens patriae* provided the governments with the power to act as guardian for persons legally unable to protect their own interests." EDWARD H.P. BRANS, LIABILITY FOR DAMAGE TO PUBLIC NATURAL RESOURCES: STANDING, DAMAGE AND DAMAGE ASSESSMENT 55 (2001).

50. Nuisance was well established by the time Sir William Blackstone wrote his famous *Commentaries on the Laws of England* in the 1760s. *See* Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 308 (2008) (noting that decisions discussing nuisance date back to the 1500s).

From the medieval period to Blackstone's day, torts protected the public's health.

BP, Transocean, Halliburton, and Anadarko Petroleum pleaded the theories of negligence and public nuisance but included no claim for products liability.[51] Alabama's amended complaint included a claim for products liability.[52] In contrast, the Louisiana AG's declaratory judgment complaint against Transocean, the company that operated the offshore deepwater drilling rig, and its corporate family, was for federal statutory causes of action, not products liability.[53] Codefendant BP has filed a products liability lawsuit against Cameron, the manufacturer and supplier of the wellhead's BOP.[54] The *Deepwater Horizon*'s 300-ton BOP was taller than a four-story building with "two annular preventers and five rams," making it possibly the largest machine ever to be the subject of a products liability lawsuit.[55]

> A neighbor who "infect[ed] the air" or polluted the environment was liable for the offense of nuisance at common law. Nuisances are difficult to conceptualize because the offensive nature of the harm is based on subjective sensory reactions to unpleasant sounds, sights and smells. Courts calculated damages for nuisance torts based on the depreciation in the value of land and the degree of personal discomfort and annoyance.

Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 14–15 (2002) (alteration in original) (footnotes omitted).

51. In addition, the State of Alabama charged these oil industry corporations with violating federal safety standards, leading the state to sustain damages to natural resources, shoreline, and habitat. Complaint at 9–17, Alabama *ex rel.* King v. BP, PLC, No. 2:10-cv-690-MEF-SRW (M.D. Ala. Aug. 12, 2010); Complaint at 11–18, Alabama *ex rel.* King v. Transocean, Ltd., No. CV-2:10-cv-00691-MHT-CSC (M.D. Ala. Aug. 12, 2010).

52. The State of Alabama's First Amended Complaint at 37–45, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179 (E.D. La. Apr. 5, 2011), 2011 U.S. Dist. Ct. Pleadings LEXIS 340, at *57–62. Neither Alabama nor Louisiana included products liability claims in their initial complaints. Alabama's amended complaint charged the oil industry defendants with violations of:

> [T]he Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701, *et seq.*, general maritime law (negligence and products liability), and Alabama law (negligence, products liability, public and private nuisance, trespass, and fraudulent concealment). Alabama also seeks civil penalties against all Defendants for violations of the Alabama Water Pollution Control Act ("AWPCA"), Ala. Code §§ 22-22-1 to -14, the Alabama Air Pollution Control Act ("AAPCA"), Ala. Code §§ 22-28-1 to -23, the Alabama Hazardous Wastes Management Act ("AHWMA"), Ala. Code §§ 22-30-1 to -24, and the Alabama Solid Waste Disposal Act ("ASWDA"), Ala. Code §§ 22-27-1 to -18. Finally, Alabama requests a declaratory judgment that BP, Transocean, Anadarko, MOEX, and MOECO are held jointly and severally liable to it for OPA removal costs.

In re Oil Spill I, 2011 WL 5520295, at *1 (footnote omitted).

53. *See* Complaint for Declaratory Judgment at 1, 14–20, Louisiana v. Triton Asset Leasing, GMBH, No. 2:10-cv-03059-CJB-SS (E.D. La. Sept. 14, 2010), 2010 WL 3864494.

54. The blowout preventer used on the *Deepwater Horizon* was designed to use hydraulically powered rams to "slice through the drill pipe from opposite directions . . . [to] completely shut in the well." *See* ACHENBACH, *supra* note 34, at 132 (describing a BOP).

55. 1 TRANSOCEAN, *supra* note 22, at 137, 139–40; Tom Fowler, *BP Sues Cameron, Transocean, Halliburton over Deepwater Horizon Disaster*, FUEL FIX (Apr.

Millions of tons of hydrocarbons flowed into the ocean due to the failure of Cameron's BOP to seal off the wellbore.[56] In December of 2011, BP settled its products liability cross-claim against Cameron, agreeing to indemnify Cameron for current and future liability associated with the *Deepwater Horizon* incident, in return for the sum of $250 million.[57] In the wake of BP's December 2011 settlement, BP must stand in the shoes of Cameron, defending it against a potential tsunami-like wave of lawsuits filed by both private claimants and governmental entities. This Article examines the multifarious products liability issues arising out of the failure of the BOP to seal the Macondo well. The states have amended their complaints to include products liability actions, jettisoning public nuisance, which strongly supports our argument that the states should have initially conceptualized their *parens patriae* actions as based upon products liability rather than as an amorphous nuisance.[58]

The states' standing to seek recovery for products liability and pursue a negligence claim under general maritime law is inherent in their *parens patriae* powers.[59] Part II of this Article describes the history, purpose, evolution, and modern usage of this thirteenth century royal prerogative.[60] This equitable concept of standing originated to protect widows, orphans, and individuals who were legally incompetent.[61] *Parens patriae* later evolved to enable the State to have standing to address public health and environmental disasters.[62] Part III examines the way

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20, 2011), http://fuelfix.com/blog/2011/04/20/bp-sues-cameron-over-failed-blowout-preventer/.

56. *See Comprehensive Picture of the Fate of Oil from Deepwater Horizon Spill*, SCIENCE DAILY (Jan. 10, 2012), http://www.sciencedaily.com/releases/2012/01/120110093601.htm.

57. Tom Fowler, *Cameron Will Pay BP to Settle Spill Claims*, WALL ST. J., Dec. 17, 2011, at B4; Press Release, Cameron International, Cameron Announces Agreement with BP (Dec. 16, 2011), http://www.c-a-m.com/forms/HighlightDetails.aspx?HighlightID=9b91d5df-df36-454d-baea-569b0af8c1ae&Type=News.

58. The state AGs are more likely to have success with a products liability theory versus stretching public nuisance, an equitable remedy to the BP oil spill. *See* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1541–42 (1997) (explaining how new tort actions such as the invasion of privacy, the intentional infliction of emotional distress, wrongful termination, and product liability were recognized because they fit within established doctrine).

59. *See supra* note 46 and accompanying text.

60. "In thirteenth-century England, common law (law of custom and usage) gave kings power of being the 'father of his country.'" KAREN M. HESS, JUVENILE JUSTICE 34 (5th ed. 2010).

61. Jane Gilbert, Richard Grimm & John Parnham, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1158 (2001).

62. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 604–05, 607 (1982) (recognizing a state has *parens patriae* standing for issues affecting "the health

that *parens patriae*, used in tandem with the tort of public nuisance, is employed by government lawyers in public health and environmental actions. Part IV proposes that state AGs (and private claimants) deploy the theory of products liability as opposed to public nuisance to redress economic losses arising out of the BP oil spill disaster. The Gulf States AGs have resurrected products liability theories under federal maritime law on behalf of the states to recover for economic losses, societal damages, and degradation of their environment and natural resources. Our previous articles on the BP oil spill examined the public health issues as well as the overall legal landscape of the *parens patriae* claims arising out of this great environmental disaster, which may provide useful background to readers who are unfamiliar with these aspects of the mass disaster.[63]

II. *PARENS PATRIAE* ACTIONS TO REDRESS ENVIRONMENTAL DISASTERS

During the past two decades, the *parens patriae* lawsuit has been resurrected as an instrumentality for cities and states to use the tort system to achieve collective solutions for mass injuries in the absence of effective action from the legislative branch.[64] In recent years, state AGs and municipalities have deployed their *parens patriae* powers to sue in a representative capacity to protect the interests of their citizens in addressing public health crises such

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and well-being—both physical and economic—of its residents in general"); William V. Luneburg, *Claim Preclusion as It Affects Non-parties to Clean Air Act Enforcement Actions: The Ghosts of* Gwaltney, 10 WIDENER L. REV. 113, 149–50 & n.262 (2003) (observing that *parens patriae* suits are filed to "vindicate 'common interests,' whether those interests implicate public health, the protection of environmental amenities generally, or non-environmental values").

63. This Article's focus is on Alabama's and Louisiana's federal maritime products liability actions against BP and the other oil industry defendants arising out of the failed BOP. A discussion of other possible products liability actions, such as litigation over the chemical dispersants, the design of the *Deepwater Horizon*, and its component parts, is beyond the scope of this Article. In an earlier article, we developed the rationale for a *parens patriae* environmental action. *See* Rustad & Koenig, *The Latest Stage in the Evolution of Crimtorts*, *supra* note 32, at 78 (conceptualizing the state AGs' BP-related lawsuits as environmental crimtorts that bridge the gap between criminal law and regulation, and arguing for the necessity of *parens patriae* action by the Gulf States to vindicate societal interests not addressed by (1) one-on-one torts; (2) class actions; or (3) the Gulf Coast Claims Facility). In another article, we conceptualized the *parens patriae* doctrine as redressing a public health crisis. *See* Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POL'Y 331, 370 (2011) [hereinafter Rustad & Koenig, *Reforming Public Interest Tort Law*].

64. *See* Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 914–15 (2008) (describing litigation brought by states and municipalities as a "new regulatory scheme[ ]" for such social problems as the marketing of tobacco products, handguns, automobiles causing global warming, and OxyContin for direct responsibility for crimes by those abusing the drug).

as global warming,[65] lead paint,[66] handguns,[67] tobacco,[68]

65. *See* Sara Zdeb, *From* Georgia v. Tennessee Copper *to* Massachusetts v. EPA: Parens Patriae *Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059, 1062–63 (2008) ("Some of the most high-profile global-warming suits to date have featured states as plaintiffs. Massachusetts played the lead role in *Massachusetts v. EPA*, joining California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington in successfully arguing that EPA violated the Clean Air Act by declining to regulate greenhouse-gas emissions from motor vehicles. In *Connecticut v. American Electric Power Co.*, Connecticut, along with California, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, are seeking injunctive relief from electric utility companies under the common law doctrine of public nuisance and are appealing the dismissal of their case on political-question grounds to the Court of Appeals for the Second Circuit." (footnotes omitted)); *see also* Amy J. Wildermuth, *Why State Standing in* Massachusetts v. EPA *Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273, 298 (2007).

66. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 770–71 (2003) ("One state—Rhode Island—and a number of counties, municipalities, and school districts have filed lawsuits against former manufacturers of lead pigment alleging either that the presence of lead in paint in residences itself constitutes a public nuisance or that the marketing and distribution practices of manufacturers constitutes a public nuisance so long as the lead remains in residences." (footnotes omitted)); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 449 ("[P]roducts liability style claims have been brought against entire industries, including the lead paint industry, gun manufacturers, and even health maintenance organizations.").

67. Amanda B. Hill, *Ready, Aim, Sue: The Impact of Recent Texas Legislation on Gun Manufacturer Liability*, 31 TEX. TECH. L. REV. 1387, 1409 (2000); *see also* David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1163, 1172–73 (2000) (describing how thirty cities and counties sued handgun manufacturers beginning in the late 1990s); David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 13–15 (1998) (explaining legal claims and basis for governmental handgun cases); Scott R. Preston, Comment, *Targeting the Gun Industry: Municipalities Aim to Hold Manufacturers Liable for Their Products and Actions*, 24 S. ILL. U. L.J. 595, 609 (2000) (describing suits filed by cities and counties against gun manufacturers).

> As many states did in asserting their *parens patriae* right in the tobacco case, the City of New Orleans, as a "home rule" charter city, is asserting its right under *parens patriae*, seeking to recover monies expended due to increased city costs due to gun violence. On October 30, 1998, the Mayor of New Orleans, Marc H. Morial, and the City of New Orleans, represented by the Center to Prevent Handgun Violence, the private law firm of Gauthier, Downing, LaBarre, Besler, & Dean, and other attorneys, filed a lawsuit against fifteen gun manufacturers, several pawn shops, and trade associations, seeking damages for expenses incurred due to allegedly defective products and unlawful actions. Because of budgetary concerns, the city signed a contingency fee contract and is purportedly not expending any taxpayer money in pursuit of the case.

Edward Winter Trapolin, *Sued into Submission: Judicial Creation of Standards in the Manufacture and Distribution of Lawful Products—The New Orleans Lawsuit Against Gun Manufacturers*, 46 LOY. L. REV. 1275, 1285–86 (2000). A number of municipalities in Ohio filed suit against handgun manufacturers under the theory of public nuisance. These *parens patriae* actions sought recovery "for costs related to gun violence." David J. Owsiany, *The Rise and Fall of Lead Paint Litigation in Ohio*, 1 STATE AG TRACKER 1, 1 (2009), *available at* http://www.fed-soc.org/doclib/20090520_StateAGTrackerVolume1No1.pdf (describing how states and cities filed public nuisance claims against gun manufacturers in Ohio and these actions were "unsuccessful across the country").

68. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1860 (2000)

environmental pollution,[69] and climate change.[70] The tort reform movement denounces these governmental lawsuits as "regulation through litigation."[71] From the opposite side of the political spectrum, former Labor Secretary Robert Reich criticizes this use of *parens patriae* as antidemocratic "product regulation through attorney general-initiated litigation."[72]

The state AGs' BP oil spill complaints were initially predicated upon public nuisance, rather than products liability. In November of 2011, Judge Barbier ruled that the Gulf States AGs could not pursue public nuisance claims but had cognizable actions for general negligence, products liability, and punitive damages under federal maritime law.[73] In this part, we explain why Judge Barbier is correct in recognizing products liability, rather than public nuisance, to redress the societal damages created by environmental disasters such as the BP oil spill.[74] Before explaining why products liability is a better fit for the BP oil spill than public nuisance, we explore the history of these two core concepts of the new regulatory scheme used by government lawyers in the lead paint and tobacco litigation.

("The attorneys general litigation against the tobacco industry broke ground on several fronts. The scope of interstate attorney general cooperation was unprecedented. The size of the settlement was unprecedented. Obtaining such massive relief against a previously undefeated litigant was unprecedented."); *cf.* Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1147–49 (2001); Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1382 (2001) (commenting on *parens patriae* lawsuits as permitting judges to intrude upon the role of legislators).

69. *See* Allan Kanner, *The Public Trust Doctrine,* Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 111–12 (2005) (proposing that *parens patriae* actions protect natural resources); Deborah G. Musiker, Tom France & Lisa A. Hallenbeck, *The Public Trust and* Parens Patriae *Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND & RESOURCES L. REV. 87, 109 (1995) (explaining that *parens patriae* extends to wildlife conservation); Jeffrey Baddeley, Note, *Parens Patriae Suits by a State Under 42 U.S.C. § 1983*, 33 CASE W. RES. L. REV. 431, 446 (1983) ("In *West Virginia v. Pfizer*, the court listed the kinds of interests which have supported parens patriae standing: 'the 'health, comfort, and welfare' of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state. . . . Only in cases where the state is pursuing the interests of individual citizens instead of general state interests is parens patriae standing inappropriate."). *See generally State Protection of Its Economy and Environment:* Parens Patriae *Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411, 412 (1970) (discussing *parens patriae* suits for damage to the economy or environment).

70. *Cf.* Comer v. Murphy Oil USA, 598 F.3d 208 (5th Cir. 2010) (involving a private party suing because of climate change).

71. *See* REGULATION THROUGH LITIGATION 3–4, 19–20 (W. Kip Viscusi, ed., 2002).

72. Gifford, *supra* note 64, at 915.

73. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179, 2011 U.S. Dist. LEXIS 131069, at *50 (E.D. La. Nov. 14, 2011).

74. *See supra* note 58 and accompanying text.

A. A History of Parens Patriae

The term "*parens patriae*," is Latin, meaning "father of his country."[75] *Parens patriae* was originally a standing doctrine so that the King could protect those who could not protect themselves. The Year Books of Edward II (1307–1327) document that the English monarch had the power to protect "idiots' or lunatics' lands."[76] Historians trace the doctrine to the reign of King Edward I, when a 1304 court decision legitimated this royal prerogative.[77] This seven-hundred-year-old legal decision "discloses the fact that idiots were then in wardship to the king, *because they were idiots*," whose disabilities made them legally equivalent to helpless infants.[78] The Court of Chancery's jurisdiction resulted from the King's delegation of his rights and duties to the Chancellor.[79] From its origins in equity, courts turned to *parens patriae* only because ordinary legal remedies were inadequate to protect vulnerable populations.[80] Equity was "firmly established as a judicial function of the court" and did not "belong to the chancellor alone as the personal delegate and representative of the crown."[81]

The Chancellor also stepped in as a representative of the King to be a surrogate parent in the event of "accident, misadventure, illness or general calamity."[82] If an infant had no

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75. CLIFF ROBERSON, JUVENILE JUSTICE: THEORY AND PRACTICE 23 (2011) (stating this is "the police power of the state to intervene . . . . of *parens patriae* (parent of the country) to allow the court to act in place of the parents (*in loco parentis*)").

76. THEODORE W. DWIGHT, COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY 305 (Boston, Little, Brown & Co. 1894) (emphasis omitted).

77. *Id.*

78. *Id.* at 306. The special jurisdiction of *parens patriae* was "over the person and property of lunatics and idiots, and all others who may be adjudicated *non compotes menis*." 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA: ADAPTED FOR ALL THE STATES AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE § 1311, at 883 (Spencer W. Symons ed., 5th ed. Lawyers Co-op. Publ'g Co. 1941) (1881).

79. JAMES P. HOLCOMBE, AN INTRODUCTION TO EQUITY JURISPRUDENCE ON THE BASIS OF STORY'S COMMENTARIES WITH NOTES AND REFERENCES TO ENGLISH AND AMERICAN CASES, ADAPTED TO THE USE OF STUDENTS 258 (Cincinnati, Derby, Bradley & Co. 1846); *see also* POMEROY, *supra* note 78, § 1304, at 870 (noting that the origins of equitable jurisdiction were part of the King's "executive power as *parens patriae* to protect his subjects, and may by him have been transferred to the court of chancery").

80. *See* 1 THOMAS CARL SPELLING, A TREATISE ON EXTRAORDINARY RELIEF IN EQUITY AND AT LAW 4 (Boston, Little, Brown & Co. 1893) (describing how the inadequacy of common law remedies led to courts of equity becoming the primary source of remedial justice).

81. POMEROY, *supra* note 78, § 1304, at 870.

82. Max Radin, *The Common Law of the Family*, 6 NAT'L L. LIBR. 81, 105 (1939).

guardian, the Court of Chancery would appoint one.[83] This court of equity had the jurisdiction to deal with out-of-control children, even removing them from households where their "morals are likely to be contaminated, [their] education neglected, or [their] property wasted."[84] Lord Cowper of the Court of Chancery, for example, once "ordered a Roman Catholic girl of fourteen, to be sent to a Protestant school, evidently with a view to her conversion."[85] The Chancery appointed guardians and supervised the distribution of funds from trusts to infants.[86] The Court of Chancery was "very careful to guard against improper or unsuitable marriage of its ward" and could use its contempt powers to sanction those "aiding or abetting such a marriage."[87] This judicial patriarchy of *parens patriae* standing drew upon its general authority from the law of trusts, trustees, and fiduciary relations.[88]

B. Parens Patriae*: Exported to America*

1. Equity Court's Origins of Parens Patriae. Early American courts and legislatures adopted a more expansive view of the *parens patriae* power of the State than the Royal Prerogative in England. American statutes, for example, extended *parens patriae* powers to protect "confirmed drunkards" in addition to the traditional categories.[89] Courts and legislatures seized upon this equitable doctrine to develop institutions for the social control of delinquents through the supervision of "abandoned, neglected, vagrant, delinquent, [or] wayward" children.[90] Jurisdictions differed as to whether those adjudicated as insane or incompetent were entitled to the right to a jury.[91]

After the American Revolution, U.S. courts did not inherently possess *parens patriae* powers over lunatics as part of

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83. HOLCOMBE, *supra* note 79, at 258. The King delegated his executive power as *parens patriae* to the Chancellor as his personal representative. POMEROY, *supra* note 78, § 1311, at 883.

84. HOLCOMBE, *supra* note 79, at 259.

85. *Id.* at 259 n.1.

86. *Id.* at 260–61.

87. *Id.* at 262.

88. POMEROY, *supra* note 78, § 1311, at 884. "The use of this individualized power was supported in tradition by the English courts' increasing use of chancery courts to determine the welfare and property of minors under the doctrine of parens [patriae]." MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 58 (1994).

89. POMEROY, *supra* note 78, § 1313, at 885.

90. 2 CLARENCE ALEXANDER, THE LAW OF ARREST IN CRIMINAL AND OTHER PROCEEDINGS 2071 (1949) (internal quotation marks omitted).

91. POMEROY, *supra* note 78, § 1313, at 886.

original equitable jurisdiction. However, some state constitutions enumerated *parens patriae* powers, and legislatures codified these powers in state statutes conferring "jurisdiction over lunatics, idiots, and persons' *non compotes mentis*."[92] In Illinois, for example, American statutes followed English law in providing support for persons of "bodily infirmity, idiocy, lunacy, or other unavoidable cause."[93] Legislatures drew upon the "general power of the State as *parens patriae*" to "deprive children of their liberty and parents of their custody."[94] In New York, courts retained jurisdiction over girls until they reached the age of twenty-one.[95] Juvenile courts continue to invoke *parens patriae* powers to control incorrigible delinquents.[96]

2. Parens Patriae *Litigation in Disputes Between States.* U.S. courts of equity and state legislatures further extended *parens patriae* to encompass "disputes between the interests of separate states with regard to natural resources and territory."[97] The doctrine has an extensive history of American application to protect "rivers, the sea, and the seashore [that] are especially important to the community's well being."[98] Cross-border pollution from a neighboring state prefigures collective injuries in the modern era. The U.S. Supreme Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico* reasoned that the states were quasi-sovereign entities whose *parens patriae*

92. *Id.*

93. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 256 (1904).

94. ALEXANDER, *supra* note 90, at 2076 (internal quotation marks omitted).

95. *Id.* at 2086. New York's statute stated, "Marriage does not oust a court of jurisdiction over a delinquent minor; the state, as *parens patriae*, controls her until its custody or supervision terminates by law, not by her or her husband's act [of marriage]." *Id.*

96. MARILYN MCSHANE & FRANKLIN P. WILLIAMS III, ENCYCLOPEDIA OF JUVENILE JUSTICE 279 (2003).

97. Gifford, *supra* note 64, at 936 ("For example, in 1906, in *Georgia v. Tennessee Copper Co.*, the [U.S.] Supreme Court considered Georgia's request that the Court enjoin a Tennessee manufacturing company from discharging noxious gases over Georgia's territory. In his classic opinion for the Court, Justice Holmes described the state's quasi-sovereign interests as follows: 'In that capacity the State has an interest independent of . . . its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.'" (second alteration in original) (footnotes omitted)).

98. Kanner, *supra* note 69, at 68, 75 ("After the American Revolution, the rights of the sovereign passed to the governments of the individual colonies, not the central federal government. Originally emphasizing water-related resources, the public trust doctrine has expanded to include nearly all natural resources." (footnotes omitted)); *see, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 518–21 (2007) (recognizing that states have broad standing to protect quasi-sovereign interests of citizens in *parens patriae* actions); North Dakota v. Minnesota, 263 U.S. 365, 372–76 (1923).

powers "consist of a set of interests that the State has in the well-being of its populace."[99]

3. Exxon Valdez *Oil Spill* Parens Patriae *Actions*. In the *Exxon Valdez* case, the U.S. government and Alaska asserted that they were exercising their *parens patriae* powers in filing suit against Exxon to recover societal damages:

> In March 1991, the United States and the State of Alaska, acting as trustees for the public, sued Exxon. . . . [T]he three parties reached a civil and criminal settlement that was approved by the district court on October 8, 1991. The resulting Consent Decree stated that the state and federal governments would recover compensatory and remedial relief in their capacity "to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill."[100]

The 1991 settlement between Exxon, the United States, and the State of Alaska "required Exxon to pay $900 million over time to natural resources 'trustees,' identified in the settlement documents as the United States and the State of Alaska."[101] This fund was allocated "to restore the damaged environment of Prince William Sound and nearby areas."[102] In the recent BP oil spill, the United States, as well as individual states, has an interest in seeking funds to clean up "millions of gallons of oil, dispersants and other materials and substances discharged into . . . the waters, property, estuaries, seabed . . . and other natural and economic resources."[103] Environmental disasters of this magnitude are collective damages of public consequence beyond the harms reflected in individual lawsuits or class actions.[104] The BP oil spill is a far

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99. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602 (1982).

100. William H. Rodgers, Jr. et al., *The* Exxon Valdez *Reopener: Natural Resources Damages Settlements and Roads Not Taken*, 22 ALASKA L. REV. 135, 175 (2005) (footnotes omitted) (quoting Agreement and Consent Decree at 3, United States v. Exxon Corp., No. A91-082-083 (D. Alaska Oct. 9, 1991)).

101. *Id.* at 137.

102. *Id.* at 138.

103. Complaint at 10, Alabama v. Transocean, Ltd., No. CV-2:10-CV-691-MHT-CSC (M.D. Ala. Aug. 12, 2010).

104. *See* Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 656–57 (2000) ("Tort law, perhaps more than any other area of modern U.S. law, is the magic mirror reflecting the ways changes in society lead to changes in the law. From the late-nineteenth to the late-twentieth century, U.S. culture underwent a dramatic transformation in attitude toward the individual's role in society. A belief in rugged individualism, laissez-faire in contractual relations, and survival of the fittest dominated late-

greater environmental cataclysm than the 1989 *Exxon Valdez* spill. Unlike the *Exxon Valdez* or other oil tanker spills, the BP spill was not a "monolithic spill," but has had a cascading impact on a number of Gulf Coast states and potentially Mexico.

III. PUBLIC NUISANCE IN ENVIRONMENTAL & PUBLIC HEALTH CASES

A. How Public Nuisance Is Deployed in Environmental Torts

1. A Brief History of Public Nuisance. The 2010 conviction of *Jersey Shore*'s reality TV star Nicole "Snooki" Polizzi for being a public nuisance because of her criminally annoying behavior on a public beach illustrates the popular usage of this term.[105] In fact, public nuisance is an expansive, ancient wrong that lies on the borderline between crime and tort.[106] This twelfth century English criminal writ, belonging only to the King, prefigured the public nuisance cause of action.[107] A nuisance action at common law, either public or private, could be used to secure a remedy for offenses as varied as "harboring a vicious dog," "illegal liquor establishments," "bullfights," "obstructing a highway," or creating a condition making travel "unsafe or highly disagreeable."[108] The Crown employed this equitable writ in land use cases involving encroachments upon royal properties or obstructions of public roads or waterways.[109] Historically, public nuisance "was not regarded as a tort, but instead as a means for public officials to pursue criminal prosecutions or seek injunctive relief to abate harmful conduct."[110]

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nineteenth century thought. By the late-twentieth century, this dominant philosophy had been replaced, in large part, by recognition of the 'complex interdependence' between individuals and between individuals and societal institutions." (footnotes omitted)); James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1005 (1985) (contending that torts scholars and teachers eschew a discussion of social context).

105. *See* Perry Chiaramonte, *'Lohan Wannabe' Snooki Pleads Guilty to Creating a Public Nuisance, Slapped with Community Service and $500 Fine*, N.Y. POST (Sept. 8, 2010), http://www.nypost.com/p/news/local/snooki_stands_trial_for_being_annoying_42CvixUFk6q5XOhMM8zmUK.

106. 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 65–67 (Boston, Little, Brown & Co. 1859) (noting that the same act may be a public prosecution and a civil action at the same time); *see also* William Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966) (stating that public nuisance is always a crime and sometimes a tort as well).

107. Gifford, *supra* note 66, at 791.

108. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 643–45 (5th ed. 1984) (listing these activities as public nuisances).

109. Gifford, *supra* note 66, at 793.

110. *Id.* at 745–46 (arguing that in only limited circumstances, public tort was an

2. Public Nuisance's Genesis as a Criminal Offense. In the modern period, William Prosser described all public nuisances as a means of societal control or "a species of catch-all [for] low grade criminal offense[s]."[111] At common law, public nuisances constituted "a miscellaneous and diversified group of minor criminal offenses, based on some interference with interests of the community, or the comfort or convenience of the general public."[112] In recent years, state AGs have deployed public nuisance as a tort to address societal risks at the intersection between criminal law and the law of torts.[113]

B. Parens Patriae *& the Public Law Model of Torts*

The revival of *parens patriae* as public law is the most recent stage in the more than 700-year evolution of this legal institution.[114] The initial wave of public law torts began in the mid-1990s when "state attorneys general and their partners, a small group of plaintiffs' attorneys" began to fill the gap "left by the political branches' abdication of regulatory responsibility."[115] A state has standing to sue as *parens patriae* so long as it can prove either a sovereign or a quasi-sovereign interest "such as the health, comfort, and welfare of its citizens and the general economy of the state, [is] implicated and [the state] is not merely litigating the

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available remedy for an individual "and apparently never to the state or municipality").

111. Prosser, *supra* note 106, at 999.

112. KEETON ET AL., *supra* note 108, § 90, at 643; *see also* State v. Beardsley, 79 N.W. 138, 141 (Iowa 1899) ("[A] nuisance is the unlawful use of one's own property, working an injury to a right of another or of the public, and producing such inconvenience, discomfort, or hurt that the law will presume a consequent damage.").

113. We coined the term "crimtorts" to describe conduct on the borderline of criminal law and the law of torts. *See* Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 294 (1998) (describing how tort law shares common ground with criminal law). The crimtort is the analogue to the concept of "contort" bridging the gap between the law of contracts and torts. *See* GRANT GILMORE, THE DEATH OF CONTRACT 91–94 (1974).

114. The birth of a new tort is often based on important social policy. Tort law divorced from public policy is like Hamlet without the Prince of Denmark. As Justice Frankfurter reminds us: "We recognize that *stare decisis* embodies an important social policy. . . . But *stare decisis* is a principle of policy and not a mechanical formula." Helvering v. Hallock, 309 U.S. 106, 119 (1940). Tort law does not come from the legal heavens, but reflects changes in culture, technology, and political economy. *See* Rustad & Koenig, *supra* note 50, at 1, 4–5, 9, 96 (2002) (tracing the historical evolution of U.S. tort law). Courts did not recognize privacy-based torts, for example, until the development of new technologies and other changes in society. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–97 (1890) (arguing that courts should recognize a new tort to redress widespread abuses in the field of journalism).

115. Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 61 S.C. L. REV. 201, 203–04 (2011) (discussing *parens patriae* cases against cigarette and gun manufacturers that constituted the first wave of public tort lawsuits).

personal claims of its citizens."[116] The *parens patriae* actions have the potential of enabling the Gulf States to recoup larger societal losses to their habitat, ecosystems, tax revenues, and tourism and the stigma of being victimized by this unprecedented environmental disaster.

C. Public Nuisance in the Tobacco Settlement

Public nuisance actions have always vindicated interferences with public health, but their contemporary expansion to dangerously defective products has radically altered the legal landscape.[117] In recent years, government lawyers have deployed public nuisance theory in mass tort and environmental lawsuits, including litigation against the manufacturers and distributors of lead paint and cheap handguns, predatory lenders, environmental polluters, and contributors to climate change.[118] Public nuisance is the foundation of the tobacco master settlement[119] as well as the cause of action underlying the largest verdict awarded in a U.S. lead paint action.[120] The notorious Love Canal litigation in the early 1980s successfully deployed public nuisance theory.[121]

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116. Romualdo P. Eclavea, Annotation, *State's Standing to Sue on Behalf of Its Citizens*, 42 A.L.R. FED. 23, 27–28 (1979).

117. *See* KEETON ET AL., *supra* note 108, § 90, at 643–44 (noting that public nuisance "includes interferences with the public health, as in the case of a hog pen, the keeping of diseased animals, or a malarial pond" (footnotes omitted)); *see also* Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1024–25 (2001) (stating that the public nuisance is reserved for "intrusions on the public good, such as houses of prostitution, sources of pollution, drug houses, and gangs").

118. Gifford, *supra* note 64, at 925–27 (discussing Rhode Island's litigation against lead paint manufacturers).

119. DONALD GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES 128–32 (2010); Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors, and Public Policy,* 26 AM. J.L. & MED. 187, 188 (2000) ("The MSA [Master Settlement Agreement] was the result of nearly two years of litigation brought by forty-six state Attorneys General in what were called the 'Medicaid' cases, wherein the states sued the tobacco companies for the health care injury inflicted by tobacco consumption.").

120. GIFFORD, *supra* note 119, at 144 (describing the 2006 Rhode Island jury verdict that held the lead paint manufacturers potentially liable for abating the consequences of lead paint rather than landlords).

121. *See* United States v. Hooker Chems. & Plastics Corp., 748 F. Supp. 67, 67–68, 71, 80 (W.D.N.Y. 1990) (holding that the State of New York could maintain a common law public nuisance action against Occidental Chemical Company for claims arising out of the creation of "the public health and environmental disaster at Love Canal," a site used by Hooker Chemicals as a landfill for chemical wasters); *see also* United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 558 (W.D.N.Y. 1988) (finding Occidental Chemical Company liable under the Comprehensive Environmental Response, Compensation and Liability Act); GIFFORD, *supra* note 119, at 93.

The products liability strategy against Big Tobacco failed when it focused on recovery for individual smokers because the tobacco industry employed blaming-the-victim defenses or rules such as assumption of risk, avoidable consequences, or contributory negligence.[122] Products liability in tobacco cases arose out of claims that personal injury or death had resulted from the industry's failure to warn of the then-known dangers of cigarettes or other tobacco products.[123] For decades, the tobacco industry was able to stymie all products liability claims through "scorched earth" defenses with endless challenges raised at every phase of judicial proceedings.[124]

The earliest verdict in favor of a plaintiff in a tobacco products liability case was handed down in 1988. The first verdict against a tobacco company was rendered in a 1998 New Jersey case where the "jury ordered defendant tobacco company to pay the husband of deceased plaintiff damages in the amount of $400,000 because it breached an express warranty when it falsely advertised its product as safe."[125] The

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122. *See* Shaukat Karjeker, Note, *Federal Preemption of Cigarette Products Liability Claims Creates a Need for Congressional Action*, 6 REV. LITIG. 339, 342–44 (1987) (discussing assumption of risk and other arguments based upon the smoker's individual choice to smoke); Susan E. Kearns, Note, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1352–53 (1999) (discussing the successes tobacco companies have had in defending individual lawsuits, due to defenses such as assumption of the risk).

123. *See* Paula C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 SUFFOLK U. L. REV. 1, 19–20 (1991) (discussing the difficulties that plaintiffs have had in prevailing against tobacco companies in failure to warn cases).

124. Gregory W. Traylor, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1090 (2010) (quoting Roger C. Cramton, *Lawyer Conduct in the "Tobacco Wars,"* 51 DEPAUL L. REV. 435, 435–36 (2001)).

> From 1954 to 1994, a period of some forty years, approximately 813 claims were filed by private citizens in tort actions in state courts against tobacco companies. Only twice did courts find in favor of the plaintiffs, and both of these decisions were substantively reversed on appeal. The tobacco companies could quite honestly and proudly assert that they had never been found guilty of wrongdoing.

LaFrance, *supra* note 119, at 190–91 (footnotes omitted).

125. Note, *Products Liability: Federal Jury Finds Tobacco Company Liable Under Breach of Express Warranty*, 21 J. HEALTH L. 177, 177 (1988) (discussing Cipollone v. Liggett Grp., No. 83-2864 (D.N.J. June 13, 1988)).

> As to the express warranty claim, the jury found that Liggett had breached an express warranty made to consumers. The jury awarded Mr. Cipollone $400,000 to compensate him for damages that he sustained from Liggett's breach of warranty; the jury awarded Mrs. Cipollone's estate no damages on the breach of warranty claim.

Cipollone v. Liggett Grp., Inc., 893 F.2d 541, 554–55 (3d Cir. 1990) (remanding the case for a new trial), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992).

jury based its verdict on the fact that the tobacco company "failed to warn consumers of [the] health risks of smoking."[126] It was a short-lived plaintiffs' victory, however, because the Third Circuit in *Cipollone v. Liggett Group* ruled that the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969 preempted the plaintiffs' state tort law claims.[127]

Government lawyers abandoned products liability theory in favor of the amorphous tort of public nuisance in order to sidestep the user-oriented defense of assumption of the risk that had long shielded the tobacco industry.[128] The state AGs claimed *parens patriae* standing "to sue as a collective plaintiff on behalf of [their] citizens suffering from product-related diseases."[129] Under a public nuisance theory, the state AGs did not need to refute tobacco industry defenses that smokers voluntarily assumed the risk (or misused) products.[130]

The state AGs' jettisoning of products liability in favor of public nuisance created a spectacular shift in tobacco litigation. In 1994, Mississippi AG Mike Moore initiated the first *parens patriae* action on behalf of a state against cigarette manufacturers.[131] Moore was able to overcome the individual choice argument by noting that the State of Mississippi had never smoked a single cigarette.[132] The second prong of the Mississippi AG's strategy was the deployment of theories never before used against Big Tobacco or other manufacturers: "public nuisance, unjust enrichment, and indemnity."[133] Forty-five other

126. Cipollone v. Liggett Grp., Inc., 693 F. Supp. 208, 210 (D.N.J. 1988), *aff'd in part and rev'd in part*, 893 F.2d 541, *aff'd in part and rev'd in part*, 505 U.S. 504.

127. Cipollone v. Liggett Grp., Inc., 789 F.2d 181, 187 (3d Cir. 1986); *see also* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 511, 530–31 (1992) (holding that petitioner's claims based upon express warranty, intentional fraud, and conspiracy were not preempted by the federal cigarette labeling statute).

128. *See* Gifford, *supra* note 66, at 759 (discussing AG Mike Moore's 1994 public nuisance action in Mississippi, and the subsequent public nuisance actions in forty other states).

129. GIFFORD, *supra* note 119, at 121.

130. *Id*. at 124 ("*Parens patriae* litigation thus accomplishes what the victim herself could not have accomplished as a litigant.").

131. *See* Traylor, *supra* note 124, at 1093 ("[O]n May 23, 1994, Mississippi became the first state to sue the tobacco industry on behalf of its citizens to recover funds expended through its Medicaid program on tobacco-related diseases.").

132. *See* GIFFORD, *supra* note 119, at 121 (quoting Mississippi plaintiffs' attorney Don Barrett); Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497, 518 (2000) (describing the Mississippi AG's argument that the tobacco industry cannot defend itself by claiming knowledge of the risks of smoking when the state has never smoked a cigarette).

133. GIFFORD, *supra* note 119, at 121–22.

states ultimately joined the tobacco litigation, seeking both compensation for the funds spent on public health crises and the right to regulate these inherently dangerous consumer products.[134]

D. The Failed Lead Paint Public Nuisance Actions

The Rhode Island AG's cases against lead paint manufacturers, unlike the tobacco *parens patriae* actions, were total fiascos, even though Providence, the state's capital city, has received the inauspicious moniker "the lead paint capital" because of its disproportionately large number of children with elevated blood lead levels.[135] Hazardous lead paint remains in hundreds of thousands of Rhode Island homes and apartments where impoverished children live despite the state legislature's enactment of the Lead Hazard Mitigation Act (LHMA).[136] The LHMA's statutory purpose was to "increase the supply of rental housing in Rhode Island in which lead hazards are, at a minimum, mitigated."[137] The court's refusal to accept collective injury as a new paradigm led to state AG lawsuits employing a theory of public nuisance rather than of products liability.[138]

In 2006, a Rhode Island jury found that the paint manufacturers were potentially liable for "$2.4 billion [to be used for] cleaning up lead hazards from an estimated 240,000

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134. *Id.* at 122.

135. State v. Lead Indus., Ass'n, 951 A.2d 428, 436 (R.I. 2008) (internal quotation marks omitted).

136. *See* Rustad & Koenig, *Reforming Public Interest Tort Law*, *supra* note 63, at 363 (stating that in spite of the LHMA, "38 million housing units containing lead-based paint are still not remediated"). The LMHA has the purpose of mitigating lead hazards, but it does not impose a requirement that lead paint be removed from existing homes. R.I. GEN. LAWS § 42-128.1-3 (2006).

137. R.I. GEN. LAWS § 42-128.1-3 (2006). Unlike tobacco and lead paint cases, abating environmental hazards has long been conceptualized as appropriate for public nuisance litigation.

> A necessary element of public nuisance is an interference with a public right—those indivisible resources shared by the public at large, such as air, water, or public rights of way. The interference must deprive all members of the community of a right to some resource to which they otherwise are entitled.

Lead Indus., 951 A.2d at 453 (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979)). "The Restatement (Second) provides much guidance in ascertaining the fine distinction between a public right and an aggregation of private rights. 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979)).

138. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 557–58 (2006) (arguing that public nuisance claims in lead pigment litigation arose out of a failure by personal injury attorneys to recover through products liability claims).

houses and other buildings in Rhode Island."[139] The Rhode Island Supreme Court reversed the judgment, holding that "the legal construct known as public nuisance" did not apply to the lead paint action.[140] Rhode Island's highest court ruled that the State failed to demonstrate that the lead paint manufacturers were in control of the instrumentality that caused the injury,[141] which in this case was the flaking paint chips.[142] The refusal of the Rhode Island Supreme Court to recognize the applicability of public nuisance theory left tens of thousands of children without any meaningful remedy for their product-related injuries.

The BP oil spill is the latest mass disaster challenging the contours of traditional tort law and its capacity to evolve to address new problems. This environmental tragedy is an illustration of the need for tort remedies that are not just about a particular plaintiff and defendant, but also compensate the widespread victims of a societal catastrophe. The destruction caused by the BP spill "is not between each angler or tour operator or fisherman or hotel worker or beach dweller and BP. Larger societal issues will play a central role . . . ."[143]

Public nuisance theory, which has its origins in criminal law, does not mesh well with environmental lawsuits seeking a monetary remedy. In the traditional public nuisance case, a government seeks abatement of the nuisance rather than monetary damages.[144] In contrast, these state AGs were primarily seeking indemnification for Medicaid expenses, but as part of the settlement, they demanded changes in the way that the tobacco industry marketed and advertised cigarettes.[145] In the BP spill,

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139. Owsiany, *supra* note 67, at 1.

140. *Lead Indus.*, 951 A.2d at 447, 468.

141.

> The state's complaint alleges simply that "[d]efendants created an environmental hazard that continues and will continue to unreasonably interfere with the health, safety, peace, comfort or convenience of the residents of the [s]tate, thereby constituting a public nuisance." Absent from the state's complaint is any allegation that defendants have interfered with a public right as that term long has been understood in the law of public nuisance. Equally problematic is the absence of any allegation that defendants had control over the lead pigment at the time it caused harm to children.

Id. at 453 (alterations in original).

142. *Id.* at 455 ("The state's complaint [ ] fails to allege any facts that would support a conclusion that [the lead pigment manufacturers] were in control of the lead pigment at the time it harmed Rhode Island's children.").

143. Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 540 (2011).

144. *See* Gifford, *supra* note 66 at 782 (noting that the Restatement (Second) says nothing about a state's right to recover damages in a public nuisance case).

145. Traylor, *supra* note 124, at 1094–95.

the oil industry defendants will not be able to imitate the tobacco companies' defense tactics of focusing on the shortcomings of plaintiffs. Neither the Gulf States nor other plaintiffs' classes contributed to this environmental catastrophe in any way, so user-oriented defenses are no obstacle.

E. Alabama's Environmental Parens Patriae *Action*

> [T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

Justice Oliver Wendell Holmes Jr.[146]

The U.S. government has a long history of scandalous neglect in carrying out its fiduciary duty to protect its public land and natural resources.[147] During the Lincoln Administration, the government asserted no real control over public land or the nation's natural resources, giving away "more than 75 million acres of public land."[148] The Teapot Dome Scandal, which has entered the popular lexicon as a synonym for notorious government corruption, involved bribery and the granting of secret leases of federal oil reserves in California and Wyoming by Warren Harding's Interior Secretary, Harry Fall.[149] Today's functional equivalent of the Teapot Dome oil land giveaway is the culture of corruption in the federal government's administration of offshore oil leases. Regulation of offshore drilling first became a major issue in the 1940s as the oil industry sought to exploit these lucrative energy sources.[150] As "oil and gas exploration

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146. Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

147. *See* WALTER A. ROSENBAUM, THE POLITICS OF ENVIRONMENTAL CONCERN 12 (2d ed. 1977) (stating that before the twentieth century, "the U.S. government asserted little effective control over public lands and their resources").

148. *Id.* at 12–13.

149. Secretary of Interior Fall received no-interest loans and cash as the quid pro quo for secretly granting Mammoth Oil's Harry Sinclair exclusive leasing rights to exploit the Teapot Dome reserves of Wyoming. THE NEW ENCYCLOPEDIA BRITANNICA 599 (15th ed. 1985).

150.

> As interest in the commercial development of natural gas and oil increased in the 1940s, control over these resources became a major issue, especially in the offshore regions. The most prominent dispute was between the United States and the State of Texas over 2.5 million acres of submerged land in the Gulf of Mexico. Congress eventually resolved this Texas tidelands dispute in 1953 by passing the Submerged Lands Act (SLA), which established the federal government's title to and ownership of submerged lands located on a majority of the continental margin. The Act gave each state jurisdiction over any natural resources within three (3) nautical miles (3.45 miles or 5.6 kilometers) of its

moved outward into the sea from inland waters, disputes arose between the federal government and coastal states over ownership of the minerals in lands under coastal waters."[151]

When oil companies asserted ownership of submerged lands off of California's shores, the U.S. Supreme Court held that "California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."[152] Congress stepped in to create a regulatory regime for offshore drilling after a number of outer continental shelf disputes that pitted states against the federal government over control and exploitation of offshore resources.[153]

In the BP oil spill, the Gulf States are the direct victims of lax federal regulation. On August 12, 2010, Alabama became the first of the Gulf States to file *parens patriae* actions against BP and its corporate affiliates for damages to that state caused by the oil spill.[154] The State of Alabama's AG charged BP,

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> coastline, except Texas and the western coast of Florida where the SLA extends each state's Gulf of Mexico jurisdiction to nine (9) nautical miles (10.35 miles or 16.7 kilometers).

Petition for Judicial Review and Request for Injunctive Relief at 4, Texas v. Salazar, No. 4:10-cv-02866 (S.D. Tex. Aug. 11, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 3680, at *3.

151. Barker v. Hercules Offshore, Inc., No. H-10-0898, 2011 WL 338812, at *2 (S.D. Tex. Feb. 1, 2011) (citing Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOY. MAR. L.J. 19, 20 (2005)).

152. United States v. California, 332 U.S. 19, 38–39 (1947); *see also* United States v. Louisiana, 339 U.S. 699, 705 (1950); United States v. Texas, 339 U.S. 707, 717–18 (1950).

153. *See* David W. Robertson, *The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes*, 38 J. MAR. L. & COM. 487, 494–95 (2007) (describing congressional action that resulted in passage of the Submerged Lands Act and the Outer Continental Shelf Lands Act). Congress stepped into breach in 1953 when it enacted the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331–1356, which allocated to the federal government "jurisdiction, control, and power of disposition" over the subsoil and seabed of the outer Continental Shelf (OCS). 43 U.S.C. § 1332(1) (2006). The Fifth Circuit has explained that "Congress enacted OCSLA to provide a federal body of law to govern operations on the outer Continental Shelf." Hufjagel v. Omega Serv. Indus., Inc., 182 F.3d 340, 349 (5th Cir. 1999).

154. Complaint at 1–4, Alabama *ex rel.* King v. Transocean, Ltd., No. 2:10-cv-00691-MHT-CSC (M.D. Ala. Aug. 12, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 14925, at *1, *3–4; *see* Eric Hornbeck, *Ala. AG Sues BP, Transocean, Others Over Oil Spill*, LAW360 (Aug. 13, 2010), http://www.law360.com/articles/187051 (reporting that Alabama's complaint was against British Petroleum Public Liability Company (BP PLC), BP Exploration & Productions, Inc., BP Products North America, Inc., and BP North America Inc.); *Alabama Becomes First State to Sue for Oil Spill Damages*, FRANCE 24 (Aug. 13, 2010), http://www.france24.com/en/20100813-alabama-becomes-first-us-state-sue-damages-bp-transocean-halliburton-oil-spill ("Alabama became the first US state to sue oil services firms for their role in the world's worst-ever offshore oil spill . . . . The lawsuit charges BP, Transocean, Halliburton and others with a 'wanton failure' to respect industry standards.").

Transocean, Halliburton, and Anadarko Petroleum, alleging that the defendants were liable for negligence and public nuisance, as well as for violating federal safety standards, leading the state to sustain damages to natural resources, shoreline, and habitat. Alabama also filed an environmental *parens patriae* complaint against non-BP companies such as Transocean, the provider of drilling management services, Cameron, the designer of the oil rig, and Halliburton, the corporation that completed the cementing operations.[155]

Alabama's AG contends that BP and other defendants in the *Deepwater Horizon* "oil rig explosion . . . were negligent and exacerbated the environmental disaster with their 'lackluster' response."[156] The state's public nuisance complaint[157] alleges that the accident "has caused and will continue to cause extensive economic, environmental, and other damage to the State of Alabama."[158] The state AG's complaint includes claims for gross negligence, trespass, and public and private nuisance, and seeks a

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155. Complaint, *supra* note 154, at 1–4; *see also* Hornbeck, *supra* note 154 (discussing Alabama's BP oil spill complaint).

156. Hornbeck, *supra* note 154 (citation omitted) (discussing Alabama's allegations against Transocean and the other non-BP defendents).

157.

> [A public nuisance] is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency. It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all . . . in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.

Copart Indus. v. Consol. Edison Co., 362 N.E.2d 968, 971 (1977) (citations omitted). In order for a public nuisance to exist, there must be proof that the activity substantially interferes with the common rights of the public at large. Daniel P. Larsen, *Combatting the Exotic Species Invasion: The Role of Tort Liability*, 5 DUKE ENVTL. L. & POL'Y F. 21, 40 (1995). Generally, the plaintiff in a public nuisance action is a public official such as a state attorney general. *Id.* at 41. The public official is seeking a remedy for violation of a public right. *Id.* at 40. Private individuals may also sue for public nuisance, but only if they can demonstrate that they suffer an injury separate and apart from the injury suffered by the public. *Id.* at 41. In order for a private plaintiff to sue, he must demonstrate that he has standing. *Id.* He must show that he has suffered an injury distinct from the public. Soap Corp. of Am. v. Reynolds, 178 F.2d 503, 506 (5th Cir. 1949) (discussing the standing doctrine in public nuisance cases); *see also* RESTATEMENT (SECOND) OF TORTS § 821B(1) (1965) (stating that a public nuisance is "an unreasonable interference with a right common to the general public"). In this case, a complaint for public nuisance must prove by a preponderance of the evidence that BP and other oil industry defendants were liable for: "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred; and (4) causation." State v. Lead Indus., Ass'n, 951 A.2d 428, 452–53 (R.I. 2008).

158. Complaint at 2, Alabama *ex rel.* King v. BP, PLC, No. 2:10-cv-690-MEF-SRW (M.D. Ala. Aug. 12, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 14924, at *2; Complaint, *supra* note 154, at 2.

statutory remedy under the Oil Pollution Act of 1990 (OPA).[159] Alabama's then-AG, Troy King, retained a prominent Birmingham law firm to help in the planning of its environmental torts litigation.[160] King subsequently lost his bid for reelection, and Alabama's new AG fired the private law firm, taking control of the litigation personally.[161] Alabama's AG seeks compensation for the environmental degradation caused when the BP oil spill invaded Alabama's wetlands, shorelines, and fisheries and destroyed wildlife habitats. The state seeks cleanup and removal costs in addition to recovery for economic damages.[162] In these government-sponsored environmental lawsuits, the state AG is in the role of *parens patriae*, trustee, guardian, or representative of citizens of Alabama.

F. Louisiana's Environmental Parens Patriae *Action*

On September 14, 2010, Louisiana's AG filed a declaratory judgment complaint against Transocean, the company that operated the offshore deepwater drilling rig, and its corporate family, seeking a court's declaration that the defendants are legally responsible for damages to the state under OPA and the Louisiana Oil Spill Prevention and Response Act.[163] In

159. The causes of action against BP, PLC and Transocean, Ltd. are mirror images in every important respect. *Compare* Complaint, *supra* note 158, at 11–18, *with* Complaint, *supra* note 154, at 9–17

160. In the Alabama *parens patriae* action, it is unclear whether the AG will be able to enter into contingency fee agreements with private attorneys in the BP case. The Governor charges:

> [The AG] offered private law firms a contingency fee of 14 percent of the state's total claim if they would join the case. Under those terms . . . the legal fees could reach $20 million, based on estimates that the state has suffered about $140 million in tax losses and other damages from the spill.

George Talbot, *Gov. Bob Riley, Attorney General Troy King Trade Jabs over BP Lawsuits*, AL (Aug. 14, 2010), http://blog.al.com/live/2010/08/gov_bob_riley_attorney_general.html. Another complexity in these cases is the need to establish an economic method for estimating nonmarket-valued losses such as the contamination of fisheries or wildlife. If the number of visitors to a state's recreational area decreases, it will typically have a cascading impact on many other industries. A state will lose tax revenues when the number of tourists decreases. The state AGs will need to document cleanup costs, loss of income from damages to natural resources, the loss of tax revenues from the loss of tourism, and the actual damage to natural resources. *See* George B. Assaf, Brent G. Kroetch & Subodh C. Mathur, *Nonmarket Valuations of Accidental Oil Spills: A Survey of Economic and Legal Principles*, 2 MARINE RESOURCE ECON. 211, 217–18 (1986).

161. *Ala. AG Fires Private Firms in BP Case*, FOX10TV (Jan. 26, 2011), http://www.fox10tv.com/dpp/news/gulf_oil_spill/ala-ag-fired-private-firms-in-bp-case.

162. Complaint, *supra* note 158, at 17.

163. Complaint at 1–2, Louisiana v. Triton Asset Leasing GmBH, No. 2:10-cv-03059 (E.D. La. Sept. 14, 2010). The declaratory judgment was sought because OPA requires that claims for removal costs or damages be first presented to the responsible parties. Parties that do not comply with OPA's presentment requirement may not file damages

March of 2011, Louisiana employed its *parens patriae* powers as trustee for the state, seeking relief from the BP oil spill.[164] Louisiana's AG is attempting to secure compensation for the environmental degradation caused by the petroleum products that "invaded Louisiana's waters and adjoining coastline, severely damaging Louisiana's natural resources including its wetlands, shorelines, habitat and wildlife, endangering the health, safety and welfare of the citizens of Louisiana."[165] The AG's action was "to protect those resources that are held in trust for the benefit of the citizens of Louisiana."[166]

Louisiana's *parens patriae* complaint alleges that the BP defendants "knew of the dangers associated with deep water drilling and failed to take appropriate measures to prevent damage to Louisiana's marine and coastal environments and estuarine areas, and the State's coastal zone."[167] Louisiana's AG argues that at the time of the oil rig explosion, "the Macondo Well was months behind schedule and significantly over budget. Defendants made and/or authorized a number of reckless decisions concerning well design, cementing, and integrity testing in the interest of speed and cost savings, at the expense of safety and industry best practices."[168] The complaint charges BP oil industry defendants with violations of industry safety standards as well as federal statutes governing offshore drilling.[169]

Louisiana's declaratory judgment complaint contends that the cementing design "had a very low probability of ever becoming an effective barrier to well flow" and that "BP E&P and Transocean elected to ignore the abnormal test results without shutting in the well."[170] The BP oil defendants, Louisiana's AG asserts, had notice of a developing profile of danger, yet did not take effective remedial action to protect the

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lawsuits. The text of OPA states: "*all claims for* removal costs or *damages shall be presented first to the responsible party* or guarantor of the source designated under section 2714(a) of this title." 33 U.S.C. § 2713(a) (2006) (emphasis added).

164. Complaint at 3, Louisiana v. BP Exploration & Prod., Inc., No. 2:11-cv-00516 (E.D. La. Mar. 3, 2011).

165. First Amended Complaint at 4, Louisiana v. BP Exploration & Prod., Inc., No. 11-cv-0516 (E.D. La. Apr. 20, 2011).

166. *Id.* at 7 ("The claims for declaratory relief sought herein against Defendants are asserted so that the State may properly and adequately protect, assess and recover for those public resources injured by Defendants, as well as for any other damages allowed pursuant to OPA . . . .").

167. *Id.* at 17.

168. *Id.* at 18.

169. *Id.* at 4.

170. *Id.* at 20.

estuaries and waters of the Gulf Coast States.[171] The state AG filed a request for a declaratory judgment that BP, Anadarko, and Moex are "responsible parties . . . jointly and severally . . . liable for unlimited removal costs and damages resulting from the . . . disaster."[172] It also seeks recovery of unpaid response costs as well as reimbursement of all expenses connected to the oil spill.[173] Finally, Louisiana seeks interest and attorneys fees.[174] Anadarko settled its claims with BP for $4 billion and has agreed to indemnify the company for claims under OPA.[175]

G. Other Gulf States Contemplating Parens Patriae *Actions*

Several other Gulf States also have retained plaintiff's counsel to advise them about their legal rights.[176] "Mississippi's attorney general, Jim Hood, along with Alabama, Florida, Louisiana and Texas attorneys general are determining how to proceed in negotiating damages from the oil spill."[177] The Mississippi AG

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171. BP had a history of safety problems in its facilities:

> In 2000, a chemical plant in Grangemouth, Scotland, owned and operated by a BP p.l.c. subsidiary, had a number of chemical releases and fires. A subsequent investigation by the U.K. authorities attributed the accidents to systemic failures in BP's safety management system. In 2005, a catastrophic explosion occurred at the Texas City, Texas refinery owned and operated by BP America, Inc. An independent report by the Baker Commission cited BP for systemic failures in its safety management systems. In 2006, an oil pipeline leak occurred in Alaska at a BP America, Inc. facility. Once again, an independent report by Booz, Allen, Hamilton cited BP for systemic failures in its safety management systems.

Id. at 30.

172. *Id.* at 107–08.

173. Louisiana's AG seeks the following:

> A judgment against [each] Defendant[ ] and [an] award [of civil penalties to] the State of Louisiana . . . of not more than $32,500 for each day of violation, up to $50,000 for each day of violation of a compliance order and an additional penalty of not more than $1,000,000.00 for each day of violation with legal interest from the date of judicial demand until paid.

Id. at 108–09.

174. The state AG requests the federal district court to "[e]nter judgment against all Defendants and award the State of Louisiana its unpaid response action costs in the amount of at least $342,612 with legal interest from the date of judicial demand until paid." *Id.* at 109.

175. Tom Fowler, *Anadarko Settles Spill Claims with BP for $4 Billion*, FUEL FIX (Oct. 17, 2011), http://fuelfix.com/blog/2011/10/17/anadarko-settles-spill-claims-with-bp-for-4-billion/.

176. Neil King Jr., Dionne Searcey & Vanessa O'Connell, *States Weigh Big Claims Against BP*, WALL ST. J., June 28, 2010, at A10 (reporting that the states of Florida, Louisiana, Mississippi, and Texas have either retained or consulted with private attorneys to discuss litigation strategies).

177. Harlan Kirgan, *Hosemann Wants Thorough Assessment of Oil Damages,*

asserted his "*parens patriae* authority under the constitution and laws of the State of Mississippi" by calling for a federal court takeover of the Gulf Coast Claims Facility.[178] In each of the filed cases, the state AG's first instinct was to deploy public nuisance rather than focusing on the cascading disasters caused by the failure of the BOP to seal the oil well.

H. The Problems of Establishing Causality in Mass Tort Litigation

In the late nineteenth century, courts did not face difficult problems involving latent injuries, indeterminate causation, or occupational illnesses. At common law, causation was a simple matter of applying the "but for" test.[179] Torts, in this bygone era, possessed a clear causal link between injurer and the injured. No elaborate chain of causation was required when a conductor threw a passenger from a moving train or when a railroad locomotive amputated a worker's leg in a decoupling accident.[180] In the modern

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Gulflive (Aug. 9, 2010, 6:22 AM), http://photos.gulflive.com/mississippi-press/2010/08/hosemann_wants_thorough_assessment_of_oil_damages.html.

178. Press Release, Attorney General Jim Hood, AG Asks Court to Take Control of Feinberg Claims Process (Jan. 25, 2011), http://www.ago.state.ms.us/index.php/press/releases/ag_asks_court_to_take_control_of_feinberg_claims_process/. The AG asserted:

> [He] has the authority, standing and duty to vindicate the rights of Mississippi citizens and businesses before this Court, based upon: 1) his parens patriae authority under the constitution and laws of the State of Mississippi on behalf of all Mississippi citizens, 2) the State's direct injuries and costs improperly shifted to the State as a result of BP's failure to fulfill its obligations to compensate the individual and business claimants injured as a result of the oil spill; and 3) the State's direct and substantial interest in the "$20 billion" Trust Fund, from which not only individual and business claims against BP will be paid, but also from which funds will be drawn to restore the natural resources of the Gulf region.

Id. The Gulf Coast Claims Facility (GCCF) was created in June of 2010 when President Barack Obama and BP established this mechanism as an alternative to the tort system. President Obama and BP jointly appointed Kenneth Feinberg, a prominent Washington lawyer, as the Claims Administrator. Feinberg was invested with complete discretion to design, implement, and administer the claims facility and to resolve BP oil claims. BP established an escrow account of $20 billion, over a four-year period, to fund the GCCF as an alternative to the tort system. Citigroup was appointed as the "corporate trustee and paying agent for the account." Press Release, Rep. Jerrod Nadler, Rep. Nadler Chairs Judiciary Hearing on Ensuring Justice for Victims of Gulf Coast Oil Disaster (July 21, 2010) [hereinafter Nadler Press Release], http://nadler.house.gov/press-release/nadler-chairs-judiciary-hearing-ensuring-justice-victims-gulf-coast-oil-disaster. The GCCF has sole authority to determine who may make a claim and what proof is required to document a claim.

179. Under the "but for" test, a plaintiff must prove that she would not have suffered injury but for the negligence of the defendant. JOHN L. DIAMOND, LAWRENCE C. LEVINE & M. STUART MADDEN, UNDERSTANDING TORTS 201–02 (2000).

180. "There was never any doubt that the broken bones of the victim of the earlier era resulted from the collision, but the cigarette manufacturer might claim that the cancer victim's disease resulted from industrial exposure to hazardous chemicals or from a genetic predisposition." GIFFORD, *supra* note 119, at 33.

collective injury case, in contrast, the plaintiff has a difficult causal connection barrier to overcome because the injury is often probabilistic and statistical rather than a byproduct of a specific injurer and a singled-out victim.[181]

Plaintiffs in the past two decades have enjoyed little success in convincing courts to adopt collective liability theories such as market share, enterprise liability, civil conspiracy, or concert of action.[182] While creative courts have sometimes sidestepped the individual causation requirement in tort law by inventing doctrines such as concurrent causation for indivisible harm, alternative liability, and market share liability, these have not proven to be flexible tools.[183] The failure of these avant-garde theories of tort causation has left plaintiffs without redress in toxic torts, products liability, environmental torts, and other collective injury cases.[184] Adding to the plaintiffs' plight, the U.S. Supreme Court's punitive damages jurisprudence has weakened this remedy's deterrent power to punish corporate wrongdoers in collective injury cases.[185]

Modern industrial injury often involves questions of apportionment of responsibility among multiple tortfeasors. Latent injury cases, for example, present the problem of identifying which defendant caused the victim's harm because it is a fundamental tenet of American tort law that there be proof of a "causal connection" between injured and injurer.[186] The national marketing and distribution of hazardous products creates similar dilemmas in establishing causation. A child poisoned by lead paint chips will find it impossible to identify the specific paint manufacturer decades after the exposure. A tenant apartment may have numerous coats of paint, each composed of different combinations of lead and nonlead paint. Lead pigment cases often have an additional causal connection problem in that the property owners could have avoided the peril of lead paint poisoning through proper

181. MARSHALL S. SHAPO, BASIC PRINCIPLES OF TORT LAW 227 (1999).

182. GIFFORD, *supra* note 119, at 62–68.

183. *Id.* at 59–63.

184. *Id.* at 61–68.

185. All eight cases that the U.S. Supreme Court has decided in its punitive damages jurisprudence "dealt with corporate punishment for group injuries that have a social impact beyond the immediate victim." Michael L. Rustad, *The Supreme Court and Me: Trapped in Time with Punitive Damages*, 17 WIDENER L.J. 783, 804–10 (2008) (footnote omitted) (summarizing the U.S. Supreme Court's punitive damages jurisprudence from 1989 to 2008).

186. GIFFORD, *supra* note 119, at 41.

maintenance.[187] The owners of the tenant apartment had the responsibility for remediating flaking paint chips, not the lead paint manufacturers.[188] These barriers to establishing cause in fact bar nearly all individual actions against lead paint manufacturers. Under products liability, the question of defect is established by the condition of the product as delivered, not after decades of poor maintenance.

Similarly, a smoker who develops lung cancer may also have extensive asbestos exposure over many decades, have a genetic predisposition to developing cancer, lead a dissolute life, or have other issues that may have contributed to his disease.[189] To complicate matters, he may have limited education and little understanding of the health hazards of tobacco and unprotected exposure to asbestos dust or other toxic substances. *Parens patriae* has been stretched in order to bypass these legal barriers to recovery by reconceptualizing these injuries as public health torts.

IV. THE REBIRTH OF PRODUCTS LIABILITY IN *PARENS PATRIAE* ACTIONS

The immediate impact of the BP blowout killed eleven workers and injured seventeen others, but the most far-reaching disaster was the resulting "approximate release of 4.9 million barrels of oil, methane gas and other pollutants" into the Gulf of Mexico.[190] Oil from the Macondo well spewed like a geyser for weeks because "[t]he blowout preventer that should have stopped the [BP] oil spill failed because of faulty design and a bent piece of pipe" in the 300-ton safety device.[191] The BP oil spill is already on track to produce the most complex environmental litigation in history.[192] It may also lead to the

187. *Id.* at 42–44.

188. *Id.*

189. *Id.* at 33, 39–40; Bruce Yandle et al., *Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation*, 2008 U. ILL. L. REV. 1225, 1246–47 ("During [the 1950s and 1960s], the tobacco industry needed no allies to achieve its objectives for several reasons. First, the industry could directly protect itself from emerging threats because its power to block change at the federal level was pervasive. Members from tobacco-producing states chaired one-third of House committees and nearly one-quarter of Senate committees in the early 1960s." (footnotes omitted)).

190. Sabrina Canfield, *In Devastating Complaint, Louisiana Demands $1 Million a Day from BP and Others*, COURTHOUSE NEWS SERVICE (Mar. 8, 2011), http://www.courthousenews.com/2011/03/08/34716.htm.

191. Harry R. Weber & Michael Kunzelman, *Gulf Probe: Blowout Preventer Was Flawed*, ABC NEWS (Mar. 23, 2011), http://abcnews.go.com/m/story?id=13203018&sid=81.

192. Nadler Press Release, *supra* note 178.

> The plume has expanded to thousands of square miles, and the oil that is

world's most expansive products liability action.[193]

A. Deepwater Horizon*'s Allegedly Defective Components*

In order for the state AGs to have a products liability case, they must prove that either the *Deepwater Horizon* or some of its component parts are dangerously defective. The Norwegian firm Det Norske Veritas has released a 551-page report that casts blame "on the blowout preventer's blind shear rams, which are supposed to pinch a well shut in an emergency by shearing through the well's drill pipe."[194]

> "Blowout preventers (BOPs) are used to control blowout. The crew usually install several blowout preventers (BOP stack) on top of the well, with an annular blowout preventer at the top and at least one pipe ram and one blind ram blowout preventer below. Also, some well control techniques require both the annular and the ram blowout preventers."[195]

The underlying jurisprudence of products liability is that the costs of a defective BOP be borne by the manufacturer that placed such a product on the market rather than by the Gulf States and their citizens who were powerless to prevent the environmental disaster.[196] It is likely that the Det Norske Veritas study will be used to determine whether Cameron employed state-of-the-art technology in its BOP. In a negligence products case, the state-of-the-art defense is the best evidence against a claim that a product was defectively designed.[197]

> being released is an extremely hazardous and/or toxic substance which poses a significant risk to the wetlands and marine life in the Louisiana Coastal Zone. A large and expanding mass of oil continues to spread to the Louisiana coastline every day and threatens the nation's largest remaining wetland areas and vulnerable habitat of fish, oysters, crabs, shrimp, birds and other precious wildlife.

Motion to Stay at 2, Wetzel v. Transocean, Ltd., No. 2:10-cv-1222 (E.D. La. June 2, 2010), 2010 U.S. Dist. Ct. Motions LEXIS 1781, at *3.

193. To put things in perspective, the Santa Barbara oil platform blowout of January 28, 1969, released 235,000 gallons of crude oil into the Santa Barbara harbor. ROSENBAUM, *supra* note 147, at 58. The oil spill that reached the beaches was the catalyst that led to federal environment legislation and new safety standards for oil platforms. *Id.*

194. Weber & Kunzelman, *supra* note 191.

195. *Blowout Preventers - Annular Blowout Preventer and Ram Blowout Preventer*, BLOWOUT PREVENTERS, http://www.blowout-preventers.com (last visited Apr. 23, 2012).

196. KEETON ET AL., *supra* note 108, § 98, at 692–93.

197.

> Product liability cases usually focus on competing experts debating whether the design of the product is sufficiently safe. The usual defense is that the product is designed substantially similar to the products of other

The complex products litigation arising out of the *Deepwater Horizon* will involve scores of plaintiffs, defendants, and cross-claimants as well as insurance claims over coverage. The MDL consolidates all liability actions arising out of the *Deepwater Horizon* under the supervision of Judge Carl J. Barbier of the Eastern District of Louisiana. Judge Barbier's supervision of MDL 2179 will involve the alignment of thousands of plaintiffs including class actions, state AG actions, and diverse causes of action filed by local governmental entities. Judge Barbier will be required to forge innovative collective solutions to ensure that the corporate polluters pay the true cost of wrongdoing, while redressing the societal interests of the Gulf States that have suffered severe declines in tourism and revenues, as well as losses of habitat, soiled coastline, and other foreseeable environmental injuries.

1. The Blowout Preventer as a Defective Product. Products liability addresses the legal liability of manufacturers, component-part makers, and others in the distribution chain for injuries caused by unreasonably dangerous defective products.[198] Weatherford designed the *Deepwater Horizon*'s float collar that failed to prevent the disaster.[199] This device, "if operated properly, would have prevented the fire, explosion and the oil spill."[200]

The *Deepwater Horizon*'s BOP was an emergency device, designed to seal the opening of the well to prevent hydrocarbon flow in the event of a serious equipment failure. An annular BOP's purpose is to seal "the annulus between the kelly, the

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> manufacturers and/or that various governmental or privately instituted standards or codes are not violated. Jurors are extremely curious about whether the product conforms with the standards in the industry. If it does, then they are extremely reluctant to find liability.

Lawrence R. Booth, *Winning Products Liability Cases*, FINDLAW (1999), http://library.findlaw.com/1999/Oct/1/129242.html.

198. Three types of product liability cases have been recognized by courts. First, there may be a flaw in the manufacturing process. Second, there may be a defect in the design of the product. Third, the product may lack adequate warnings or instructions. Barker v. Lull Eng'g Co., 573 P.2d 443, 446, 452, 454 (1978).

199. *BP Reaches Deal with Weatherford over Gulf Oil Spill Costs*, INS. J. (June 21, 2011), http://www.insurancejournal.com/news/national/2011/06/21/203358.htm; Complaint for Private Economic Losses in Accordance with PTO No. 11 [CMO NO.1] Section III (BI) ["B1 Bundle"] at 14, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, No. 2:10-md-02179-CJB-SS (E.D. La. Apr. 20, 2011) [hereinafter Carnival's Complaint], *available at* http://www.contractormisconduct.org/ass/contractors/61/cases/1592/2333/bp-amoco-and-halliburton-carnival_complaint.pdf.

200. Carnival's Complaint, *supra* note 199, at 5 (describing Weatherford's ability to supply a product that could have prevented the explosion that led to the sinking of the *Deepwater Horizon*).

drill pipe, or the drill collar. If no part of the drill stem is in the hole, the annular blowout preventer closes on the open hole."[201] An annular BOP "uses a shaped elastomeric sealing element to seal the space between the tubular and the wellbore or an open hole."[202] A BOP used for offshore drilling must be able to withstand pressure of 15,000 psi.[203] In *Broughton Offshore Drilling, Inc. v. South Central Machine, Inc.*,[204] "[a]s the barge was being set up on the site, two hydraulic cylinders holding up the rig's blowout preventer were broken," and the massive BOP fell to the bottom of the ocean.[205] BOPs were not generally "connected to the wellhead until the well was drilled to a depth of approximately 1500–3000 feet. When the well was completed, the BOP was disassembled."[206] The fact that BOPs are connected to the wellhead raises the issue of whether the BOPs are appurtenant to the drilling platform or a component part of the rig. As these cases tacitly assume, BOPs are moveable and operate on moveable oil rigs, and therefore theories of products liability will apply.

The *Deepwater Horizon* oil rig is classifiable as moveable goods, potentially making it one of the largest products ever to be subjected to litigation.[207] The BOP stack consists of the "[a] set of two or more BOPs used to ensure pressure control of a well. A typical stack might consist of one to six ram-type preventers and, optionally, one or two annular-type preventers. A typical stack configuration has the ram preventers on the bottom and the annular preventers at the top."[208] The design consisted of "five vertically stacked rams and two vertically stacked annular preventers."[209] The ram preventer is a massive valve that seals the well, while the annular preventers inflate and seal off "the void outside the

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201. *Blowout Preventers - Annular Blowout Preventer and Ram Blowout Preventer*, *supra* note 195 (explaining the difference between annular and ram blowout preventers).

202. *Id.* § 3.1.3, at 9.

203. BOB CAVNAR, DISASTER ON THE HORIZON 37 (2010).

204. Broughton Offshore Drilling, Inc. v. S. Cent. Mach., Inc., 911 F.2d 1050 (5th Cir. 1990).

205. *Id.* at 1051.

206. Harrison v. Exxon Corp., 824 F.2d 444, 446 (5th Cir. 1987).

207. The *Deepwater Horizon* was a semi-submersible deepwater drilling vessel and was moveable because it floated upon the navigable waters of the Gulf of Mexico. CAVNAR, *supra* note 203, at 16–18.

208. *Oilfield Glossary, BOP Stack*, SCHLUMBERGER, http://www.glossary.oilfield.slb.com/Display.cfm?Term=BOP%20stack (last visited Apr. 23, 2012).

209. MACONDO, *supra* note 22, at 30.

pipe."[210] Assuming no part of the drill stem is in the hole, the annular BOP pinches off the open hole.[211]

Cameron designed, supplied, and maintained the BOP, which generally "can weigh as much as half a million pounds" and is "as tall as a five-story building."[212] Figure One depicts the BOP system on the port side of the *Deepwater Horizon*.[213] The BOP consists of "two well-sealing components: the upper annular preventer and the lower annular preventer."[214] The preventers are designed to be "flexible, elastomeric 'doughnut' seals backed by steel elements that [can] accommodate a range of diameters of pipe."[215] When the BOP operates properly, it "seal[s] off the annular space between the pipe and the LMRP [lower marine riser package]."[216] The BOP uses a Blind Shear Ram (BSR) comparable to "massive metal scissors with two opposing blades that are designed to slice through the drill pipe."[217] The BSR is a "device of last resort . . . to slice the drill pipe and seal the well."[218] The BSR can be activated by personnel, automatically, or by subsea remote vehicles.[219] The National Academy of Sciences Report examined the role the BOP played in the *Deepwater Horizon* oil spill and what could be done to modify the design of BOPs to prevent future malfunctions.[220]

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210. CAVNAR, *supra* note 203, at 35.

211. *Id.* at 37–38. "[A b]lowout preventer stack consists of annular blowout preventer, single ram blowout preventer, double ram blowout preventer and drilling spool. Blowout preventer stacks designed and fabricated in accordance with API 16A are similar to Shaffer's BOP or Cameron's BOP." *Annular Blowout Preventer (Spherical BOP)*, SUNRY PETROL. EQUIP. CO., http://www.sunrypetro.com/bop.html (last visited Apr. 14, 2012).

212. CAVNAR, *supra* note 203, at 37.

> The blowout preventer stack was indirectly connected to the drilling rig by means of a pipe, or flowline, through which drilling fluids were pumped into the well. The only other connection between the blowout preventer stack and the drilling rig were various flexible steel hoses that ran from the accumulator pressure tank on the rig to various sections of the blowout preventer stack. These lines transported hydraulic fluid to activate the blowout preventer.

Harrison v. Exxon Corp., 824 F.2d 444, 445 (5th Cir. 1987) (discussing an earlier accident involving a Dolphin-Titan International, Inc. oil rig and faulty BOP).

213. *See infra,* Figure One; *see also* NAT'L ACAD. OF ENG'G & NAT'L RESEARCH COUNCIL, MACONDO WELL—*DEEPWATER HORIZON* BLOWOUT: LESSONS FOR IMPROVING OFFSHORE DRILLING SAFETY 35 fig.3-1 (2011) [hereinafter MACONDO WELL], *available at* http://www.nap.edu/catalog.php?record_id=13273#toc.

214. *Id.* at 36.

215. *Id.*

216. *Id.*

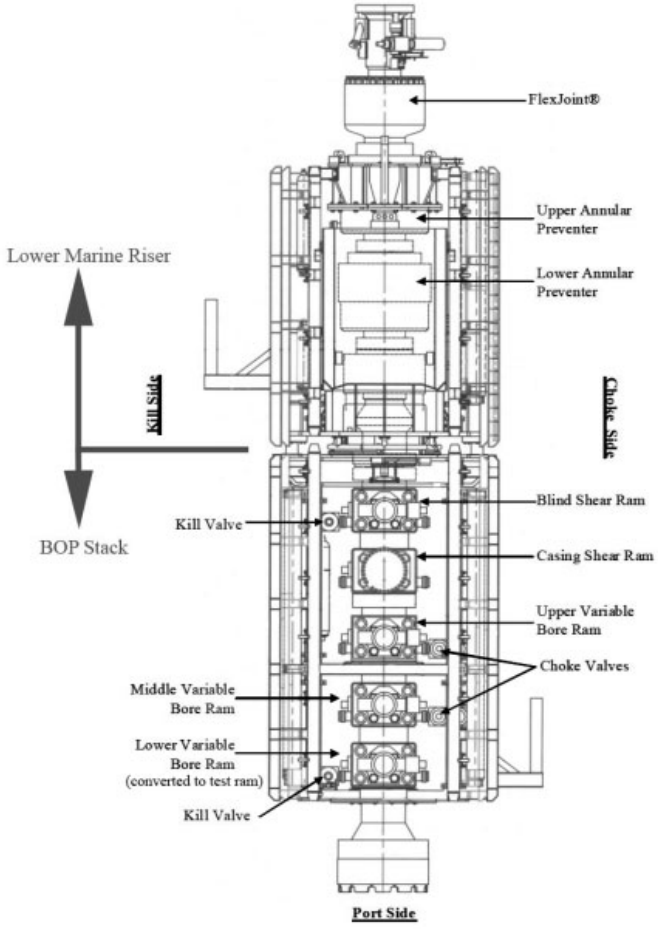
217. *Id.*

218. *Id.*

219. *Id.* at 37.

220. *Id.* at 40.

Figure One[221]



Deepwater Horizon BOP Port Side

The BOP was designed to be installed on top of the wellhead in order to seal off the well in the event of a blowout. As explained by the National Academy of Sciences Report:

> The BOP system for *Deepwater Horizon* was a massive, 57-foot-tall, approximately 400-ton well control system located at

221. Reprinted from 1 DET NORSKE VERITAS, FINAL REPORT FOR UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, AND ENFORCEMENT WASHINGTON, DC 20240: FORENSIC EXAMINATION OF DEEPWATER HORIZON BLOWOUT PREVENTER 5 (2011), *available at* http://www.boemre.gov/pdfs/maps/DNVReportVolI.pdf, with permission from Det Norske Veritas, in association with the U.S. Department of the Interior.

> the wellhead. A riser pipe attached to the top of the BOP system extended to the drilling platform on the *Deepwater Horizon* to permit drilling fluids to circulate between the borehole and the rig, passing through the BOP system. The bottom of the BOP rests on top of a remotely detachable connection to the wellhead, which allows the BOP to be released after well completion.[222]

The shear rams did not perform as intended because the drill pipe became stuck and bucked, which constitutes both a product defect and a breach of express and implied warranties under Article 2 of the Uniform Commercial Code (UCC). Cameron, the company that produced the BOP,[223] was an equipment supplier to the *Deepwater Horizon* and is strictly liable if the BOP proves to be defective.[224]

B. The Requirement of a Defect

Admiralty law draws largely upon state products liability law. Section 402A of the Restatement (Second) of Torts generally holds a manufacturer strictly liable for harm to a person or property caused by "any product in a defective condition unreasonably dangerous to the user."[225] The Restatement (Third) of Torts: Products Liability recognizes three paradigmatic types of defects in products litigation: (1) manufacturing defects; (2) design defects; and (3) the failure to

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222. *Id.* at 34.

223.

> Cameron International Corporation f/k/a Cooper-Cameron Corporation ("Cameron"), is a Delaware corporation with its principle place of business in Houston, Texas. Defendant Cameron is registered to do and does do business in the State of Florida. Defendant Cameron manufactured, designed, supplied, installed and/or maintained the sub-sea device, known as a BOP, that was installed and deployed at the Macondo well and that failed to operate at the time of the blowout, was improperly designed, not appropriate for the intended environment and/or possessed product defects.

Class Action Complaint at 8, Joannou v. BP, PLC, No. 10-CV-00380 (M.D. Fla. June 17, 2010), 2010 WL 2751210, at *4.

224. Strict liability arose first against assembler-manufacturers but was extended to those who made component parts. In this case, Cameron supplied the BOP incorporated into the overall design of the *Deepwater Horizon* oil rig. "[T]he component part maker should be directly responsible to one physically harmed by an event proximately caused by such defect. Thus, care must be exercised in ascertaining the reason for the failure of the component part to serve the manner of use made of it." KEETON ET AL., *supra* note 108, § 100, at 705 (footnote omitted). If the BOP is a component part and failed, "then the component part is itself defective and the cause for the assembled product being defective." *Id.* § 100, at 705–06 (footnote omitted). Here, it seems that the component part itself was defective because it was unfit for its environment of use. *Id*. at 706.

225. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

warn or inadequate warnings.[226] In order to impose products liability, there must be an injury attributable to a defect rather than operator error.

The general standard for products liability is that the product be fit for its environment of use. The Deepwater Horizon Study Group of the Center for Catastrophic Risk Management (CCRM) at the University of California, Berkeley, explains the challenging environment of use for deep-sea oil drilling:

> The oil and gas industry has embarked on an important 'next generation' series of exploration and production operations in the ultra-deep waters of the northern Gulf of Mexico. These operations pose risks (likelihoods and consequences of major failures) much greater than generally recognized. The significant increases in risks are due to: (1) complexities of hardware and human systems and emergent technologies used in these operations, (2) hazards posed by the ultra-deep water marine environment (geologic, oceanographic, metrological), (3) hazards posed by the hydrocarbon reservoirs (high productivities, pressures, temperatures, gas–oil ratios, and low strength formations), and (4) sensitivity of the marine environment to introduction of large quantities of hydrocarbons.[227]

Products designed for offshore drilling a mile below the surface must meet exacting performance standards. "Offshore drilling,

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226. A defect is determined if "at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings." RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998). Section 2 defines the three categories of product defects:

> (a) [a product] contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) [a product] is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) [a product] is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Id.

227. DEEPWATER HORIZON STUDY GRP., CTR. FOR CATASTROPHIC RISK MGMT., UNIV. OF CAL., THE MACONDO BLOWOUT: 3RD PROGRESS REPORT 4 (Dec. 5, 2010) (footnote omitted) (citations omitted), *available at* http://ccrm.berkeley.edu/pdfs_papers/bea_pdfs/DHSG_ThirdProgressReportFinal.pdf.

especially in deep water, is an inherently hazardous activity."[228] The environment of use requires "[s]ophisticated equipment . . . operate[d] in a highly coordinated manner in areas of uncertain geology, often under challenging environmental conditions, and subject to failures from a variety of sources including those induced by human and organizational errors."[229]

1. Manufacturing Defect in BOPs. A "manufacturing defect involves an unintended condition or abnormality in a product and can be identified in most cases by comparing the allegedly defective [oil rig or BOP] with other products in the same line."[230] In order to prevail in a manufacturing defect case, plaintiffs must prove that there was a defect in Cameron's BOP, or other component part, at the time it was delivered to the *Deepwater Horizon*.[231] In the BP oil spill litigation, the failure of the BOP would be classified as a manufacturing defect if the design worked in its environment of use, but this specific unit malfunctioned. A class of private claimants has filed suit against Cameron, alleging a manufacturing defect in its BOP.[232] Carnival Cruise Lines argues that the BOP was either defectively designed or had a manufacturing defect that caused it to malfunction. Carnival contends that it is entitled to recover from Cameron "for its defective design and/or manufacture of the blowout preventer that was appurtenant to and a part of the equipment of the *Deepwater Horizon*, pursuant to Section 402A of the Restatement (Second) of Torts as adopted by maritime law."[233]

Further discovery will be necessary to determine whether the BOP system failed because of a manufacturing defect. This massive component part is composed of complex structural assemblies, with many potential parts that could fail in deep-sea drilling operations. Alternatively, the BOP could have failed because it was negligently installed, maintained, or operated.

2. Design Defect. The question of whether the BOP was defectively designed will center on whether Cameron should have included a backup BOP stack to operate should the first

228. MACONDO WELL, *supra* note 213, at 1 (footnote omitted).

229. *Id.*

230. Kevin R. Boyle, Comment, *The Expanding Post-sale Duty of a Manufacturer: Does a Manufacturer Have a Duty to Retrofit Its Products?*, 38 ARIZ. L. REV. 1033, 1043 (1996).

231. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998) ("A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.").

232. Complaint at 27, Cochran v. BP, P.L.C., No. 0:10-cv-61179-KMM (S.D. Fla. July 8, 2010), 2010 WL 3922642, at *13 (pleading strict products liability for manufacturing defect in class action against Cameron as a result of the BOP's product defect).

233. Carnival's Complaint, *supra* note 199, at 10.

ram shear fail to cut the *Deepwater Horizon*'s drill pipe. Section 402A's consumer expectation test is irrelevant to a BOP because it is not a consumer product, and the users are experienced subsea oil drillers.[234] In its exercise of federal maritime jurisdiction, the court will likely apply state products liability law in determining whether the single ram shear BOP was defectively designed.[235] Cameron's questionable use of one BSR in its BOP when other oil rigs used BOPs with two shear rams raises a viable design claim.[236] The failure of the single blind shear left the *Deepwater Horizon* without a backup, according to investigators:

> But from documents and interviews, it is possible to piece together some of the decisions and events that came into play when the Deepwater Horizon most needed the blind shear ram. Engineers contended with hydraulic fluid leaks that may have deprived the ram of crucial cutting force. They struggled to comprehend what was going on in the steel sarcophagus that encased the shear ram, as if trying to perform surgery blindfolded.
>
> They wondered if the blades had by chance closed uselessly on one of the nearly indestructible joints that connect drilling pipe—a significant bit of misfortune, given a decision years before to outfit the Deepwater Horizon's blowout preventer with just one blind shear ram when other rigs were already beginning to use two of them to guard against just this possibility.[237]

234. State products liability, which developed first on land, has been imported by judges applying maritime law. Federal maritime law has adopted section 402A of the Restatement (Second) of Torts recognizing strict products liability. *See, e.g.*, Ocean Barge Transp. Co. v. Hess Oil V.I. Corp., 726 F.2d 121, 123 (3d Cir. 1984) (quoting Pan-Ala. Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1134 (9th Cir. 1977)).

235. It is unclear whether the federal court will apply the Restatement (Second) of Torts or the Restatement (Third) of Products Liability adopted in 1997. *Cf.* Fisher v. Bristol-Myers Squibb Co., 181 F.R.D. 365, 369 (N.D. Ill. 1998) ("[T]here is no monolithic products liability law in the United States . . . . Someone seeking an example of the diversity of our nation and the continuing supremacy of the system of federalism as embodied in the Tenth Amendment to the United States Constitution need look no farther than products liability.").

236. David Barstow et al., *Between Blast and Spill, One Last, Flawed Hope*, N.Y. TIMES, June 21, 2010, at A1 (reporting that most rigs were requiring BOPs with two shear rams rather than the single-shear ram incorporated in Cameron's BOP used on the *Deepwater Horizon*).

237. *Id.*

The question of whether Cameron's decision to use only a single-shear ram rather than two creates liability will be decided by courts considering expert testimony.

A subsidiary question will be whether Cameron's failure to include a backup created a defective design, given that the BOP is the last line of defense against a catastrophic environmental disaster. All design decisions of any product require a risk assessment of the environment of use and the radius of the consequences of failure.[238] The environment of use for a BOP, operating under extreme pressure a mile below the surface of the Gulf, is perilous. Transocean, one of the BP oil industry defendants, commissioned Det Norske Veritas to assess the reliability of BOPs focusing "on some 15,000 wells drilled off North America and in the North Sea from 1980 to 2006."[239] In its findings, Det Norske Veritas reported:

> [There were] 11 cases where crews on deepwater rigs had lost control of their wells and then activated blowout preventers to prevent a spill. In only six of those cases were the wells brought under control, leading the researchers to conclude that in actual practice, blowout preventers used by deepwater rigs had a "failure" rate of 45 percent.[240]

A failure rate of nearly one in two BOPs calls for further testing and the development and inclusion of new design features.

Louisiana products liability is firmly rooted in the strict liability rationale adopted by section 402A of the Restatement (Second).[241] Courts have generated five principal tests for establishing design defects in products cases: (1) the "deviation from the norm" test;[242] (2) "reasonable fitness for intended purpose" test;[243] (3) the Restatement consumer expectation test;[244] (4) the risk–utility analysis test;[245] and (5) the *Barker v.*

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238. *See* DEEPWATER HORIZON STUDY GRP., *supra* note 227, at 4 (conducting risk assessment on the possibility of blowout in hydrocarbon drilling); BOEMRE, *supra* note 22, at 10 (concluding that an inadequate risk assessment played a role in the Macondo blowout).

239. Barstow et al., *supra* note 236.

240. *Id.*

241. *See* John Neely Kennedy, *The Role of the Consumer Expectation Test Under Louisiana's Products Liability Tort Doctrine*, 69 TUL. L. REV. 117, 124 (1994) (quoting DeBattista v. Argonaut-Sw. Ins. Co., 403 So. 2d 26, 31 (La. 1981), *superseded by statute*, LA. REV. STAT. ANN. § 9:2800.56 (2009)).

242. Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 880 (Alaska 1979), *superseded by statute*, ALASKA STAT. ANN. § 09.17.060 (West 2010), *as recognized in* Smith v. Ingersoll-Rand Co., 14 P.3d 990, 995–96 (Alaska 2000) (internal quotation marks omitted).

243. *Id.* (internal quotation marks omitted).

244. *Id.*

245. *Id.*

Lull[246] test that permits plaintiffs to prove product defect through either the consumer expectation test or the risk–utility test.[247] Louisiana's products liability statute adopts the risk–utility test rather than Section 402A's consumer expectation test.[248] The federal court sitting in admiralty will need to choose which design defect theory best fits the *Deepwater Horizon* case.

The design of pressure-containing joints is a performance concern due to the hydrostatic pressure of deep-sea drilling. Hydrostatic pressure created by drilling mud must be of a "sufficient magnitude to maintain the well under control and prevent a blowout."[249] In the event of a blowout, the BOP's annular seals "could be activated and seal off the annular space between the pipe and the LMRP (lower marine riser package)."[250] The annular preventer installed on the *Deepwater Horizon* "was designed for up to 10,000-psi differential pressure for sealing against a drill pipe or 5,000 psi when sealing the entire hole."[251] However, the "lower annular preventer was apparently designed for a 5,000-psi differential pressure for sealing around a drill pipe."[252] The court will likely apply a risk–utility test to determine whether the maker of the BOP should have designed the annular preventer to function under conditions that are more rigorous.

The burden is on Cameron, as maker of the *Deepwater Horizon* BOP, to demonstrate that its product is reasonably designed with sufficient redundancy to be deployed effectively in the event of a full-scale blowout. Given the best available data on failures,[253] it is probable that a judge or jury will find that Cameron should have considered the utilities of including the

246. California was the first court to adopt a risk–utility test to use in defective design cases. *See* Barker v. Lull Eng'g Co., 573 P.2d 443, 453–56 (Cal. 1978).

247. *Beck*, 593 P.2d at 880; *Barker*, 573 P.2d at 455–56.

248. DeBattista v. Argonaut-Sw. Ins. Co., 403 So. 2d 26, 31 (La. 1981) (describing Louisiana products liability as the equivalent of section 402A of the Restatement (Second) Torts), *superseded by statute*, LA. REV. STAT. ANN. § 9:2800.56 (2009); *see also* John Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 LA. L. REV. 565, 613 n.199 (1989) (stating that the consumer expectations test did not survive the adoption of the Louisiana products liability statute).

249. *See* Drilling Well Control, Inc. v. Dresser Indus., Inc., 340 F. Supp. 1266, 1274 (S.D. Tex 1971) (discussing the importance of hydrostatic pressure in well control).

250. MACONDO WELL, *supra* note 213, at 36.

251. *Id.*

252. *Id.*

253. *See* DET NORSKE VERITAS, ENERGY REPORT: BEAUFORT SEA DRILLING RISK STUDY, at i (July 31, 2009), *available at* http://www.lib.lsu.edu/oilspill/BOP_failure_study_documents.pdf (conducting a study to determine the likelihood of experiencing an uncontrollable flow of hydrocarbons during a deep-sea drilling operation, and estimating the probability of such at one in every 285,000 wells drilled).

two-shear rams and that the burden of using this alternative design was not excessive. Cameron is likely to argue that the "benefit" of reduction in risk of the alternative design does not justify the burden of extending products liability to the defective BOP. A court applying a law and economics perspective would focus on the radius of the environment risk should the single ram shear fail.[254] In the *Deepwater Horizon* case, the "magnitude of the risk" was so great that substantial incentives to motivate companies to produce a safer BOP are easy to justify.[255] The *New York Times* describes the failure of the single-shear ram caused by an obstruction likely embedded in the drilling pipe:

> They were driven on, documents and interviews reveal, by indications that the shear ram's blades had come within a few maddening inches of achieving their purpose. Again and again, they tried to make the blades close completely, knowing it was their best chance to end the nightmare of oil and gas billowing into the Gulf of Mexico.[256]

A battle of experts will largely determine whether Cameron will be liable for the failure of the BOP.

The Gulf States AGs will contend that if Cameron had included a second shear ram as a backup, the well's borehole would have closed and there would have been no explosion, no sinking of the *Deepwater Horizon* drilling platform, and no loss of life or habitat. The AGs will be able to present evidence that the alternative of a backup shear ram was readily available.[257]

Section 2 of the Restatement (Third) also mandates that the plaintiff show that the hazards of a particular design "could have been reduced or avoided by the adoption of a reasonable alternative design."[258] In addition, the defect in the BOP must be the actual and proximate cause of the AG's societal injuries. The state AG would advance his argument of a design defect if he could show the

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254. *Cf.* Barbara Ann White, *Risk–Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand that Hides?*, 32 ARIZ. L. REV. 77, 83 & n.22 (1990) (likening law and economics to cost–benefit analysis in products liability cases).

255. The court will likely apply a modified form of the Learned Hand formula to determine breach of the standard of care in strict product liability actions because of the Restatement Third's emphasis on risk–utility. *Cf.* Michael L. Rustad & Thomas H. Koenig, *Extending Learned Hand's Negligence Formula to Information Security Breaches*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 237, 243–44 (2007) (arguing for the extension of the Learned Hand formula in a cybercriminal setting).

256. Barstow et al., *supra* note 236.

257. *See id.* (stating that the *Deepwater Horizon* "could easily [have] accommodate[d] two blind shear rams").

258. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998). Jurisdictions adopting the Restatement (Third) require the plaintiff to prove a reasonable alternative design as an absolute requirement for liability. *Id.*

existence of a cost-effective alternative BOP device that would have contained the subsea oil spill. A plaintiff's expert testimony would be required to demonstrate that a defective BOP (or other design defect) was a proximate cause of the oil spill and that a reasonable, more effective oil containment system was available.

In order to prevail in a defective design lawsuit against Cameron, the plaintiffs and cross-claimants will need to prove that the BOP was manufactured defectively and not modified contrary to its specifications. Carnival asserts that Cameron's BOP had multiple design defects in addition to the shear ram design decision, for its products liability complaint alleges:

> (a). Inadequate, faulty, nonfunctioning and defective battery systems;
>
> (b). inadequate, faulty, nonfunctioning and defective dead man switches and related wiring;
>
> (c). the absence of acoustic triggers;
>
> (d). inadequate, faulty, nonfunctioning and defective emergency disconnect systems (EDS);
>
> (e). improperly sealed, leaky hydraulic systems;
>
> (f). improperly designed, manufactured, and installed annular seals;
>
> (g). insufficiently robust blind shear rams;
>
> (h). insufficient warnings, instructions, and guidelines on permissible, foreseeable uses and modifications to the blowout preventer and its component parts;
>
> (i). insufficient testing and design verification of the blowout preventer and its component parts to ensure the shearing capability of the ram and other functioning of the blowout preventer during reasonably foreseeable uses; and
>
> (j). in such other particulars as the evidence may show.[259]

In addition, Carnival asserted that there were feasible design alternatives that Cameron should have considered.[260] Carnival also alleged that "the blowout preventer appurtenant to the *Deepwater Horizon* was used in an intended and/or reasonably foreseeable manner."[261]

The state AGs' products liability lawsuit will make arguments that will be functionally equivalent to Carnival's complaint. The prima facie case against the manufacturer of the

259. Carnival's Complaint, *supra* note 199, at 12–13.

260. *Id.* at 13.

261. *Id.*

BOP is that that a defect caused millions of gallons of oil to be released from the *Deepwater Horizon* mobile offshore drilling unit, thereby causing injury to the Gulf States. The BOP's failure may be the result of a manufacturing defect, a design defect, operator error, or some combination of these factors.[262] A senior patent agent claims that the BOP was defectively designed:

> "Since June, I have been filing patent applications associated with the features of the 'BOPstopper,' which encompasses various solutions for containing oil and/or gas spewing from a defective blowout preventer stack located on the floor of an ocean using two individual assemblies: a containment assembly and a valve assembly. . . . First, the containment assembly is submerged below the ocean surface and positioned on a portion of the ocean floor that circumvents the defective BOP stack. After the containment assembly is reinforced, the valve assembly is submerged below the ocean surface and positioned on top of the containment assembly to contain the oil and/or gas. The valve assembly is also reinforced" . . . . [I]nstead of tapping off various points of the defective BOP stack, the "BOPstopper" uses its various features to isolate the BOP stack from the ocean by completely circumventing and encasing the defective stack. Therefore, the amount of ocean that mixes with the spewing oil and/or gas is minimized. A combination of one or more heating elements and measurement equipment, as well as the addition of one or more valves, allows the "BOPstopper" to better contain and control the spewing oil and/or gas.[263]

Courts have adopted the risk–utility test, which would weigh the BOP's risks against its benefits without a requirement of a showing of an alternative reasonable design.[264] If the BOP's

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> As a last line of defense against a blowout, a blowout preventer (BOP) is installed at the seafloor and connected to the marine riser. The BOP is essentially a system of valves designed to be closed in the event of anomalous wellbore pressure (such pressure is sometimes referred to as a "kick"). At the depth and pressures encountered by the *Deepwater Horizon* well, BOEMRE/MMS regulations require at least four such valves, or rams, which must be remote-controlled and hydraulically operated during offshore operations. During the *Deepwater Horizon* blowout, all of the rams on the BOP failed to close properly.

HAGERTY & RAMSEUR, *supra* note 4, at 3 (footnote omitted).

263. Jessica Driscoll, *Washington Township Inventor and Rowan University Professor Team Up to Tackle Oil Spill Containment Issue in Wake of Gulf of Mexico Disaster*, GLOUCESTER COUNTY TIMES (New Jersey), Feb. 1, 2011.

264. *See* Ruwantissa Abeyratne, *The* Deepwater Horizon *Disaster—Some Liability Issues*, 35 TUL. MAR. L.J. 125, 134 (2010) (distinguishing the risk–utility test adopted by several jurisdictions from the reasonable standards test, which considers the adoption of a reasonable alternate design).

utility, as designed, outweighs its risks, the product's design is not defective. Section 1 of the Restatement (Third) makes each seller in the chain of distribution liable if there is proof that the product was sold with a defect.[265]

3. Failure or Inadequate Warning. A manufacturer of a BOP would have a duty to give adequate warnings for the safe operation of the device in its foreseeable environment of use.[266] The duty-to-warn theory of products liability applies to BP's claim against Cameron but is simply inapplicable to the state AGs' claims against Cameron. Louisiana's products liability statute treats a product as unreasonably dangerous because of an inadequate warning "if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product."[267]

Courts applying the Louisiana Products Liability Act have noted that even when a product is not defective, a manufacturer may have a duty to instruct reasonably foreseeable users about the product's safe use.[268] A federal court instructed a jury about a product maker's duty to warn in a defective BOP case:

> The instructions and warnings given by a manufacturer with respect to the capability and limitations that its products are part of the overall design. A manufacturer of a product must give warning of any danger inherent in the product made by him or any use of which he knows or should know in which the user of the product would not ordinarily discover. The warning should be such that if told it would make the product safe for the user. The duty of the manufacturer to warn, however, goes only to those dangers which are not obvious. A manufacturer is not compelled to warn knowledgeable purchasers of the dangers of which they either knew or should be aware.[269]

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265. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 & cmt. e (1998).

266. *See* LA. REV. STAT. ANN. § 9:2800.57(A), (C) (2009).

267. LA. REV. STAT. ANN. § 9:2800.57(A) (2009).

268. *See, e.g.*, Boutte v. Kelly, 863 So. 2d 530, 544–45 (La. Ct. App. 2003) ("Although a product is not defective, a manufacturer still has the duty to instruct reasonably foreseeable users of its product with regard to its safe use."); Ezeb v. Sandoz Pharm., 50 So. 3d 166, 169–70 (La. Ct. App. 2010) (quoting *Boutte*, 863 So. 2d at 545, for the same proposition).

269. Cities Serv. Co. v. Ocean Drilling & Exploration Co. (*In re* Incident Aboard the D/B Ocean King on Aug. 30, 1980), 813 F.2d 679, 684 n.9 (5th Cir. 1987).

The radius of the risk will determine the BOP manufacturer's duty to advise the operator of particular risks in the environment of use, which in this case is the deeply submerged drilling site under the Gulf of Mexico. "A manufacturer must anticipate foreseeable misuse and also consider the particular hazard. When a product presents a serious risk of harm, the manufacturer must warn in a manner [ ] likely to catch the user's attention."[270] Manufacturers of the BOP would have a duty to warn users of the safe external hydrostatic pressure "rating of each joint including valve stems, annular BOP seals, or ram type piston locking mechanism, at any point that forms a barrier from internal to external pressure."[271] The maker of the BOP would also have the duty to communicate information about service conditions and load capacities, and this information will vary depending upon the dimensions of the wellhead connector.[272]

The duty to warn, like a design defect determination, depends upon the environment of use. For example, if the driller is likely to encounter hydrogen sulfide gas zones, the materials selected for the BOP must be corrosion resistant as well as able to operate within the maximum anticipated pressure.[273] If this is not the case, Cameron would have a duty to warn the ultimate user about the dangers of using the BOP in this environment of use. The duty to warn also includes a duty to train personnel to operate the rig's BOP in an emergency so that the operator knows how to take remedial action in a timely manner.[274]

Cameron may potentially be liable for failing to warn or instruct BP and the operators of the rig on proper use of the device. Plaintiffs and cross-claimants may be able to prove that

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270. Delery v. Prudential Ins. Co. of Am., 643 So. 2d 807, 813–14 (La. Ct. App. 1994) (alteration in original) (quoting Easton v. Chevron Indus., Inc., 602 So. 2d 1032, 1037 (La. Ct. App. 1992)) (internal quotation marks omitted).

271. AM. PETROL. INST., *supra* note 195, § 4.5.4, at 21 (stating proposed industry standard for BOPs).

272. *Id.* § 4.6.3, at 21.

273. *Id.* § 5.1.1, at 24 ("Where there is reasonable expectation of encountering hydrogen sulfide gas zones that could potentially result in the partial pressure of the hydrogen sulfide exceeding 0.05 psia (0.00034 MPa) in the gas phase, at the maximum anticipated pressure, the BOP equipment shall be in accordance with NACE MR0175/ISO 15156.").

274. *See id.* § 3.1.21, at 11, § 7.6.3, at 100 (stating that the maintenance and testing of well control equipment should be performed by competent persons); AM. PETROL. INST., RECOMMENDED PRACTICE FOR WELL CONTROL OPERATIONS: API RECOMMENDED PRACTICE 59 § 7.15, at 40–41 (2d ed. 2006), *available at* http://ballots.api.org/ecs/dpos/59e2.pdf ("All concerned personnel should be familiar with the well control system components and installation and capable of reacting quickly and efficiently to potential situations requiring its use.").

Cameron and other defendants had a duty to warn of the perils of using the BOP in hazardous Gulf waters. The National Academy of Engineering and the National Research Council found a pattern of failures in past BOP systems:

> Before the Macondo well blowout, there were numerous warnings to both industry and regulators about potential failures of existing BOP systems. While the inadequacies were identified and documented in various reports commissioned over the years by industry operators and regulatory organizations alike, it appears that there was a misplaced trust by responsible government authorities and many industry leaders in the ability of the BOP to act as a fail-safe mechanism.[275]

Further discovery will be necessary to determine what Cameron knew, and when it knew, about performance deficits of its BOP in deep-sea drilling.

It is possible that the BOP maker could have "failure to warn" liability to third-party claimants. The failure-to-warn theory could be extended to BP[276] and other entities for incorporating a defective BOP into the *Deepwater Horizon* platform. Halliburton, the supplier of the cement, may have had a duty to warn BP and the operators of the *Deepwater Horizon* about the hazards of using foaming cement to seal a wellbore in the event of a blowout.[277] The National Academy of Engineering Report on the BP oil spill pointed to the risks of using foamed

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275. MACONDO WELL, *supra* note 213, at 40.

276.

> BP p.l.c. is the holder of a lease that allows BP to drill for oil and perform oil production-related operations at the Macondo well site in the Mississippi Canyon 252 section of the outer continental shelf in the Gulf of Mexico close to the states of Louisiana, Mississippi, Alabama and Florida. The *Deepwater Horizon*, a mobile offshore drilling unit owned and built by Transocean, had been chartered by BP and completion operations of the well were directed by BP. As the operator of the well that the *Deepwater Horizon* had drilled, BP was ultimately responsible for ensuring that appropriate safety protocols were implemented and followed.

Class Action Complaint for Violations of the Employee Retirement Income Security Act of 1974 ¶ 85, Riely v. BP Corp. N. Am., Inc., No. 1:10-cv-04448 (N.D. Ill. July 16, 2010), 2010 WL 2912153 (filing class actions to recover losses from BP Employee Savings Plan and Capital Accumulation Plan).

277. *See* BP's Third-Party Complaint Against Halliburton ¶ 110, *In re* Oil Spill by the Oil Rig "*Deepwater Horizon*" in the Gulf of Mex., on Apr. 20, 2010, No. 2:10-md-02179-CJB-SS (E.D. La. Apr. 20, 2011), 2011 WL 1496742 ("Despite Halliburton's unique knowledge of the foam cement slurry that it designed and pumped into the production interval of the Macondo well, Halliburton did not inform BP of any risks to the well, and did not warn BP or any of the other parties or the drilling crew of the potential risk of blow out. As such, BP and the other parties were not able to take additional precautions in light of the added risk of an unstable foamed cement slurry.").

cement, which has approximately 35% of the compressive strength of "Class H base cement under the same curing conditions."[278] A products liability defendant such as Cameron could argue that Halliburton should also be held liable for supplying defective cement, which was a superseding cause. The National Academy concluded:

> Foamed cement that may have been inadvertently left in the shoe track would likely not have developed the compressive strength of the un-foamed cement, nor would it have had the strength to resist crushing when the differential pressure across the cement was increased during the negative test.[279]

In a failure-to-warn case, the reasonable BOP maker has a duty to warn when it has knowledge of the product's harmful character.[280] A BOP manufacturer will typically have superior knowledge about the necessity to close the ram BOP during a "gas kick." A BOP must be timely activated for proper performance.[281] Prior to settlement of its claims with BP, Cameron could have interposed a sophisticated user defense to warning or instruction claims.[282]

C. Multiple Theories of Products Liability

Products liability lies in the borderland between the law of contracts and of torts, reallocating the cost of injuries to those

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278. MACONDO WELL, *supra* note 213, at 22.

> The properties of Class H cement are well known. The properties of foamed cement are not well known and not easy to measure because of the compressibility of the foam. In principle, the compressive strength of foamed cement should be less than the compressive strength of un-foamed Class H cement, given the same curing conditions and additives. Testing has shown this to be true.

Id.

279. *Id.* at 24.

280. *See, e.g.*, LA. CIV. CODE ANN. art. 2545 (1996) ("A seller who knows that the thing he sells has a defect but omits to declare it . . . is liable to the buyer . . . . A seller is deemed to know that the thing he sells has a redhibitory defect when he is a manufacturer of that thing.").

281. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, CHIEF COUNSEL'S REPORT 194 (2011), *available at* http://www.oilspillcommission.gov/sites/default/files/documents/C21462-407_CCR_for_print_0.pdf ("Once gaseous hydrocarbons move past the blowout preventer, they expand exponentially with decreasing depth and reach the rig within minutes. Timely BOP activation is therefore crucial to drilling safety.").

282. Cities Serv. Co. v. Ocean Drilling & Exploration Co. (*In re* Incident Aboard the D/B Ocean King on Aug. 30, 1980), 813 F.2d 679, 687 (5th Cir. 1987). "The sophisticated user defense provides that a manufacturer has no duty to warn a user of dangers of which the user is already aware." *Id.* (citing Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700, 719 (5th Cir. 1986)). "However, the sophisticated user defense applies only when the user knew of the particular danger . . . ." *Id.* BP would likely be classified as a sophisticated user, shielding Cameron from inadequate warning or instruction liability.

who supply dangerously defective "goods or products for the use of others."[283] This subfield of tort law combines elements of contracts and torts (contorts) because it permits injured plaintiffs to assert claims for warranty as well as for negligence and strict products liability.[284] Plaintiffs frequently plead multiple theories including strict liability, negligence, and warranty.[285]

1. Strict Products Liability. Strict products liability is based upon the simple principle that the cost of environmental disasters must be reallocated to those corporate defendants best able to avoid the peril.[286] To prevail in a strict products liability action, the Gulf States AGs must prove: (1) a defect made Cameron's BOP unreasonably dangerous; (2) the defect was present when the BOP was in the possession of Cameron; (3) Cameron was engaged in the business of manufacturing or selling BOPs; (4) the states' societal damages, including lost tourism, were proximately caused by the defect in the BOP; and (5) the BOP was being used in a reasonable, foreseeable manner at the time of the *Deepwater Horizon* explosion.[287] The advantage of strict products liability is that plaintiffs need not prove that Cameron was negligent, only that Cameron placed a BOP that contained a defect into the stream of commerce.

2. Negligence. Negligence in products liability shares common ground with strict liability, but the focus of the latter is on the defective BOP itself, not the conduct of Cameron, the product manufacturer. The emblem of negligence is the breach of a standard of care, which is not a concern for a plaintiff pursuing strict liability. Noncompliance with an industry safety standard is a factor in determining whether the BOP or the rig was defective. Section 4 of the Restatement (Third), entitled "Noncompliance and Compliance with Product Safety Statutes or Regulations," states that safety standards are relevant to liability in defective design or inadequate

283. KEETON ET AL., *supra* note 108, § 95, at 677–78.

284. THOMAS C. GALLIGAN, JR. ET AL., TORT LAW 551 (2007); *see* GRANT GILMORE, THE DEATH OF CONTRACT 90 (1974) (discussing the blurring of the related concepts of promissory estoppel in contract law and of detrimental reliance in tort law).

285. GALLIGAN ET AL., *supra* note 284, at 551.

286. See Joseph DiBenedetto, *Generator Liability Under the Common Law and Federal and State Statutes*, 39 BUS. LAW. 611, 620 (1984) ("Strict liability is premised on the theory that certain activities, such as hazardous waste disposal, are likely to result in some injury to the environment. Liability is, therefore, imposed upon those who economically benefit from the activity and who are in the best position to reduce or eliminate the attendant risks.")

287. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 & cmts. a, c (1998).

instructions or warnings cases. Section 4 of the Restatement (Third) explains:

> In connection with liability for defective design or inadequate instructions or warnings:
>
> > (a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and (b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.[288]

In the BP oil spill, the Gulf States AGs can contend that BP and other defendants failed to act with due care under the circumstances in designing the *Deepwater Horizon* rig and BOP. In a negligence-based products liability case, Cameron, the designer of the BOP, would be liable if it acted or failed to act in such a way as to create an unreasonable risk of harm or loss to a foreseeable user. The state AGs could use a number of tests to demonstrate that Cameron or other oil industry defendants were negligent, including the Learned Hand test, negligence per se, or risk–utility analysis.[289] If the BP oil rig was being operated in a foreseeable manner, there will be no defense of misuse of the product, assumption of risk, or contributory negligence.[290] Contributory negligence, misuse, and other intervening misconduct defenses are also not assertable against the BP oil plaintiffs, in clear contrast to the tobacco and lead paint public health *parens patriae* actions.[291] Similarly, there is no possibility

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288. *Id.* § 4.

289. The Restatement (Second) uses a risk–utility test that draws in large part from the famous Learned Hand risk–benefit model. *See* RESTATEMENT (SECOND) OF TORTS § 291 & cmt. d (1965). The Hand formulation finds a defendant such as Cameron in breach if the burden of taking measures to avoid the harm would be less than the multiple of the likelihood that the harm will occur times the magnitude of the harm should it occur, or B<PL. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

290. Courts have sometimes withheld injunctive relief in nuisance cases because of the problem of "coming to a nuisance." However, even if this doctrine applied to the BP oil spill, it would be only one factor in determining whether BP or other defendants' actions were unreasonable. The use of this doctrine against state AGs is questionable. It is an absurd proposition to say that the Gulf States came to the nuisance. It would be the ultimate victim-blaming defense: "What were the Gulf States doing so close to the offshore oil rig anyway?"

291. *See generally* Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988) (remarking that misuse of lead paint could be a defense if that misuse is

that a superseding cause limits the liability of the oil spill defendants.[292] The state AGs' actions also cannot be barred by an unforeseeable misuse of either the oil rig or the component parts.[293] The American Petroleum Institute (API) has proposed an industry standard for blowout prevention for oil wells that could be the basis for demonstrating the maker of the device was negligent.[294] The API notes that in order for a BOP to function under varying rig and well conditions, it must have the following components in working order: BOPs, choke and kill lines, choke manifolds, control systems, and auxiliary equipment.[295] The API's proposed standard imposes a duty to instruct equipment owners about "identifying frequency of inspection or renewal, and acceptance criteria for all elastomeric seals."[296]

Courts have long recognized that statutory standards may define the applicable standard of care owed and that the violations of such standards may constitute negligence per se,[297] but the API standard is only a proposal. The MMS has not weighed in on this alternative design, so it is not a regulation. While the API standard is only a proposed industry benchmark, it presents guideposts useful in determining whether Cameron was negligent in the design of its device. If the API standard had

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the sole cause or an intervening or superseding cause); Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 DENV. U. L. REV. 457, 462 (2009) ("Perhaps the most successful defense offered by the cigarette manufacturers involved variations on the assumption of risk doctrine—the argument that smokers chose to smoke despite awareness of potential adverse health effects, and therefore were legally responsible for their own illnesses.").

292. *See* 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-3, at 192–93 (4th ed. 2001) ("The doctrine of superseding cause is . . . applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable."); MACONDO WELL, *supra* note 213, at 19 (finding that the oil spill defendants made "a series of questionable decisions in the days preceding the blowout that had the effect of reducing the margins of safety, and that evidenced a lack of safety-driven decisionmaking").

293. Product manufacturers may be liable for harm caused by a defective component part. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 (1998). On the *Deepwater Horizon*, there may be scores of component part makers. However, none of the component part makers are liable unless there is proof that the component part was defective. A seller of a nondefective component part used on the *Deepwater* rig would not be liable despite the fact that the rig burned and sunk to the bottom of the ocean killing workers and causing the greatest environmental catastrophe in U.S. history.

294. AM. PETROL. INST., *supra* note 195, § 1.1.1, at 7.

295. *Id.* § 1.1.2, at 7.

296. *Id.* § 4.9.4, at 23.

297. *See, e.g.*, Sanchez v. Galey, 733 P.2d 1234, 1242 (Idaho 1986) (explaining how a court may adopt a legislative enactment or administrative regulation as a measure of negligence); *see also* RESTATEMENT (SECOND) OF TORTS § 286 (1965) (stating when a court may adopt a standard of conduct defined by legislation or by regulation).

been mandated by the industry, the violation of the standard would constitute negligence per se. Even though the API standard does not qualify as a measure of negligence per se, it is a surrogate measure of custom. Industry customs are "always a factor to be taken into account in determining whether the actor has been negligent."[298] Even if custom is not controlling in the case of BOP design, a court may take it in account.[299] Negligence per se is an advantage for claimants because the violation of the statute constitutes both the duty of care and the breach.

3. UCC Warranties. A court in admiralty is likely to allow UCC-type warranty actions. Under the UCC, a "good" is any tangible thing that is moveable.[300] A BOP is classified as a good, despite its vast size and dimensions, because it is moveable; therefore, it is classifiable as personal property, not realty. Louisiana also requires goods to be moveable, but it is the only state that has not adopted UCC Article 2 governing the sale of goods.[301] Louisiana's redhibitory action has analogues to UCC warranties.[302]

a. Express Warranties. Cameron sold and delivered the BOP to Transocean at the *Deepwater Horizon* in 2001.[303] Further discovery is needed to determine what warranties Cameron made and whether the warranty period is still in force, given that the BOP it sold Transocean is now ten years old. Products liability

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298. RESTATEMENT (SECOND) OF TORTS § 295A & cmt. b (1965).

299. *Id*. § 295A & cmt. c.

300. U.C.C. § 2-105(1) & cmt. 1 (2010).

301. *Sales Law: An Overview*, LEGAL INFO. INST., CORNELL U. L. SCH., http://www.law.cornell.edu/wex/sales (last visited Apr. 14, 2012); *see also* LA. CIV. CODE ANN. art. 2601 (2008) ("An expression of acceptance of an offer to sell a movable thing suffices to form a contract of sale . . . .").

302. Article 2520 of the Louisiana Civil Code recognizes a warranty against redhibitory defects. The redhibitory vices warranty requires the seller to warrant to the buyer for redhibitory defects or vices. Article 2520 defines a defect as redhibitory

> when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale." LA. CIV. CODE ANN. art. 2520 (1996). "A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

Id. This action is similar to a breach of warranty covered by UCC section 2-714 whereby the buyer recovers the difference in value between what goods were as warranted and what was actually delivered. U.C.C. § 2-714 (2010).

303. "Cameron was in the business of designing, manufacturing, marketing, selling, and/or distributing the blowout preventer" delivered to Transocean on the *Deepwater Horizon* around 2001. Carnival's Complaint, *supra* note 199, ¶¶ 68, 70.

claims may be predicated upon express or implied warranties of merchantability or of fitness for a particular purpose.[304] Express warranties may be based upon affirmations of fact that go to the basis of the bargain.[305] If a BOP maker advertised its wares as "fail safe," that may be definite enough to constitute an express warranty. If a BOP describes its function as "choke and kill," that may serve as an express warranty. Definite statements about how a product such as a BOP works constitute affirmations of fact going to the "basis of the bargain."[306] The state AGs and private claimants need only prove that the warranty was breached without a showing of Cameron's fault.

Cameron's descriptions of how its annular DL BOP works constitute express warranties. Cameron describes its BOP as working by forcing "the operating piston and pusher plate upward to displace the solid elastomer donut and force the packer to close inward."[307] Another Cameron warranty has to do with the closing of the packer. "As the packer closes, steel reinforcing inserts rotate inward to form a continuous support ring of steel at the top and bottom of the packer."[308] The statement that "[t]he inserts remain in contact with each other whether the packer is open, closed on pipe or closed on open hole" is also definite enough to constitute an affirmation of fact under UCC section 2-313.[309] Cameron's descriptions of other features of its DL BOP also constitute express warranties:

- The Cameron DL BOP is shorter in height than comparable annular preventers.
- A quick-release top with a one-piece split lock ring permits quick packer change-out with no loose parts involved. The design also provides visual indication of whether the top is locked or unlocked.
- The DL BOP is designed to simplify field maintenance. Components subject to wear are field-replaceable and the entire operating system may be removed in the

304. *See* GALLIGAN ET AL., *supra* note 284, at 551 ("In the typical products liability case, plaintiff will assert causes of action in contracts (express warranties, implied warranty of merchantability, fitness for a particular purpose) as well as torts (negligence, strict liability, misrepresentation).").

305. U.C.C. § 2-313 (2010).

306. *Id.*

307. *DL Annular Blowout Preventer*, CAMERON, http://www.c-a-m.com/forms/Index.aspx (select "D" under "Search Alphabetically"; then select "DL Annular Blowout Preventer" in the "Select a Product" drop down menu) (last visited Apr. 14, 2012).

308. *Id.*

309. *Id.*

> field for immediate change-out without removing the BOP from the stack.
>
> - Twin seals separated by a vented chamber positively isolate the BOP operating system from well bore pressure. High strength polymer bearing rings prevent metal-to-metal contact and reduce wear between all moving parts of the operating systems.
> - All Cameron DL BOPs are manufactured to comply with NACE specification MR-01-75 for H2S service.
> - Packers for DL BOPs have the capacity to strip pipe as well as close and seal on almost any size or shape object that will fit into the wellbore. These packers will also close and seal on open hole. Some annular packers can also be split for installation while pipe is in the hole. Popular sizes of the DL BOP are available with high-performance CAMULAR annular packing subassemblies.
> - The Cameron DL BOP is available in sizes from 7-1/16" to 21-1/4" and in working pressures from 2000 to 20,000 psi.[310]

These statements about Cameron's BOP are definite enough to constitute express warranties, and they are nondisclaimable. For example, if Cameron states that its BOP can work with sea pressures as great as 20,000 psi, this statement goes to the basis of the bargain.

b. Implied Warranties and "Redhibitory Vices." "Sales of goods in Louisiana carry an implied warranty that the goods are free of hidden defects ('redhibitory vices') and are reasonably fit for their intended use."[311] Article 2475 of the Louisiana Civil Code sets out a seller's obligations of delivery and warranty as follows: "The seller is bound to deliver the thing sold and to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use."[312] Article 2475's warranty obligations are functionally equivalent to an implied warranty of merchantability recognized under UCC section 2-314.[313] The

310. *Id.*

311. Datamatic, Inc. v. Int'l Bus. Machs. Corp., 795 F.2d 458, 461 (5th Cir. 1986).

312. LA. CIV. CODE ANN. art. 2475 (1996).

313. The performance standards in UCC section 2-314 are more detailed than the unitary standard of the civil law that goods fulfill their intended purpose. *Compare* LA. CIV. CODE ANN. art. 2475 (1996) (containing no subsections with minimal requirements for warranties), *with* U.C.C. § 2-314 (2010) (detailing minimal requirements for merchantability of goods).

single-shear ram employed by Cameron was the last defense against the blowout of the Macondo well. A merchantability inquiry would focus on whether a single-shear ram was fit for its ordinary purpose to seal off the wellbore. The West Engineering Report on BOPs lays out performance standards for a BOP that would pass without objection in the trade:

> "Can a rig's BOP equipment shear the pipe to be used in a given drilling program at the most demanding condition to be expected, and at what pressure?" The most demanding condition includes: maximum material condition, strength and ductility for the pipe and the maximum wellbore pressure in the bore (mud head and kick pressure equaling the working pressure).[314]

Further discovery is necessary to determine whether Cameron disclaimed the warranty against redhibitory vices. Warranties against redhibitory vices are disclaimable, but there must be evidence of the buyer's express and explicit waiver.[315] The disclaimer or the limitation of the redhibitory vices would be inapplicable to the state AGs' actions because they were not party to the original contract with Cameron that sold the BOP.[316]

c. Fitness for a Particular Purpose. An admiralty court will likely import the fitness warranty from the UCC. Louisiana law recognizes a fitness-type obligation in addition to the implied warranty against redhibitory vices. Louisiana law requires sellers to warrant that products are reasonably fit for their ordinary use, but Louisiana also acknowledges fitness warranties.[317] The seller must not only deliver goods

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314. WEST ENG'G SERVS., SHEAR RAM CAPABILITIES STUDY § 2.1, at 2-1 (2004) (emphasis in original), *available at* http://www.boemre.gov/tarprojects/463/(463)%20West%20Engineering%20Final%20Report.pdf.

315. Williams v. Ring Around Prods., Inc., 344 So. 2d 1125, 1128 (La. Ct. App. 1977); Cal. Chem. Co. v. Lovett, 204 So. 2d 633, 636 (La. Ct. App. 1967).

316. *See* U.C.C. § 2-313 & cmt. 1 (2010) (explaining that an express warranty exists between a seller and an immediate buyer, defined as a buyer with whom the seller has a contractual relationship).

317. LA. CIV. CODE ANN. art. 2524 (1996). The presumption is that the seller delivered goods for their ordinary purposes. Comment d to Article 2524 states:

> The second Paragraph of this Article contemplates a situation where the seller, without giving the buyer an express warranty, has reason to know that the buyer intends to put the thing sold to a particular use or that he is buying it for a particular purpose and the buyer relies on the seller's skill or judgment for the selection of the thing. The first Paragraph addresses the very frequent situation where, due to the absence of special circumstances, the presumption must prevail that the buyer's intention is to put the thing to its ordinary use.

LA. CIV. CODE ANN. art. 2524 cmt. d (1996).

"reasonably fit for [their] ordinary use," but "fit for the buyer's intended use or for his particular purpose."[318] Article 2524 states in relevant part that there is a fitness warranty

> [w]hen the seller has reason to know the particular use the buyer intends for the thing, or the buyer's particular purpose for buying the thing, and that the buyer is relying on the seller's skill or judgment in selecting it, the thing sold must be fit for the buyer's intended use or for his particular purpose.[319]

Louisiana requires that sellers fulfill "general rules of conventional obligations" if the BOP is not so fit.[320] The fitness warranty under Louisiana law is not as delictual or as tort-like as UCC Section 2-315.[321] This means that the remedy is predicated upon contract law not upon tort law.

Cameron designed and maintained the BOP used on the *Deepwater Horizon*. "The well control function of last resort is to shear pipe and secure the well with the sealing shear ram. As a result, failure to shear when executing this final option would be expected to result in a major safety and/or environmental event."[322] Fitness for a particular purpose would require the purchaser of Cameron's BOP to rely upon Cameron to select equipment suitable for subsea drilling in the Gulf of Mexico. It is unclear whether Cameron made a fitness-type warranty for "the buyer's intended use or for his particular purpose."[323] A seller of a blowout device presumably would represent that its BOP was suitable on the sea floor. The National Academy of Engineering Report noted the challenges of drilling "under the harsh conditions directly at the sea floor."[324]

Ideally, plaintiffs and cross-claimants would establish that the purchaser of the BOP relied upon Cameron's expertise in choosing a

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318. LA. CIV. CODE ANN. art. 2524 (1996).

319. *Id.*

320. *Id.*

321. *See* LA. CIV. CODE ANN. art. 2524 cmt. c (1996) ("The seller's obligation under this Article is not the common law warranty of fitness."); Hob's Refrigeration & Air Conditioning, Inc. v. Poche, 304 So. 2d 326, 327 (La. 1974) (declaring that under Louisiana law, implied warranties may only be limited through clear and unambiguous statements); Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc., 262 So. 2d 377, 381 (La. 1972) (explaining Louisiana's effort to provide consumer protection by allowing a consumer suit even though privity does not exist). "At common law the remedies arising from the warranty of fitness offer quasi-delictual overtones entirely absent from this Article." LA. CIV. CODE ANN. art. 2524 cmt. c. (1996).

322. WEST ENG'G SERVS., *supra* note 314, § 3.2, at 3-1.

323. LA. CIV. CODE ANN. art. 2524 (1996).

324. MACONDO WELL, *supra* note 213, at 6.

BOP suitable for the complex "[g]eologic structures beneath the deepwater of the Gulf of Mexico."[325] The Gulf "provide[s] a harsh and unpredictable environment of high-temperature and high-pressure hydrocarbon reservoirs that typically contain significant amounts of dissolved natural gas."[326] These factors require additional precautions in the design of the BOP. A fitness warranty would require proof that the purchaser of Cameron's BOP system relied upon Cameron to select the system suitable for the challenging Gulf of Mexico waters.

4. Misrepresentation. The Restatement (Third) leaves open the question of whether a seller should be liable for an innocent misrepresentation that is made to an individual and not to the public at large.[327] The Restatement (Second) in section 402B would make the seller of a BOP liable for innocent misrepresentations even if the seller was without fault or even knowledge of the defect.[328] The Reporters of the Restatement (Third) also left "open the question of whether a seller should be liable for an innocent misrepresentation that causes harm to the person or property of one who is not a consumer of the product."[329] The advantage for plaintiffs of the misrepresentation cause of action is that they do not have the burden of establishing that a product such as a BOP or a component part of the *Deepwater Horizon* was defective.[330] Section 402B is only available for the wrongful death or personal injury claimants; therefore, the state AGs could not bring this cause of action. Codefendants will file products liability actions as cross-claims arising out of the manufacture, design, installation, testing, and operation of the *Deepwater Horizon* and its various components. Further discovery will be necessary to determine whether any of the BP defendants are liable for fraudulent, negligent, or innocent misrepresentation of material fact. The Restatement (Third) recognizes liability for misrepresentation: "One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation."[331]

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325. *Id.* at 7.
326. *Id.*
327. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 9 cmt. b (1998).
328. RESTATEMENT (SECOND) OF TORTS § 402B & cmt. a (1965).
329. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 9 cmt. b (1998).
330. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 9 cmt. d (1998).
331. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 9 (1998).

Admiralty law limits liability for purely economic losses such as Carnival's claim that it suffered harm from lost tourist bookings.[332] Carnival contends, "BP attempted to downplay and conceal the severity of the oil spill. BP's initial leak estimate of 1,000 barrels per day" was a fraction of the actual spill, estimated at 50,000 barrels of oil per day.[333] Carnival seeks recovery against "BP, Halliburton and Transocean for their fraudulent concealment of material facts concerning the oil spill."[334] The state AGs have no evidence that Cameron underplayed the dangers of the BOP or misrepresented its product's qualities.

D. Quandaries for Deepwater Horizon *Products Litigation*

1. Choice of Law Dilemmas. Federal courts have jurisdiction that stretches to the beginning of the Outer Continental Shelf.[335] Because there is no federal common law of products liability, a federal court will need to apply choice of law principles to determine which Gulf State's products liability law applies.[336] Louisiana appears to have the best claim as to choice of law since the *Deepwater Horizon* was closest to that state. The MDL has consolidated class actions and individual cases in Louisiana, suggesting that the center of gravity is there. In the federal admiralty claims, the court will draw upon state law, but choice of law will not be an issue.

In *Mixon v. Anadarko Petroleum Corp.*, a Halliburton employee was injured on the job when he slipped by stepping on

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332. "Carnival is a Cruise Line that operates Cruise Vessels in the Gulf of Mexico and elsewhere. Carnival has suffered economic losses and damages as a result of the explosion and fire aboard the oil rig *Deepwater Horizon* and the subsequent sinking of that vessel." Carnival's Complaint, *supra* note 199, at 1.

333. *Id.* at 17.

334. *Id*.

335. The jurisdictional grant of the OCSLA, 43 U.S.C. §§ 1331–49, provides, in relevant part:

> [D]istrict courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with [ ] any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals.

43 U.S.C. § 1349(b)(1) (2006).

336. "If product liability claim meets admiralty jurisdiction test—that locality of injury be on navigable waters and that wrong bear significant relationship to traditional maritime activity—then applicable law is federal maritime law, regardless of whether jurisdiction is admiralty or diversity." Jean F. Rydstrom, Annotation, *Products Liability Claim as Within Admiralty Jurisdiction*, 7 A.L.R. Fed. 502, 70 (Supp. 2011–2012) (citing Ali v. Offshore Co., 753 F.2d 1327, 1332 n.11 (5th. Cir. 1985)).

a piece of iron not intended as a foothold, while attempting to access a coil.[337] "The Halliburton crew was working pursuant to a contract with Anadarko Petroleum Corporation . . . aboard the semi-submersible drilling rig NOBLE PAUL ROMANO located on the Outer Continental Shelf off the coast of Louisiana."[338] The plaintiff was injured while working with the crew in "disassembling a coiled tubing reel ('CTR') on a multi-part unit designed and custom built by NOV for Halliburton."[339] The CTR was so heavy and so large that it was necessary to take it apart to move it on or off the location on the platform.[340] The plaintiff contended that the CTR was defectively designed for use on an oil rig platform because workers could not access bolts without using a ladder or climbing on the equipment.[341] The products liability claim was based upon the plaintiff's contention that the CTR was not designed for its particular environment of use. The court stated:

> As designed and manufactured, if the CTR was on the deck, access to these bolts could be obtained without the necessity of a ladder or climbing on the equipment. However, on this particular job, the rig's crane could not put the CTR in the proper location directly on the deck. Therefore, skid beams manufactured by Devin were utilized for it to be located properly.[342]

The court reasoned that the plaintiff must prove:

> (1) that his damages were proximately caused by a characteristic of the product that renders it unreasonably dangerous, and (2) that his damages arose from a reasonably anticipated use of the product. If a plaintiff's damages did not arise from a reasonably anticipated use of the product, then the "unreasonably dangerous" question need not be reached.[343]

The court ruled that there was an issue of material fact as to whether the manufacturer was liable because using the "angled iron as a foothold to access a stepladder was a reasonably anticipated use" for the reel.[344] The court found an issue of

337. Mixon v. Anadarko Petrol. Corp., No. 07-1063, 2010 WL 1443901, at *1 (W.D. La. Apr. 9, 2010).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at *1, *4.

342. *Id.* at *1.

343. *Id.* at *3.

344. *Id.* at *5.

material fact upon evidence that there was an alternative, safer design for the CTR.[345] The BOP is an even more gargantuan product than the CTR, and the issue of whether there is a reasonably safer alternative design will be important.

2. General Maritime Law & Products Liability. Admiralty jurisdiction applies to products liability claims arising out of the sinking of the *Deepwater Horizon* mobile drilling platform.[346] "[M]aritime law[ ] falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate . . . ."[347] Courts have not extended admiralty law to apply to "accidents on piers, jetties, bridges, or even ramps or railways running into the sea."[348] "To the extent that it has been applied to fixed structures completely surrounded by water, this has usually involved collision with a ship and has been explained by the use of the structure solely or principally as a navigational aid."[349]

Cameron argued that the *Deepwater Horizon* MODU was not classifiable as a vessel for purposes of admiralty law.[350] The plaintiffs and all other oil industry defendants acknowledged that the rig was a vessel for purposes of maritime law.[351] The court cited Fifth Circuit cases and

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345.

> The evidence establishes that there was an alternative design as it was used on the 'Thunderhorse' reel and ultimately placed on the CTR in question after the accident. However, there is a genuine issue as to whether that alternative design would have been significantly less likely to cause the damage given the manufacturer's contention that its intended use was for the CTR to be placed on the deck and the presence of a work platform may have actually been an impediment to working on the CTR.

Id.

346. "[F]or admiralty jurisdiction to lie over a general maritime tort action not only must the locality test be met but also the injury complained of must bear a significant relationship to maritime activity." Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co., 644 F.2d 1132, 1133, 1135 (5th Cir. 1981) (deciding case where the defendant was performing work aboard a "submersible drilling barge . . . resting on the bottom of a dead-end dredged canal slip in Louisiana").

347. Exxon Shipping Co. v. Baker, 554 U.S. 471, 489–90 (2008) (explaining the relationship between the common law and Congress's authority to enact statutory changes affecting common law rights and remedies under maritime law).

348. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 360 (1969) (explaining how admiralty law does not stretch to include structures on water).

349. *Id.*

350. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 808 F. Supp. 2d 943, 949 (E.D. La. 2011) (holding the *Deepwater Horizon* was a vessel for purposes of maritime law).

351. *Id.*

pointed to the complaint that described the *Deepwater Horizon* as "a dynamically-positioned semi-submersible deepwater drilling vessel. It employed a satellite global positioning device and complex thruster technology to stabilize itself. At all material times, the vessel was afloat upon the navigable waters of the Gulf of Mexico."[352]

Cameron's contention was that while the *Deepwater Horizon* may have been a vessel while being moved from one drilling location to another, it was stationary and attached to 5,000 feet of drill pipe at the time of the blowout.[353] Cameron described its BOP as being "physically attached to the wellhead, located on the seabed some 5,000 feet below the surface of the water, and that the oil spill occurred at the wellhead, not from the DEEPWATER HORIZON."[354] Judge Barbier, who presides over the MDL, ruled that the *Deepwater Horizon* was a vessel and, thus, the litigation will be adjudicated under general maritime law.[355]

The court noted that the BOP was part of the *Deepwater Horizon*'s gear or appurtenances and cited maritime law that "an 'appurtenance' attached to a vessel in navigable waters [is] part of the vessel itself."[356] The court applied the location test, ruling that the torts occurred on navigable waters.[357] The court stated "the blowout, explosions, fire, and subsequent discharge of oil, occurred on or from the DEEPWATER HORIZON and its appurtenances, which was operating on waters overlying the Outer Continental Shelf; i.e., navigable waters."[358]

The court ruled that tort damages such as the "explosion and resulting spill caused [by] a disruption of maritime commerce" exceeded the "'potentially disruptive' threshold" and "bore a substantial relationship to traditional maritime activity."[359] Judge Barbier also determined that the claimants' general maritime claims for negligence and products liability and that punitive damages were recoverable.[360] The court ruled that the states could not proceed in their nuisance claims against the BP oil industry

352. *Id.* at 950.

353. *Id.* at 949.

354. *Id.* at 950.

355. The court "conclusively [ruled] that the Deepwater Horizon, a *mobile* offshore drilling unit, was a vessel." *Id.* at 947, 949 (emphasis in original).

356. *Id.* at 950.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at 962–63.

defendants, given this cause of action is not recognized in maritime law.[361] Federal appeals courts have refused to entertain claims for nuisance under maritime law.[362]

3. State AG Lawsuits & Lack of Privity of Contract. Contractual privity was a historic barrier that barred actions against parties that were not immediate sellers.[363] However, the courts breached the citadel of privity and overran it in nearly every jurisdiction beginning in the mid-1960s when strict products liability swept the legal landscape like an ocean tide.[364] In 1965, the American Law Institute's (ALI) section 402A of the Restatement (Second), entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," abolished the doctrine of privity[365] in all but a few states.[366] Section 402A's consumer expectations test holds a manufacturer strictly liable for any condition not contemplated by the ultimate consumer that would be unreasonably dangerous to him or her.[367] In 1998, the ALI issued the Restatement (Third), which, like its predecessor, abolished privity.[368] Louisiana, which follows the Restatement (Second), would not find privity to be a barrier to the state AG's products liability actions.[369] Privity is not a predicate to recovery in

361. *Id.* at 958.

362. *See, e.g.*, Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 56–57 (1st Cir. 1985) (refusing to extend public nuisance law to maritime claims for fear of an overextension of nuisance principles); Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1030–32 (5th Cir. 1985) (en banc) (declining to adopt plaintiff's state law theories of recovery for nuisance under maritime law).

363. *See* Richard E. Speidel, *Products Liability, Economic Loss, and the UCC*, 40 TENN. L. REV. 309, 314 (1973) (discussing the barrier created by a privity requirement in suits against manufacturers).

364. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791, 794–97 (1966).

365. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

366. All but a handful of states adopted Restatement Section 402A. Even in these states, privity is not a problem. Massachusetts declined to adopt Section 402A but has embraced the policies of strict products liability in its version of the implied warranty of merchantability and in other provisions of Article 2 of the UCC. *See* MASS. GEN. LAWS ANN. ch. 106, § 2-314 (West 1999). Massachusetts, for example, eliminated the defense of privity in its version of Section 2-318. Suppliers of goods may not disclaim either the implied warranty of merchantability or fitness for particular purpose in Massachusetts. MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West 1999). Massachusetts has in effect a functional equivalent of section 402A in its version of Article 2 of the UCC.

367. The Restatement (Second) of Torts states in section 402A that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer." RESTATEMENT (SECOND) OF TORTS § 402A(1) & cmt. g (1965).

368. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (1998).

369. *See* LA. REV. STAT. ANN. § 9:2800.54 (2009) (establishing manufacturer liability

Louisiana under its doctrine of redhibition.[370] In *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc*., the Louisiana Supreme Court held that lack of privity was no barrier to recovery for an ultimate consumer.[371] Admiralty law, too, follows state products liability law, which has largely abolished privity.

4. Overcoming Causal Connection Problems. The BOP is critical to the causal connection problem because it is "used in the event of a pressure surge or blowout to isolate the well bore, thus protecting the rig and the ocean."[372] The BP oil spill raises both cause in fact and proximate cause issues because operational decisions played a role in addition to the failure of the BOP. In order to prevail in a products liability case, the state AGs must establish both cause in fact and proximate cause by a preponderance of the evidence. "[T]he burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff."[373] Proximate cause, sometimes called legal cause, is a normative issue decided on public policy issues such as fairness. "Legal cause has little to do with causation in any factual or scientific sense and may well invite a consideration of duty."[374] Legal causation concedes that there is a cause in fact but cuts off liability because the damages are not reasonably connected to the act or the omission of the defendant.

a. Cause in Fact

i. But-For Test. The state AGs will need to demonstrate that there is evidence to support the finding that failure of the BOP was the cause in fact of their environmental, economic, and

upon proof that defendant's product proximately caused damage to the claimant or to another person or entity without the requirement of privity of contract). *See generally* Kennedy, *supra* note 248, at 565, 577 (contending that Louisiana first adopted products liability in the 1971 Louisiana Supreme Court decision of Weber v. Fid. & Cas. Ins. Co. of N.Y., 250 So. 2d 754 (1971)).

370. *See* Touro Infirmary v. Sizeler Architects, 900 So. 2d 200, 206 (La. Ct. App. 2005) (explaining that a contract is not required for recovery in tort or redhibition and that a duty may be owed to all persons).

371. *See* Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc., 262 So. 2d 377, 380–81 (La. 1972) ("Louisiana has aligned itself with the consumer-protection rule, by allowing a consumer without privity to recover, whether the suit be strictly in tort or upon implied warranty.").

372. GlobalSantaFe's Claim Construction Brief at 7, Transocean Offshore Deepwater Drilling, Inc. v. GlobalSantaFe Corp., No. H-03-2910 (S.D. Tex. Nov. 12, 2004).

373. RESTATEMENT (SECOND) OF TORTS § 433B(1) (1965).

374. GALLIGAN ET AL., *supra* note 284, at 231 (explaining the distinction between cause in fact and proximate cause).

societal damages. If the BOP had worked properly, it would have stopped the flow of oil at the wellhead and averted the catastrophic oil spill that caused the Gulf States to suffer environmental and other societal damages. The Gulf States will contend that "but for" the failed preventer, the *Deepwater Horizon* disaster would not have occurred.[375] A court applying a counterfactual inquiry will ask the question of what would have happened if the BOP had worked.

In *Dillon v. Twin State Gas & Electric Co.*, a young boy was electrocuted when he slipped from a bridge girder and grasped an uninsulated wire.[376] The New Hampshire Supreme Court applied the counterfactual inquiry, asking whether the boy would have survived had the electric company insulated the wire.[377] The court reasoned that even if the negligently maintained lines had not electrocuted the boy, he would have lost his life by falling from the top of the bridge to its floor.[378]

Similarly, a court could find that there was no causal connection if the explosion and oil spill would have occurred even if the BOP had worked as designed. The state AGs will need to establish that Cameron's BOP or some other *Deepwater Horizon* component part was the cause in fact of their societal damages, rather than collateral causes such as well design or operational errors. In order to prevail, the state AGs must prove that societal damages, such as lost tourism injuries, would not have occurred but for Cameron's defective BOP's failure to seal the wellbore.

Properly framing the but-for issue in the *Deepwater Horizon* products liability lawsuit will be tricky given the confluence of other factors, such as BP's delay in activating the "fail safe" device. The negligence of a number of codefendants combined to cause the cascading environmental and economic damages suffered by the citizens of the Gulf States. For example, BP designed its well contrary to systems commonly used in deep-sea drilling in the Gulf, which incorporate an additional layer of pipe called a liner.[379] "The liner and casing are locked together with

375. *See* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770–71 (1997) ("Properly framing the but-for issue in a lawsuit is a significantly complex mental operation" requiring one to determine what injuries the plaintiff is seeking recovery, to determine what the defendant did that was wrong, to create a counterfactual hypothesis, and to ask "whether the injuries that the plaintiff suffered would probably still have occurred had the defendant behaved correctly").

376. Dillon v. Twin State Gas & Electric Co., 163 A. 111, 111–12 (N.H. 1932).

377. *Id.* at 114–15.

378. *Id.*

379. Kevin Spear, *Documents Show BP Chose a Less-Expensive, Less-Reliable*

two cement jobs, which makes them less prone to failure."[380] A deepwater engineer argued that BP's Macondo well incorporated a less reliable, inferior design, and "that the well design virtually always used by his own company, which uses both a liner and casing, was approximately ten times more safe and reliable than the design BP used. However, the safer design might have cost BP an additional $7 million to implement."[381]

ii. Substantial Factor Test for Multiple Causes. Section 432 of the Restatement (Second) adopts a substantial factor test, where multiple actors contribute to the harm. Section 432 asks whether "the actor's negligent conduct is not a substantial factor in bringing about harm to another."[382] The Restatement (Second)'s avant-garde view of cause in fact states that if "each of . . . [the multiple sources of fault] is sufficient to bring about harm to another," negligence may be found.[383] The Gulf States AGs could clear the causation hurdle if they have proof that the BOP was only one of multiple forces that led to the *Deepwater Horizon* oil rig explosion, so long as the BOP was a "substantial cause" of the cascading series of events.

BP and Transocean appear to have made a series of poor decisions that contributed to the *Deepwater Horizon* explosion:

> One of the explosion's primary causes was the decision to temporarily abandon the well, a process that involves covering the well with cement and putting cement "corks" in the drill column. These corks plug the well shut until production begins and oil and gas are extracted from the reservoir below. The decision to cover the well with cement was made despite numerous safety concerns and questions about the "operating knowledge" of key personnel.
>
> On the morning of the explosion, there was a disagreement between the BP manager and the Transocean manager over whether to remove the manmade drilling mud from the drilling column before plugging the well with the cement corks. Removing the mud would reduce the

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Method for Completing Well in Gulf Oil Spill, ORLANDO SENTINEL (May 23, 2010), http://articles.orlandosentinel.com/2010-05-23/news/os-florida-oil-spill-unspoken-risks-20100522_1_oil-company-bp-rig-oil-spill.

380. *Product Liability: BP May Have Used Cheaper, Less Reliable Design*, OLDHAM & SMITH BLOG, (June 2, 2010), http://www.orlandopersonalinjurylawyersblog.com/2010/06/product-liability-bp-may-have-used-cheaper-less-reliable-design.shtml.

381. *Id.*

382. RESTATEMENT (SECOND) OF TORTS § 432(1) (1965).

383. RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) (drawing upon the rationale of the Minnesota Supreme Court in Anderson v. Minneapolis, St. P. & S. S. M. Ry., 179 N.W. 45, 48–49 (Minn. 1920)).

> amount of pressure controlling and containing the oil and gases below the well column, but would also reduce the amount of time BP would need to begin production upon returning to the well. In this case, BP's opinion prevailed and the mud was removed before the cement plugs were installed. According to Dr. Bob Bea, professor of engineering at the University of California, Berkeley and former chief engineer of Shell Oil, if the mud had not been removed, the subsequent blow out and explosion may not have occurred.[384]

Because of BP's failure to activate the BOP in a timely fashion or other causal factors, such as Halliburton's cementing operation, the court could find multiple concurrent causes by applying the substantial factor test to BP and to Cameron in its causation calculus. The court should have little difficulty in proving that Cameron's defective BOP was a substantial factor in bringing about the Gulf States' societal damages and other harms. Nevertheless, if Cameron can produce sufficient evidence that the result would have occurred even if the BOP had worked as intended, the product supplier would be shielded from liability. Under a products liability theory, it is essential that the plaintiff prove a causal link between a product defect, such as the single-shear ram, and consequential damages or harm. The thrust of the design claim would be that the failure of a single valve carrying hydraulic fluid to the shear ram meant that the BOP could not seal the well.[385]

The duty of Cameron is to deliver a working BOP. The BOP must be properly installed, maintained, and not be modified contrary to the manufacturer's specifications.[386] The state AGs or private claimants will not prevail against Cameron if third parties modified or repaired the BOP contrary to its instructions and other specifications. Cameron may have superseding causation arguments if BP, Halliburton, or a crew from third parties erected, installed, assembled, started, operated, used, handled, stored, stopped, serviced, tested, adjusted, maintained, or repaired Cameron's BOP contrary to its specifications. Further discovery is necessary to determine whether there is a basis for a misrepresentation cause of action.

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384. Rebecca K. Richards, Note, *Deepwater Mobile Oil Rigs in the Exclusive Economic Zone and the Uncertainty of Coastal State Jurisdiction*, 10 J. INT'L BUS. & L. 387, 392–93 (2011) (footnotes omitted).

385. Carnival's Complaint, *supra* note 199, at 11.

386. *See* Verge v. Ford Motor Co., 581 F.2d 384, 389 (3d Cir. 1978) (stating that a manufacturer is not liable if a third party modifies the product); Mark A. Latham, *Five Thousand Feet and Below: The Failure to Adequately Regulate Deepwater Oil Production Technology*, 38 B.C. ENVTL. AFF. L. REV. 343, 354 (2011) (detailing efforts by BOEMRE to impose industry-wide regulations on the maintenance and operation of BOPs).

Cameron will have a superseding causation argument to any products liability claim if it can demonstrate that the fluids escaped from the wellbore because BP activated the BOP too late. BOPs are intended to prevent uncontrolled releases of fluids from the wellbore, but this assumes that they are operated according to specifications. The failure of the crew of the *Deepwater Horizon* drilling rig to react promptly to problems with BP's Macondo well contributed to the catastrophe.[387]

In this societal injury case, the state AGs must prove causation by a preponderance of the evidence. The test for determining the causal relationship between an accident and an injury is whether the plaintiff proved through expert testimony that the BOP was defective and that it was more probable than not to be a substantial factor in causing the BP oil spill.[388] Under the Restatement (Third), "If multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time . . . , each act is regarded as a factual cause of the harm."[389]

Codefendants will raise multiple causal connection issues in the complex products litigation that will likely ensue. For example, if the BOP failure on the *Deepwater Horizon* was due to user error, there will be no causal connection between a design defect or a failure to warn and the catastrophic failure. Courts have identified multiple operational factors that have caused failures in BOPs. In *Underwriters at Lloyd's London v. OSCA, Inc.*, a September 9, 1999 oil and gas well blowout on a fixed platform in the Gulf of Mexico occurred about 100 miles off the Louisiana coast.[390] "The blowout, fire, and subsequent well control activities resulted in a damaged well, lost hydrocarbons, and a severely damaged platform."[391] In *OSCA, Inc.*, the contractor

387. *See Gulf Spill Report by Marshall Islands Steers Clear of Blame*, J. CONNOR CONSULTING, INC. (Aug. 17, 2011), http://www.jccteam.com/RegAlerts/DeepwaterHorizon/#720 (identifying three causal factors for the BP oil spill: "the crew's failure to detect well control problems; deviation from standards of well control engineering; and deviation from well abandonment plans approved by the former Minerals Management Service"). *See generally* OFFICE OF THE MAR. ADM'R, REPUBLIC OF THE MARSH. IS., OFFICIAL NO. 2213, DEEPWATER HORIZON MARINE CASUALTY INVESTIGATION REPORT (2011), *available at* http://www.register-iri.com/forms/upload/Republic_of_the_Marshall_Islands_DEEPWATER_HORIZON_Marine_Casualty_Investigation_Report-Low_Resolution.pdf.

388. *See* Maranto v. Goodyear Tire & Rubber Co., 650 So. 2d 757, 759 (La. 1995) (describing the standard of proof necessary to establish causation in a personal injury action); RESTATEMENT (SECOND) OF TORTS § 432 (1965) (providing the "substantial factor" requirement necessary to find negligence).

389. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (2010).

390. Underwriters at Lloyd's London v. OSCA, Inc., Nos. 03-20398, 03-20817, 2006 WL 941794, at *1 (5th Cir. Apr. 12, 2006).

391. *Id.* at *1–2.

ignored specifications requiring the use of a back pressure valve when lowering a tubing assembly into the well.[392]

In *Cleere Drilling Co. v. Dominion Exploration & Production, Inc.*, the drilling crew failed to close a hydraulic bypass valve before activating the BOP.[393] The proximate cause of the failure of the BOP was not defective design but the crew's failure to "close a hydraulic bypass valve, a critical prerequisite to the preventer's effective operation."[394] A BOP manufacturer could have liability for misuse of a product if it failed to give an adequate warning about the dire consequences of ignoring specifications. A cross-defendant alleges the following list of causal factors led to the *Deepwater Horizon* explosion and oil spill:

> (a) Failing to exercise ordinary and reasonable care in connection with designing and executing the Macondo well;
>
> (b) Failing to exercise reasonable care while conducting drilling operations to ensure that a blowout did not occur;
>
> (c) Failing to exercise reasonable care after the blowout to prevent an oil spill from occurring;
>
> (d) Failing to exercise reasonable care to quickly contain the oil that spilled from the Macondo well;
>
> (e) Failing to exercise reasonable care to ensure that adequate safeguards, protocols, and resources would be available to respond to and mitigate the effects of an uncontrolled oil spill from the Macondo well;
>
> (f) Failing to properly interpret pressure tests relating to well control and integrity;
>
> (g) Failing to adequately train employees in management of the *Deepwater Horizon*'s complex systems;
>
> (h) Failing to take appropriate action to avoid the release of oil into the Gulf of Mexico;
>
> (i) Failing to timely control the release of oil;
>
> (j) Failing to exercise reasonable care in designing, operating, and executing the relief and recovery efforts following the oil spill; and
>
> (k) Violating applicable statutes, regulations, and industry standards.[395]

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392. *Id.* at *2.

393. Cleere Drilling Co. v. Dominion Exploration & Prod. Inc., 351 F.3d 642, 644 (5th Cir. 2003).

394. *Id.*

395. Defendant M-I, L.L.C.'s First Amended Cross-Claims ¶ 54, *In re* Oil Spill by the

In addition to these alternative explanations for the oil well blowout, the failure to inject mud and nitrogen-foamed cement has also been blamed.[396] The cementing of the annulus of the Macondo well did not occur until September 18, 2010.[397] In any products liability action by the state AGs, Cameron can attempt to reallocate liability to codefendants such as Transocean or Haliburton.

b. Proximate or Legal Causation. The question whether Cameron or any other products liability defendant is liable for remote damages goes to the heart of proximate causation. At common law, a defendant was liable for all of the consequences of her negligence because Anglo-American courts applied a direct cause test rather than one based upon foreseeability.[398] At early common law, courts did not distinguish between factual and legal causation.[399] Modern courts have substituted the plaintiff-friendly direct cause test for the foreseeable consequences approach.[400] The Restatement (Second) adopted a foreseeable consequences approach in its definition of negligence as "an act which the actor as a reasonable [person] should recognize as involving an unreasonable risk of causing an invasion of an interest of another."[401] Foreseeability has also extended beyond negligence to strict products liability. A plaintiff, such as the state AGs, must not only demonstrate factual causation but must also prove that the harm attributable to the defect "(a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution."[402]

Oil Rig "Deepwater Horizon" in the Gulf of Mex. on Apr. 20, 2010, No. 2:10-md-02179-CJB-SS (E.D. La. May 24, 2011), 2011 U.S. Dist. Ct. Pleadings LEXIS 316.

396. *Id.* ¶¶ 71–72.

397. *See* ACHENBACH, *supra* note 34, at 138 (describing a BOP); David A. Fahrenthold & Steven Mufson, *BP Macondo Oil Well Successfully Capped*, WASH. POST, Sept. 18, 2010, at A3.

398. *See In re* Polemis, [1921] 3 K.B. 560 (C.A.) 568–72 (ruling that the charterers were liable for all the direct consequences of negligence in the case where a stevedore negligently dropped a board into the ship's hold causing a spark setting fire to residual petrol vapors that destroyed the ship).

399. *See* Nicolas P. Terry, *Collapsing Torts*, 25 CONN. L. REV. 717, 775 & n.274 (1993) (describing how the *Polemis* court collapsed cause in fact and legal causation).

400. *See* Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound.), [1961] A.C. 388 (P.C.) 422–23 (appeal taken from New S. Wales) (noting the inequity of the direct cause test and adopting a foreseeability test, which limits liability to the probable consequences of an act).

401. RESTATEMENT (SECOND) OF TORTS § 284 (1965); *see also* Palsgraf v. Long Island R.R., 162 N.E. 99, 104 (N.Y. 1928) (adopting the foreseeable harm test).

402. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 (1998).

Courts will sometimes treat proximate cause as if it contained both the cause in fact and the foreseeable consequences tests.[403] Proximate cause serves to limit the defendant's liability where there is cause in fact. The issue boils down to whether the result is "so unusual, extraordinary or bizarre (*i.e.*, so 'unforeseeable') that the policy of the law [ ] relieve[s] the [defendant] of any liability."[404] Cameron is unlikely to be successful in proving that the harm suffered by the states was unforeseeable. The purpose of a BOP is to seal off the wellbore and prevent the well liquids from escaping. A court is unlikely to use either proximate cause or a "no duty" rule to cut off Cameron's liability for the states' societal damages claims. Cameron and the entire industry had advance notice that BOPs were technologies critical to preventing environmental catastrophes if well pressure was compromised.[405]

Mark Latham argues that not only did the industry know about the questionable effectiveness of BOPs but also the dire consequences if the BOP should fail:

> [I]t is shocking that this technology serves as the final fail-safe mechanism to control well pressure in an emergency. As a starting point in considering the questionable reliability of blowout preventer technology, we must realize that the Deepwater Horizon spill was not some unexpected, unanticipated, rare occurrence. It was an entirely foreseeable event. That is, the Deepwater Horizon was not the first time that a blowout preventer failed to stop a catastrophic flow of oil after pressure control was lost at a well in the Gulf of Mexico.[406]

Cameron had constructive knowledge that well blowouts were a relatively common occurrence and not unusual, extraordinary, or bizarre. As Latham explains, well blowouts are not rare events:

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403. *See, e.g.*, Goldberg v. Fla. Power & Light Co., 899 So. 2d 1105, 1116 (Fla. 2005) (explaining that in order for proximate cause to be found, there must also be an unbroken chain of events "between the prior wrong and the injury"); Gibson v. Avis Rent-A-Car, 386 So. 2d 520, 522 (Fla. 1980) ("One who is negligent is not absolved of liability when his conduct 'sets in motion' a chain of events resulting in injury to the plaintiff.").

404. *Goldberg*, 899 So. 2d at 1116 (third alteration in original) (quoting Palm Beach Cnty. Bd. of Cnty. Comm'rs v. Salas, 511 So. 2d 544, 547 (Fla. 1987)) (internal quotation marks omitted).

405. *See* Latham, *supra* note 386, at 349 (calling BOPs "the most critical piece of pressure control technology" and discussing industry-wide regulations that emphasize the importance of BOPs in controlling well pressure).

406. *Id.* at 350.

> According to MMS data evaluating blowouts on the Outer Continental Shelf, between 1971 and 1991, eight-seven [sic] blowouts occurred. MMS also found that between 1992 and 2006, another thirty-nine blowouts happened. While the data show that the number of blowouts decreased over the years, nonetheless, over the thirty-five year period studied by MMS there were a total of 126 blowouts on the Outer Continental Shelf. The data compiled from 1971 through 1991, according to MMS authors, correlated to one blowout for every 246 wells drilled, and between 1992 through 2006 the blowout rate was one blowout for every 387 wells drilled. Consequently, the potential for a well blowout is startlingly high since there are over 4000 wells in the Gulf of Mexico, and even more alarmingly, 700 of these are in waters deeper than 5000 feet.[407]

The best available data on BOPs demonstrate that this equipment was not fit to be a fail-safe solution to foreseeable well explosions.[408] Proximate cause measures the closeness of the connection between the failure of the BOP and the harm suffered. It is likely that the federal court will find proximate causation, as well as direct causation, in any products litigation arising out of the defective BOP.

5. Does the Economic Loss Rule Present a Barrier? BP contends that even if the federal OPA did not preempt tort actions,[409] these lawsuits would be barred by the economic loss

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407. *Id.* at 351 (footnotes omitted).

408.

> For years MMS has been concerned about the effectiveness of blowout preventers as the critical technology in the event well pressure was compromised. A decade before the Deepwater Horizon incident, MMS funded a study to evaluate blowout preventer reliability. The study examined a total of 117 failures associated with blowout preventers at eighty-three deepwater wells, and categorized fifty-seven percent of the failures as "safety critical failures."

Id. (footnotes omitted). "Blowout preventer unreliability has not escaped scrutiny in the Deepwater Horizon congressional investigations. One congressional committee's investigation noted that 'in numerous cases, blowout preventers have failed to operate, often with catastrophic consequences. The blowout preventer installed on the Macondo well failed to control the blowout.'" *Id.* at 352. (quoting *Legislation to Respond to the BP Oil Spill and Prevent Future Oil Well Blowouts: Hearing Before the H. Comm. on Energy & Commerce*, 111th Cong. 6 (2010) (Memorandum by Rep. Henry A. Waxman, Chairman, H. Comm. on Energy & Commerce, and Rep. Joe Barton, Member, H. Comm. on Energy & Commerce)) (internal quotation marks omitted).

409. The Oil Pollution Act of 1924 was the first federal statute to address marine pollution.

> This Act was intended to protect the nation's coastal waters from vessel discharges, but failed in that purpose because it conditioned recovery on a showing of gross negligence. A shipowner or operator was not liable for oil spills resulting from emergency situations imperiling life or property, or for

rule.[410] The economic loss rule would preclude an action in tort if the

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> unavoidable accidents, collisions or strandings. The penalty for violation was a maximum of $2,500 and/or one year imprisonment. In addition, a $10,000 fine constituting a maritime lien could be imposed on the vessel and her officers' licenses either suspended or revoked.

3 EDWARD V. CATTELL, JR., BENEDICT ON ADMIRALTY § 111, at 9-9 to 9-10 (rev. 2011) (footnotes omitted). Congress enacted OPA. Senator George Mitchell contended that this legislation was blocked for decades because of concerns that it would preempt state rights and remedies. Hon. George J. Mitchell, *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990*, 21 ENVT'L L. REV. 237, 239 (1991). The grounding of the *Exxon Valdez* in 1990 moved Congress to update the law. "The dramatic collapse in oil tanker safety broke a decade-long stalemate that had prevented enactment of a comprehensive oil spill law to protect our coasts. As a result, in August the Congress overwhelmingly passed, and the President signed, such a measure, the Oil Pollution Act of 1990 (OPA)." *Id.* at 238.

> During the past two years, America's waters and shores were fouled repeatedly by oil spewed from the torn hulls of leaking tankers. Globs of oil from wrecked ships victimized the Texas coast and were commonplace in New York harbor. A similar fate struck the California shoreline, the Delaware River, Rhode Island's Narragansett Bay and, of course, Alaska's Prince William Sound. Virtually every major waterbody in our nation has been scarred by spilled oil.

Id. at 237–38.

410. Claims for purely economic losses unaccompanied by physical damage to a proprietary interest are precluded by Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). *See also* Marastro Compania Naviera, S.A. v. Canadian Mar. Carriers, Ltd., 959 F.2d 49, 53 (5th Cir. 1992) (explaining the economic loss rule in maritime law); Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1020–21 (5th Cir. 1985) (en banc) (applying federal maritime law and rejecting state nuisance law for plaintiffs seeking to recover economic losses in a chemical spill case on the Mississippi River). The economic loss rule is a tool for the court to limit plaintiff classes because liability cannot extend to all of the foreseeable consequences of a massive blowout. Federal maritime products liability plaintiffs must demonstrate some physical damage to a proprietary interest in order to avoid dismissal at an early stage. The oil industry cross-claimants will be able to demonstrate collateral property damage. The *Deepwater Horizon* workers on the platform injured or killed will have cognizable products liability claims. It is unclear which categories of claimants will be able to circumvent the limits of the *Robins Dry Dock* rule. *See Robins*, 275 U.S. at 108–09. Judge Barbier has already applied the *Robins Dry Dock* rule to dismiss claims against cities located a long distance from the spill. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon," 2011 U.S. Dist. LEXIS 142037, at *9 (E.D. La. Dec. 31, 2011) ("General maritime law claims that do not allege physical damage to a proprietary interest are dismissed under the *Robins Dry Dock* rule."). In an earlier opinion, Judge Barbier also applied the *Robins Dry Dock* rule to limit economic losses in cases filed by private parties for economic loss and for property damage resulting from the oil spill. *See In re* Oil Spill by the Rig Deepwater Horizon in the Gulf of Mex. on Apr. 20, 2010, 808 F. Supp. 2d 943, 958, 962 (E.D. La. 2011). It is likely Judge Barbier will use the economic loss rule as an exclusionary device for classes of plaintiffs in federal maritime products liability cases. Kenneth Feinberg retained Harvard University law professor John Goldberg to advise the GCCF on economic loss issues. George W. Conk, *Diving into the Wreck: BP and Kenneth Feinberg's Gulf Coast Gambit*, 17 ROGER WILLIAMS U. L. REV. 137, 163 (2012). Professor Goldberg's report on economic loss in connection with the BP *Deepwater Horizon* oil spill is a template for assessing economic loss for GCCF claimants. *See generally* John C.P. Goldberg, Liability for Economic Loss in Connection with the Deepwater Horizon Spill 42 (Nov. 22, 2010) (unpublished manuscript), http://dash.harvard.edu/handle/1/4595438 (select "Report on Economic Loss Liability" hyperlink). Goldberg's report "emphasized the causal terms 'results from' and 'due to'. . . . Although the United States Department of Justice has complained that Feinberg is using an unreasonably restrictive 'direct cause' standard than a 'results from' standard, any distinction between the two is obscure." Conk, *supra*,

only damages were to the oil rig or to the BOP itself.[411] The BP oil spill defendants argue that the federal OCSLA preempts most tort claims.[412] In *East River Steamship Corp. v. Transamerica Delaval Inc*., the U.S. Supreme Court held that a tort claimant could recover for products liability in admiralty even though it could not recover for the physical damage a defective product causes to itself.[413] The Court noted that strict liability, as well as negligence, was "already incorporated into the general maritime law."[414] In *East River*, the plaintiff sought to apply products liability to recover for damages to a steam turbine engine when there was neither personal injury nor property damages other than to the engine itself.[415] The Court ruled that the plaintiff's remedy was restricted to UCC Article 2 warranties and was not cognizable in torts given that this was not the kind of harm dealt with by the public policy-oriented theory of strict liability.[416] In *East River*, the only injury was economic loss due to a defective component that damaged the turbine itself and, therefore, Article 2 warranties provided the exclusive remedies for the plaintiff.

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at 163. In his GCCF protocol, Feinberg shows an inclination to recognize economic loss claims far beyond those allowed in the *Exxon Valdez* case. *Id.* at 163–64. It is unclear whether Judge Barbier will draw from the well of Goldberg's sliding scale of potential claimants in deciding the contours of economic loss in the state AGs' products liability actions. Economic loss arguments have already been made by oil industry defendants. *See, e.g.*, Motion to Dismiss at 2, 22, Paul v. BP plc, No. 1:10-cv-00245-WS-N (S.D. Ala. Aug. 16, 2010), 2010 U.S. Dist. Ct. Motions LEXIS 9272 [hereinafter Motion to Dismiss] (alleging that even if OPA had not displaced plaintiffs' claims, they would still be barred by the economic loss rule of *Robins Dry Dock* or by Louisiana state law principles).

411. *See, e.g.*, BP Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' Complaint at 25–26, Fishburn v. BP plc, No. 1:10-cv-00248-WS-C (S.D. Ala. Aug. 16, 2010), 2010 U.S. Dist. Ct. Motions LEXIS 9272 [hereinafter BP Defendants' Memorandum of Law] (arguing that the plaintiffs' recovery for damages "would be barred by the economic loss rule").

412. *See* 43 U.S.C. § 1332 (2006) ("It is hereby declared to be the policy of the United States that [ ] the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter. . . ."); BP Defendants' Memorandum of Law, *supra* note 411, at 20–21.

413. E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 865 (1986). The Court cited federal appeals court precedents that products liability applied in general maritime law.

414. *Id.* at 865–66.

415. *Id.* at 875.

416. "Obviously, damage to a product itself has certain attributes of a products-liability claim. But the injury suffered—the failure of the product to function properly—is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." *Id.* at 867–68, 872–73. *See also* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1023 (5th Cir. 1985) (describing *Robins Dry Dock*'s economic loss rule as being "a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability").

The economic loss rule is inapplicable to the wrongful death and personal injury claims.[417] The likely damages arising out of the BOP failure will include: (1) personal injuries and death; (2) physical harm to the *Deepwater Horizon* drilling rig constructed with the use of the BOP as a component part; and (3) direct economic loss such as lost revenues, cleanup costs, and environmental degradation resulting from the inferior product.[418] "The consolidated cases [in the MDL] include claims for the deaths of eleven individuals, numerous claims for personal injury, and various claims for environmental and economic damages."[419] The personal injury, environmental, and property damages claims arise out of recovery of damages to the BOP itself. The essence of the state AGs' actions centers on recovery for collateral property and economic damages.[420] Cross-defendants, too, will seek consequential damages from the failure of the BOP. The collateral economic damage caused by the *Deepwater Horizon* case was massive environmental devastation.[421] For the *Deepwater Horizon*'s eleven workers killed by the explosion, there will be wrongful death damages.[422] The federal court ruled in November of 2011 that the

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417. The estates of the eleven oil drill workers will be seeking claims under the federal Jones Act, rather than under the common law. "The Jones Act provides a death remedy for designated survivors of a seaman who is fatally injured while in the course and scope of his employment. It is the exclusive remedy of a seaman's survivors against the employer for the employer's negligence in causing the death." deGravelles & deGravelles, *supra* note 32, at 1075, 1085; *see also* Latham, *supra* note 386, at 355.

418. Possible theories of recovery are: (1) strict products liability; (2) negligence; (3) breach of warranty (express, implied, fitness for a particular purpose); and (4) public nuisance.

419. *In re Oil Spill I*, MDL No. 2179, 2011 WL 5520295, at *1 (E.D. La. Nov. 14, 2011).

420.

> By and through their respective Attorneys General, the States of Alabama and Louisiana . . . initiated individual actions that were consolidated with this MDL . . . and subsequently filed Amended Complaints . . . [alleging] that the oil spill caused a variety of past, present, and future damages, including damage to natural resources and property, economic losses (including lost revenues, such as taxes), costs associated with responding to the oil spill and performing removal actions, costs associated with providing increased or additional public services, and the long-term reputation damage or "stigma" associated with the oil spill.

Id. at *5.

421. "On the evening of April 20, 2010, an explosion erupted on the *Deepwater Horizon*. Two days after the explosion, on April 22, 2010, the *Deepwater Horizon* sank and began discharging oil into the Gulf of Mexico. Eleven workers died because of the *Deepwater Horizon* explosion." Class Action Complaint for Violations of the Employee Retirement Income Security Act of 1974, *supra* note 276, at 21 (filing class actions to recover losses from BP Employee Savings Plan and Capital Accumulation Plan).

422. *See* deGravelles & deGravelles, *supra* note 32, at 1085–86 (discussing how the Jones Act and the Death on the High Seas Act provide the exclusive remedies for wrongful death of individuals at sea).

Deepwater Horizon was a vessel subject to maritime law and that the court's admiralty jurisdiction was applicable.[423]

Economic loss is unlikely to be a barrier to the state AGs' products litigation because they have documented collateral damages to their states' real property, including shorelines, wetlands, estuaries, and waters.[424] Similarly, some plaintiff categories, such as commercial fishermen, will be able to overcome this barrier.

6. Federal Preemption.[425] The BP oil spill products liability claims will be tried under federal maritime law, rather than the products liability statute or common law of a particular Gulf State. Judge Barbier has already ruled that the state AGs' claims may proceed in products liability and in negligence under general maritime law, finding no preemption by any federal statutes.[426] The maritime products liability claims of the Gulf States AGs arise out of the failure of the BOP and other component parts of the oil rig.[427] The oil industry defendants contend that OPA preempts common law claims, an argument rejected by Judge Barbier. Congress enacted OPA to respond to the perils of oil spills after the 1989 *Exxon Valdez* oil disaster.[428] The oil spill defendants contend that OPA supplants tort claims such as negligence, wantonness, nuisance, products liability, and strict liability

423. *In re Oil Spill I*, MDL No. 2179, 2011 WL 5520295, at *3, *14 (ruling that the states may pursue products liability and negligence claims under general maritime law).

424. *See* CAVNAR, *supra* note 203, at 13, 101–03 (describing the devastation caused by toxic oil dispersants on the Gulf Coast's shorelines, wetlands, and waters); Rustad & Koenig, *supra* note 50, at 90–91 (stating Alabama was the first Gulf Coast state to sue BP for damages to the state's waters, wetlands, and other real property assets).

425. State law may be preempted in several ways by the operation of a federal statute or regulation. *See, e.g.*, Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 865, 884 (2000). In each case, the objective or purpose of Congress is of primary concern in determining whether preemption exists. *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) (stating that "the purpose of Congress is the ultimate touchstone in every pre-emption case" and that such purpose is "revealed not only in the [statute's] text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law"); *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 cmt. e (1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulation affects liability for product defectiveness"). *See generally* Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of 33, 43, and 46 U.S.C.).

426. *In re Oil Spill I*, MDL No. 2179, 2011 WL 5520295, at *3, *14.

427. *Id.* at *1, *2.

428. Rodgers et al., *supra* note 100, at 187.

claims.[429] BP, for example, contends that OPA displaces claims for negligence, negligence per se, private nuisance, and strict liability for abnormally dangerous and ultrahazardous activities as well as for products liability claims.[430]

Maritime products liability plaintiffs will need to present their claims to BP through the OPA claims process as a condition for filing their causes of action arising out of the oil spill.[431] No presentment requirement applies to the state AGs' products liability and negligence claims.[432] Plaintiffs' groups contend that the *Deepwater Horizon* was neither an "artificial island" nor a "fixed structure" and that, therefore, OPA is inapplicable.[433] The BP oil defendants counter that the *Deepwater Horizon* was a MODU and a "vessel" operating in navigable water.[434] They cite authority for the proposition that "semi-submerged, mobile rigs like the Deepwater Horizon are 'vessels,' and not fixed platforms."[435]

7. Punitive Damages Under General Maritime Law. Even though the Gulf States' actions were filed in Louisiana federal court, federal maritime law must be applied to the question of punitive damages, not Louisiana or Alabama law.[436] Alabama's amended complaint seeks punitive damages "under the Oil Pollution Act of 1990, . . . general maritime law (negligence and products liability), and Alabama law (negligence, products liability, public and private nuisance, trespass, and fraudulent

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429. Motion to Dismiss at 1, Smith v. BP PLC, No. 1:10-cv-00319-WS-C (S.D. Ala. Aug. 16, 2010), 2010 U.S. Dist. Ct. Motions LEXIS 9446, at *1; *see also* 33 U.S.C. § 2701 (2006).

430. Motion to Dismiss, *supra* note 429, at 1. ("The Oil Pollution Act of 1990 (OPA) displaces Plaintiffs' negligence, wantonness, nuisance, and strict liability claims." (citation omitted)).

431. OPA requires a "responsible party" for a vessel or a facility from which oil is discharged to pay specified removal costs and damages. 33 U.S.C. § 2702 (2006). OPA requires that "all claims for removal costs or damages *shall* be presented first to the responsible party" before the claimant may pursue such costs or damages in court. 33 U.S.C. § 2713(a) (2006) (emphasis added). If the claim is not resolved to the claimant's satisfaction within ninety days, only then may the claimant "elect to commence an action in court against the responsible party . . . or to present the claim to the [Oil Spill Liability Trust] Fund" established by the statute. 33 U.S.C. § 2713(c) (2006); *see also* 33 U.S.C. § 2712(f) (2006) (explaining that the U.S. government retains a subrogation right against the responsible party if the Fund compensates the claimant). If the claim is not paid by the Fund, the responsible party must pay if found liable.

432. The requirement for presentment is spelled out in 33 U.S.C. § 2713. All claims for removal cost or damage must first be presented. 33 U.S.C. § 2713(a), (b) (2006).

433. Motion to Dismiss, *supra* note 410, at 13–14, 16–17.

434. *Id.* at 17.

435. *Id.* at 17–18.

436. *See infra* note 521. *See generally* David Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997) (describing definitively the federal maritime law of punitive damages).

concealment)," as well as civil penalties under Alabama's clean water statute.[437] "Alabama also seeks civil penalties against all Defendants for violations of the Alabama Water Pollution Control Act."[438] While Louisiana has functionally equivalent claims, its amended complaint makes no mention of punitive damages.[439] Judge Barbier ruled that the state AGs may recover punitive damages under federal maritime law rather than under common law.[440] In an earlier proceeding, the court ruled that punitive damages were available against all responsible parties and not preempted by the federal OPA.[441]

Punitive damages have been recognized since the formative era of federal maritime law.[442] The U.S. Supreme Court's first judicial recognition of punitive damages was the 1818 marine trespass case of *The Amiable Nancy*, where pirates robbed and plundered a Haitian schooner.[443] Though the Court did not award exemplary damages, the Court acknowledged the possibility of civil punishment in federal maritime cases.[444] Justice Story stated, "[I]f this were a suit against the original wrong-doers, it might be proper to . . . visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct."[445]

In *Exxon Shipping Co. v. Baker*, the Court carved out a distinctive punitive damages jurisprudence for federal maritime awards, rather than the due process framework it created in

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437. *In re Oil Spill I*, MDL No. 2179, 2011 WL 5520295, at *1 (E.D. La. Nov. 14, 2011).

438. *Id.*; *see also* NAT'L ASS'N STATE DEP'TS OF AGRIC. RES. FOUND., STATE ENVIRONMENTAL LAWS AFFECTING ALABAMA AGRICULTURE, at AL-3, *available at* http://www.nasda.org/nasda/nasda/Foundation/state/Alabama.pdf (last visited Apr. 14, 2012) (explaining the enforcement system set forth in Alabama's Water Pollution Control Act).

439. *In re Oil Spill I*, MDL No. 2179, 2011 WL 5520295, at *2.

440. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179, 2011 WL 4575696, at *11 (E.D. La. Sept. 30, 2011) ("As explained in *Townsend* . . . neither the Jones Act nor the Death on the High Seas Act speak to negligence claims asserted by non-seamen under general maritime law, and punitive damages have long been available at common law. The Court finds punitive damages are available to [ ] Plaintiffs who are not seamen.").

441. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 808 F. Supp. 2d 943, 962–63 (E.D. La. 2011) (recognizing that all responsible parties were subject to punitive damages in course of considering BP's master complaint).

442. Lake Shore & Mich. S. Ry. v. Prentice, 147 U.S. 101, 107–08 (1893).

443. The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 546–47, 558 (1818); *see also* Stephen K. Carr, *Living and Dying in the Post-*Miles *World: A Review of Compensatory and Punitive Damages Following* Miles. v. Apex Marine Corp., 68 TUL. L. REV. 595, 611–12 (1994) (noting that *The Amiable Nancy* was the first maritime case in which punitive damages were contemplated).

444. *The Amiable Nancy*, 16 U.S. (3 Wheat.) at 558–59.

445. *Id.* at 558.

common law cases.[446] Justice Souter acknowledged that the Court's review in admiralty differed "from due process review" and that the maritime review was confined to the question of whether the jury award was in "conformity with maritime law, rather than the outer limit allowed by due process."[447] In *Baker*, the Court imposed a cap, ruling that a punitive-to-compensatory ratio of 1:1 yielded maximum punitive damages roughly in the amount of $500 million.[448] "The *Exxon Valdez* oil spill generated one of the largest punitive damages awards in the history of the [U.S.] legal system. However, the recent British Petroleum (BP) oil spill surpasses the economic and environmental damage that occurred in Alaska."[449]

The heedless corporate culture that led to the BP oil disaster may be punishable, but justice may be capped by the rule established in the *Baker* case. Judge Barbier's opinion is that Louisiana's AG may seek punitive damages even though Louisiana is a civil law jurisdiction that has never recognized punitive damages.[450] Federal maritime law, not Louisiana law, will determine the question of whether Cameron is liable for punitive damages in products liability. Five recurrent types of corporate misconduct result in punitive damages in products liability: "(1) fraudulent-type misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing; and (5) post-marketing failures to remedy known dangers."[451] Many BP oil plaintiffs are seeking punitive damages, not just for defective products, but also for reckless operation of the *Deepwater Horizon*.[452] The single-shear design did not violate a federal safety standard and is thus not a source of punitive liability.

The state AGs' most likely punitive damages claim was that Cameron (and BP as successor in interest) knew the danger of

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446. Exxon Shipping Co. v. Baker, 554 U.S. 471, 501–03 (2008).

447. *Id.* at 501–02.

448. *Id.* at 512–15.

449. Ilisja Moreland, *From the* Exxon Valdez *to the* Deepwater Horizon*: Will BP's Dollar Reach Where the Oil Didn't?*, 14 SUSTAINABLE DEV. L.J. 117, 117 (2011).

450. *In re Oil Spill I*, MDL No. 2179, 2011 WL 5520295, at *3 (E.D. La. Nov. 14, 2011).

451. David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH L. REV. 1257, 1329 (1976) (conducting content analysis of the conduct leading to punitive damages in a quarter century of products liability cases and finding that defendant's aggravated conduct fell into one or more of Professor Owen's categories); *see also* Michael Rustad, *In Defense of Punitive Damages of Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 23, 66 (1992).

452. *E.g.*, Class Action Complaint ¶¶ 114–17, 125–130, Ferguson v. BP, PLC, No. CV-10-281 (S.D. Ala. June 3, 2010), 2010 WL 4253363.

using its BOP, yet failed to warn the operator or user. No fraud or misrepresentation has been asserted against Cameron. In contrast, Florida plaintiffs charged BP and Transocean with misrepresenting the oil spill and "attempt[ing] to downplay and conceal the severity of the Oil Spill in the press. In this regard, their initial estimate was that following the blowout and Oil Spill, the well was discharging 1,000 barrels of crude oil per day."[453] The oil spill defendants that failed to warn operators of a known danger involving the oil or its components could be liable for punitive damages in products liability.

The state AGs will need to demonstrate that BP or other oil industry defendants were recklessly indifferent in either the design or the operation of the *Deepwater Horizon* oil rig in order to overcome the limitations on liability under OPA. Given the data on BOP malfunctions, Cameron's design choice created a high probability of single point failure. The Gulf States AGs may use Cameron's single-ram design decision to argue that it violated the following MMS-mandated safety standard:

> Code of Federal Regulations, Title 30 Mineral Resources, Chapter II—Minerals Management Service, Department of the Interior, Subchapter B—Offshore, Part 250—Oil and gas and sulphur operations in the Outer Continental Shelf asks in 250.416(e): "What must I include in the diverter and BOP descriptions?" . . . "Information that shows the blind-shear rams installed in the BOP stack (both surface and subsea stacks) are capable of shearing the drill pipe in the hole under maximum anticipated surface pressures."[454]

The state AGs will contend that Cameron and the other oil industry products liability defendants violated their statutory duty of assuring that the BOP shear rams used on the *Deepwater Horizon* would reliably shear the drill pipe under the operational conditions found in the Gulf of Mexico at the Macondo well.

8. Caps on Damages. If the state AGs were to pursue punitive damages, it would be under general maritime law rather than under Louisiana or Alabama state law. Private plaintiffs "will find it difficult or impossible to evade the effect of the caps.

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453. Complaint ¶¶ 127, 188, Ware v. BP P.L.C., No. 10-cv-10069-JEM (S.D. Fla. July 8, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 4878, at *1, *41, *61 (charging BP P.L.C. and Transocean with gross negligence and seeking punitive damages); *see also* Complaint—Class Action and Demand for Jury Trial ¶ 211, Murphy v. BP P.L.C., No. 8:10-cv-01521-JDW-TGW (M.D. Fla. July 9, 2010), 2010 WL 3579579 (seeking punitive damages against BP defendants under a Florida statute "to punish and deter the Drilling Defendants' conduct").

454. WEST ENG'G SERVS., *supra* note 314, § 1, at 1-1 (quoting 30 C.F.R. § 250.416(e) (2003)).

To do so, they may have to show gross negligence or a regulatory violation."[455] It is unclear whether the court will be more receptive to circumventing the cap in the Gulf States' products liability actions. Punitive damages claims are potentially subject to the $75 million cap imposed by OPA, but there is case law to the contrary that holds that common law claims are not subject to the cap.[456] The Gulf States AGs will likely contend that the claims are under general maritime law rather than under OPA. Even if the punitive damages are not limited by OPA, they are subject to constitutional limitations based upon due process.[457] If Cameron failed to test its BOP in conditions similar to those found in the Macondo well, punitive damages would be appropriate. Nevertheless, it is likely that there will be either a hard cap of $75 million or a 1:1 cap imposed in the Gulf States' cases.

9. Defenses

a. Comparative Negligence. The federal courts will apply federal maritime law, which apportions harm.[458] The

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455. Mark A. Cohen et al., *Deepwater Drilling: Law, Policy, and Economics of Firm Organization and Safety*, 64 VAND. L. REV. 1853, 1891–92 (2011).

456.

> These claims potentially implicate caps on damages under the Limitation of Liability Act, and the Oil Pollution Act, which currently caps certain oil spill liability at approximately $75 million. Plaintiffs have asserted that there are various exemptions from this reach of the Oil Pollution Act, for gross negligence and certain cleanup costs. . . . [T]here is some case law suggesting that the Oil Pollution Act will not preempt state common law tort liability.

Sean Wajert, *Gulf Oil Spill Litigation*, MASS TORT DEFENSE BLOG (May 26, 2010, 5:51 AM), http://www.masstortdefense.com/2010/05/articles/gulf-oil-spill-litigation; *see also* Mid-Valley Pipeline Co. v. S.J. Louis Constr., Inc., No. CIV.A. 2:11-235-DCR, 2012 WL 208086, at *5–8 (E.D. Ky. Jan. 24, 2012) (holding that OPA will not preempt state common law tort liability).

457. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 501 (2008) (noting the Supreme Court's punitive damages due process jurisprudence).

> In Alaska [in the Exxon Valdez case], the lawyers won $500 million in damages and $5 billion in punitive damages. After five years of trial and 14 years of putzing around in appeals court, the case finally arrived before John Roberts's Supreme Court in 2008, with the punitive damages already reduced to $2.5 billion.

Alex Beam, *Engulfed in Damages*, BOSTON GLOBE (June 15, 2010), http://www.boston.com/lifestyle/green/articles/2010/06/15/get_ready_for_years_of_ugly_litigation_once_the_bp_oil_spill_disaster_hits_the_courts/.

458. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 410–11 (1953) (holding that comparative negligence applies in federal maritime cases), *superseded by statute*, Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1641 (codified as amended at 33 U.S.C. § 905(b) (2006)) (restricting seamen's ability to recover based on a warranty of seaworthiness, but not altering the application of comparative negligence in federal maritime cases); *see also* Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1086–87 (2d Cir. 1993) (holding that federal maritime law applies exclusively to actions brought under proper admiralty jurisdiction).

apportionment of fault will be an issue in BP's cross-claims. BP, which will step into Cameron's shoes to defend products claims, may be able to assert the defense in response to cross-claims by oil industry defendants Halliburton and Transocean in products litigation. Courts apportion fault considering "both the nature of the conduct of each party . . . and the extent of the causal relation between the conduct and the damages claimed."[459] In the case of the *Deepwater Horizon* oil spill, fault may be apportioned among several parties. In the state AGs' products liability and negligence actions, Judge Barbier will apply federal maritime law, rather than Louisiana or Alabama law, so pure comparative fault rules will be in play.[460] As shown below, the crew on the *Deepwater Horizon* did not respond appropriately to a developing profile of danger:

> In hindsight, it is evident that the well was in the process of 'kicking' for almost an hour before it actually blew out. Yet, no one on the rig noticed the evolution until sea water was blown to the top of the drilling derrick, followed quickly by a stream and shower of oil drilling mud, followed by gas and oil that spread across the decks of the Deepwater Horizon. Early detection of the symptoms of a potential crisis situation is critical so that more time is available to analyze and understand those symptoms, analyze alternatives for corrective action, and then implement the alternative or alternatives that can rescue the system. The available evidence indicates that those on the Deepwater Horizon that night were confident that the well was secure and that all was going just fine.[461]

The University of California's Center for Catastrophic Risk Management did not find evidence that BP consciously traded profits for safety at the time of the Macondo well, but it did hypothesize that the corporate culture was not safety-conscious:

> In contrast, at the time of the Macondo blowout, BP's corporate culture remained one that was embedded in risk-taking and cost-cutting – it was like that in 2005 (Texas City), in 2006 (Alaska North Slope Spill), and in

459. Campbell v. La. Dep't of Transp. & Dev., 648 So. 2d 898, 902 (La. 1995) ("In apportioning fault the trier of fact shall consider both the nature of the conduct of each party . . . and the extent of the causal relation between the conduct and the damages claimed.").

460. United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975) (recognizing the federal maritime law adopts pure comparative negligence or the division of damages based upon degree of fault); Oswalt v. Resolute Indus., 642 F.3d 856, 860 (9th Cir. 2011) (stating that plaintiff's products liability claims "are controlled by the federal common law of maritime torts, which is informed by the American Law Institute's Restatement of Torts").

461. DEEPWATER HORIZON STUDY GRP., *supra* note 227, at 12.

> 2010 ("The Spill"). Perhaps there is no clear-cut "evidence" that someone in BP or in the other organizations in the Macondo well project made a conscious decision to put costs before safety; nevertheless, that misses the point. It is the underlying "unconscious mind" that governs the actions of an organization and its personnel. Cultural influences that permeate an organization and an industry and manifest in actions that can either promote and nurture a high reliability organization with high reliability systems, or actions reflective of complacency, excessive risk-taking, and a loss of situational awareness.[462]

b. Defect Is Known to the Buyer. Suits in maritime law draw deeply from the well of state law in products liability cases.[463] Louisiana's civil code bars recovery in redhibition if the defect is either "known to the buyer at the time of the sale, or [is one] that should have been discovered by a reasonably prudent buyer of such things."[464] The redhibition defense would not be cognizable to the state AGs who neither knew of the defects in the BOP nor could have reasonably discovered them. In a negligence-based action, a product maker could use implied assumption of the risk. Nevertheless, assumption of risk, either implied or express, would not be available defenses against the state AGs.[465] However, Cameron could use implied assumption of the risk in defending against products liability cross-claimants. Cameron's burden will be to show that BP (and other oil industry defendants) must have known and appreciated the specific risk created by using the BOP. Here, the test is subjective, and the plaintiff's knowledge and appreciation is that of the reasonable company.[466] BP's over-dependence upon the BOP, and its failure to take additional

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462. *Id.* at 16.

463. E. River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 864–65 (1986) (recognizing that state products liability principles apply in general maritime law).

464. LA. CIV. CODE ANN. art. 2521 & cmt. b (1996).

465. Assumption of the risk encompasses two concepts: express and implied assumption of the risk. Express assumption of the risk is when the plaintiff signs a consent form or enters into a contractual relationship. In contrast, the implied assumption of the risk is a tort concept where a person knowingly and voluntarily assumes the risk of harm from another's conduct. *See generally* Fleming James, *Assumption of the Risk*, 61 YALE L.J. 141, 142, 162 (1952). With the enactment of comparative negligence, some states have eliminated the assumption of risk defense. *See* Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1129–30 (La. 1988) (describing the decisions of many states to abandon assumption of the risk as a defense).

466. Desai v. Silver Dollar City, Inc., 493 S.E.2d 540, 540, 545 (Ga. Ct. App. 1997) (explaining implied assumption of the risk in the context of an amusement ride involving a consumer).

safety steps knowing the hazards of subsea drilling in the Gulf, may be regarded as an assumption of risk.

c. Avoidable Consequences. BP's failure to mitigate damages in the aftermath of the *Deepwater Horizon* explosion may be treated as a failure to mitigate under the doctrine of avoidable consequences. If BP failed to act reasonably before the *Deepwater Horizon* explosion, and its risky conduct contributed to the blowout of the well, it is contributorily negligent under federal maritime law. Contributory negligence arises when the plaintiff is negligent "*before* the defendant's wrongdoing has been completed."[467] The operator of the oil rig needed to close the Cameron BOP in time to avert the explosion, and the failure to do so could amount to contributory negligence. In contrast, the doctrine of avoidable consequences is the failure to mitigate damages.[468] The Restatement (Third) of Apportionment of Liability treats avoidable consequences as an apportionment issue, rather than as contributory negligence.[469]

d. Unavoidably Dangerous Products. Cameron was the patent holder of the BOP that is the industry standard-bearer.[470] Comment k to section 402A of the Restatement (Second) provides that "[t]here are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use."[471] Comment k exempts from strict liability certain "[u]navoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use."[472]

Comment k is limited to products with high utility where there are unavoidable dangers. The Comment is commonly used in vaccine cases, not for heavy equipment used on offshore drilling platforms. In the case of the Cameron BOP, there is evidence that the failure was the result of excessive preventable and perhaps avoidable dangers. The University of California's

467. Ostrowski v. Azzara, 545 A.2d 148, 154 (N.J. 1988).

468. *Id.*

469. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 3 cmt. b (2000). *See generally* Greenwood v. Mitchell, 621 N.W.2d 200, 205–07 (Iowa 2001) (explaining the differences between contributory negligence and avoidance consequences).

470. *See* CAVNAR, *supra* note 203, at 34–36 (describing Cameron's BOP as the industry leader and standard); MACONDO WELL, *supra* note 213, at 43 (identifying Cameron as the original inventor of the BOP); *see also* Ram Type Blowout Preventer, U.S. Patent No. 2,964,284 (filed Apr. 1, 1958).

471. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

472. *Id.*

Deepwater Horizon Study Group concluded that the BOP had known hazards that were preventable:

> Available evidence and testimony indicates there were a wide variety of maintenance and modification concerns associated with the BOP. These included leaking hydraulic connections, nonfunctional battery packs needed to activate the blind shear BOP, "re-plumbing" of the BOP components, and overdue inspections and certifications. Review of the available test and analysis background pertaining to the reliability of the specific make and model of BOP on the Deepwater Horizon clearly shows that the industry and government had major concerns for the reliability of this "generation" of BOP.[473]

e. State of the Art. State of the art is not technically a defense, but it is evidence that is often persuasive to a fact finder. BOPs are made by "three major blowout preventer manufacturers: Cameron, Hydril, or Shaffer (NOV)."[474] State of the art evolved in negligence, and there are courts that reason that this defense brings negligence principles into a strict liability case through the backdoor.[475] The state-of-the-art defense in the BP litigation may prove to be a tool in the state AGs' hands rather than a shield for BP in its role as indemnitor for Cameron. The issue of state of the art applies not only to the allegedly defective BOP, but also to the operational plans and to the cleanup effort. The state AGs will argue that a single-shear ram fell below the state of the art. An academic critic of the federal agencies overseeing deep-sea drilling operations charged, "MMS would have been required to evaluate the impact from a well blow out and the propriety of using a blow out preventer that fell below the state of the art in the industry."[476]

Shell has recently promised the Interior Department that it will use state-of-the-art equipment in its Alaskan exploration,

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473. DEEPWATER HORIZON STUDY GRP., *supra* note 227, at 13.

474. *Rams*, VARIABLE BORE RAMS, INC., http://vbri.com/CatSubCat/CatSubCat.asp?p9=CSC1 (last visited Apr. 14, 2012) (emphasis added).

475. *See* Carrecter v. Colson Equip. Co., 499 A.2d 326, 329–31 (Pa. Super. Ct. 1985) (summarizing two decisions reasoning that state-of-the-art defenses bring negligence principles into products liability cases). *See generally* Gary C. Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 NW. U. L. REV. 1, 9–19 (1982) (reviewing the courts' divergent approaches to the introduction of state-of-the-art evidence in strict products liability actions).

476. Eric V. Hull, *Crude Injustice in the Gulf: Why Categorical Exclusions for Deepwater Drilling in the Gulf of Mexico Are Inconsistent with U.S. and International Ocean Law and Policy*, 29 UCLA J. ENVTL. L. & POL'Y 1, 37 (2011).

which involves shallower waters than BP's exploration at the Macondo well.[477] Shell's promise of state-of-the-art equipment extends to including "two shearing rams on its blowout preventer and an oil spill capping system."[478] The court will likely seek expert testimony to determine whether Cameron's single-shear ram satisfies state of the art. The state-of-the-art issue will likely be a battle between experts testifying as to industry standards, given that there is no government standard requiring a double-shear ram. State-of-the-art evidence will be instrumental in determining whether the BOP was reasonably fit for its environment of use, a mile below the waters of the Gulf and forty miles beyond the Louisiana shore.

E. Likely Parties in Deepwater Horizon *Defective Product Litigation*

1. Plaintiffs. A products liability claim under federal maritime law, whether based on a manufacturing defect, a design defect, failure to warn, or a claim of unseaworthiness will be tried in strict liability, rather than in negligence.[479] The field of federal maritime products liability is based in large part upon state products liability law.[480] The plaintiffs in the products liability lawsuits will not only be the states, but also the codefendants who have not yet settled with BP or Cameron. Potential defendants and cross-claimants include BP, which owned a 65% stake in the Macondo well.[481] Anadarko and Japan's Mitsui were BP's partners; "Transocean was the drilling contractor; Halliburton performed cementing operations; M-I[ ]SWACO handled drilling fluids; and Cameron manufactured the [BOP] purchased for the rig about 10

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477. Phil Taylor, *Offshore Drilling: Interior Moves Closer to Reviewing Shell's Chukchi Proposal*, E&E NEWS PM (Aug. 18, 2011), http://www.eenews.net/eenewspm/2011/08/18/archive/3?terms=phil+taylor.

478. *Id.*

479. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a) (1998) (setting the standard of strict products liability in product defect cases).

480. Courts in maritime products liability actions rely heavily upon the Restatements of Torts. *See, e.g.*, E. River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 866 (1986) ("Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty.").

481. *Who Will Be Held Responsible for Deepwater Horizon*, OIL & GAS FIN. J. (May 4, 2010), http://www.ogfj.com/articles/2010/05/Gulf_of_Mexico_oil_spill.html. A number of BP defendants are parties to the litigation. "BP p.l.c. is a British limited company with its corporate headquarters in London, United Kingdom. BP p.l.c. is the global parent company of the worldwide business operating under the 'BP' tradename." Defendant M-I L.L.C.'s First Amended Cross-Claims, *supra* note 395, ¶¶ 2–4.

years ago."[482] M-I SWACO was sued "for failing to maintain the appropriate drilling mud weight before and during the drilling operations of the Macondo Discovery Well. The lawsuits included allegations of liabilities for damages to individuals and businesses."[483]

In December of 2011, BP settled its products liability action against Cameron for $250 million.[484] Under the settlement, "BP will indemnify Cameron for current and future compensatory claims against Cameron associated with the Deepwater Horizon incident."[485] BP has also entered into settlements with other partners and product suppliers including "Mitsui & Co., which owned a 10% stake in the well; Anadarko Petroleum Corp., which had a 25% stake; and Weatherford International Ltd., the manufacturer of some equipment used in the well."[486] BP also settled with MOEX Offshore LLC.[487] ACE American Insurance Co. and M-I SWACO also "settled a[n insurance] coverage dispute arising out [of] M-I's performance of mud engineering activities within the Macondo Discovery Well pursuant to a contract with BP Exploration and Production Inc."[488]

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482. *Who Will Be Held Responsible for Deepwater Horizon?*, *supra* note 481. "Transocean Offshore Deepwater Drilling Inc. . . . is a Delaware corporation with its principal place of business in Houston, Texas." Defendant M-I L.L.C.'s First Amended Cross-Claims, *supra* note 395, ¶ 17, at 5.

> During drilling operations, the drill bit and drill pipe (or drill string) extend through the riser from the drill platform and through a subsea drilling template—essentially a large metal box embedded in the seafloor—into the marine sediments and rocks down to the hydrocarbon-bearing zone. A special fluid called drilling mud (a mixture of water, clay, barite, and other materials) is circulated down to the drill bit and back up to the drilling platform. The drilling mud, which has higher viscosity and density than water, serves several purposes: it lubricates the drill bit, helps convey rock cuttings from the drill bit back to the surface, and exerts a column of weight down the hole to control pressure against a possible blowout. A blowout can occur if the subterranean pressure encountered down the hole exceeds the pressure exerted by the weight of the drill assembly and drilling mud. The *Deepwater Horizon* rig experienced a blowout on April 20, 2010, and the role of the drilling fluid is under investigation.

HAGERTY & RAMSEUR, *supra* note 4, at 3.

483. *ACE, BP Contractor Settle Deepwater Horizon Coverage Dispute*, 25 MEALEY'S POLLUTION LIABILITY REP. 15 (2012).

484. Tom Fowler, *Cameron Will Pay BP to Settle Spill Claims*, WALL ST. J., Dec. 17–18, 2011, at B4.

485. Press Release, *supra* note 57.

486. Fowler, *supra* note 484.

487. Christopher Bauer, *BP Announces Settlement Of Claims Related to Deepwater Horizon Accident*, LITIGATION BLOG (Dec. 16, 2011, 12:35 PM), http://www.lexisnexis.com/community/litigationresourcecenter/blogs/litigationblog/archive/2011/12/16/bp-announces-settlement-of-claims-related-to-deepwater-horizon-accident.aspx.

488. *ACE, BP Contractor Settle Deepwater Horizon Coverage Dispute*, *supra* note 483.

> *2. Possible Defendants.* Plaintiffs allege;
>
> that a complicated cascade of deep-sea equipment failures and procedural problems played a major role in the oil rig explosion and massive spill that is still fouling the waters of the Gulf of Mexico and threatening industries and wildlife near the coast and on shore. All of these problems were the result of BP p.l.c.'s failure to adhere to safety procedures.[489]

Several other corporations may also bear legal responsibility for the oil spill.

a. Hyundai Heavy Industries Products Liability Exposure. Hyundai Heavy Industries Co. of South Korea designed the *Deepwater Horizon*, which was "a $560,000,000.00 ultra-deepwater, dynamically-positioned semi-submersible oil drilling rig."[490] Nevertheless, there is no evidence that Hyundai delivered an oil rig with a manufacturing flaw or a design defect. Section 402A of the Restatement (Second) requires sellers to give directions or warnings on use.[491] The *Deepwater Horizon* oil rig had no structural defects, but it did have an ineffective safety device—the BOP. If the BOP was conceptualized as a component part, rather than as defective equipment used aboard the *Deepwater Horizon*, Hyundai could have exposure as a products liability defendant.

Transocean was the purchaser of the semi-submersible oil-drilling rig, so it, and not BP, would have potential liability in any action based upon sales law. As purchaser of the oil rig, Transocean may have a cause of action against Hyundai, based upon breach of warranty. Because South Korea did not join the U.N. Convention on Contracts for the International Sale of Goods until 2004, a 1991 sales contract would be governed either by the UCC Article 2 or by South Korean law of sales.[492] If UCC Article 2 applies, Hyundai may be liable for three kinds of performance warranties.[493] Hyundai may also be liable

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489. Class Action Complaint for Violations of the Employee Retirement Income Security Act of 1974, ¶ 89, McGuire v. BP Corp. N. Am., Inc., No. 1:10cv04337 (N.D. Ill. July 13, 2010), 2010 WL 2810485.

490. Complaint—Class Action and Demand for Jury Trial, *supra* note 453, ¶ 53, at 13.

491. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

492. LARRY A. DIMATTEO, LAW OF INTERNATIONAL CONTRACTING 222, 224–25 (2d ed. 2009).

493. "Three kinds of performance warranties are found in UCC Article 2:" (1) UCC Section 2-313 (express warranties); (2) UCC Section 2-314 (the implied warranty of merchantability); and (3) UCC Section 2-315 (the implied warranty of fitness for a particular purpose). MICHAEL L. RUSTAD, UNDERSTANDING SALES, LEASES, AND LICENSES IN A GLOBAL PERSPECTIVE 147 (2008). If Hyundai made express warranties that went to

under strict products liability and a negligent design theory for the failure of its oil rig. Transocean removes all doubt about the immovability of Hyundai's oil platform by describing it as a "mobile offshore drilling unit."[494] Transocean was operating the semi-submersible oil rig "130 miles southeast of New Orleans, and 50 miles southeast of Venice, Louisiana."[495]

The state AGs and classes of private plaintiffs have yet to file products liability complaints against Hyundai as the manufacturer of the *Deepwater Horizon* oil rig. At present, no party alleges that the *Deepwater Horizon* MODU was defectively manufactured or that it was designed or delivered with inadequate warnings or instructions to the operators. The National Academy of Engineering Report concluded that there was "no evidence implicating the *Deepwater Horizon* MODU as a causative factor in the blowout" other than the BOP.[496] However, the National Academy expressed concern about the design of the rig and its operation as causal factors in the death of the oil rig workers.[497] Further discovery is necessary to determine whether there are any grounds for a breach of warranty action against Hyundai.

b. Transocean's Potential Products Liability. "Transocean Holdings, Transocean Offshore, and/or Transocean Deepwater (collectively 'Transocean') [were] the owners and/or operators of the Deepwater Horizon, a semi-submersible movile [sic] drilling rig."[498] Transocean used this rig in "operations for BP, BP Exploration, BP America[ ], and BP Products on the outer Continental Shelf, at the site from which the oil spill"

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the basis of the bargain, it will be strictly liable for performance deficits of the oil rig. The implied warranty of merchantability would hold Hyundai liable to the extent that the oil rig was not at least of "fair average quality" for the industry. To meet the merchantability standard, Hyundai's rig must have been "fit for [its] ordinary purpose[ ]." This would mean that the oil rig would need to be designed safely in a high pressure, deepwater drilling environment. Section 2-314 also requires the oil rig to "pass without objection in the trade under the contract description." Further discovery would be necessary to determine whether that warranty was breached. *See* U.C.C. § 2-314 (2010). Similarly, further discovery would be needed to determine whether Hyundai gave Transocean a warranty of fitness for a particular purpose under UCC § 2-315. Transocean's damages under any of these breach of warranty actions would include consequential damages, unless limited. *See* U.C.C. § 2-719 (2010).

494. TRANSOCEAN, http://www.deepwater.com (last visited Apr. 14, 2012).

495. BP Defendants' Memorandum of Law, *supra* note 411, at 3.

496. MACONDO WELL, *supra* note 213, at 11.

497. *Id.*

498. Amended Class Action Complaint ¶ 17, Marine Horizons, Inc. v. BP, PLC, No. 1:10-cv-00227-WS-N (S.D. Ala. June 28, 2010), 2010 WL 2604284.

originated.[499] Transocean, Inc. has its principal place of business in the Cayman Islands where it is organized.[500] "The *Deepwater Horizon* was connected to the wellhead on the sea[ ] floor by a 5,000-foot pipe called a riser. As the *Deepwater Horizon* sank to the bottom, it pulled the riser down with it, bending and breaking the pipe before finally tearing away from it completely."[501] The oil leaked because the riser "bent into a crooked shape underwater, and [snaked] along the ocean floor and in the deepest waters slightly above it. Oil was leaking from the open end of the riser and from three places along its length."[502]

Louisiana's AG initially filed a declaratory judgment against Transocean and its related entities in order to establish their legal responsibility for the discharge of oil into the Gulf of Mexico.[503] The Louisiana AG's lawsuit initially was filed to respond to Transocean's and its related entities' contention that they were not "responsible part[ies] for the discharges emanating from the Macondo Prospect."[504] Transocean is a potential products liability defendant if it designed the semi-submersible offshore drilling rig used in the exploration and production of subsea oil wells. The makers of the marsh-washing technology used to clean oil from the *Deepwater Horizon* oil well could also be exposed to products liability to the extent that their technology is not fit for its intended purpose.[505] However, there is no evidence that the rig was defectively designed, nor is there evidence that the technologies used in the cleanup were a proximate cause of harm. Transocean, as well as other contractual parties, will seek indemnification from BP. Transocean, as the owner of the *Deepwater Horizon*, may be liable because it arguably was a substantial cause in compounding the risk by "disabling critical warning and safety systems intended to detect gas leaks and prevent explosions, on the grounds that 'false alarms' would wake up workers."[506] Transocean may also have played a causal

499. *Id.*

500. Class Action Complaint, *supra* note 452, ¶ 18.

501. Class Action Complaint for Violations of the Employee Retirement Income Security Act of 1974, *supra* note 276, ¶ 88.

502. *Id.*

503. Complaint for Declaratory Judgment, *supra* note 53, at 1.

504. *Id.*

505. *See* Core 4 Kebawk, LLC v. Ralph's Concrete Pumping, Inc., No. 10-2792, 2011 WL 743455, at *1 (E.D. La. Feb. 22, 2011) (concerning marsh-washing technology used in aftermath of BP oil spill).

506. Rebecca M. Bratspies, *A Regulatory Wake-Up Call: Lessons from BP's Deepwater Horizon Disaster*, 5 GOLDEN GATE U. ENVTL. L.J. 7, 17 (2011).

role in its "bypass[ing of] a key system on the blowout preventer control panel that might have prevented the explosion by cutting off spark sources once gas got in the drill stack."[507]

c. BP PLC's Duty to Indemnify Cameron for Products Liability. BP's liability in a products liability action stems from its duty to indemnify Cameron as well as exposure from its own conduct.[508] BP's use of a "cheaper, quicker but potentially less dependable method to complete the drilling of the Deepwater Horizon well" was allegedly a substantial cause of the oil spill.[509] BP incorporated "a 13,293-foot-long length of permanent pipe, called 'casing,' to be locked in place with a single injection of cement," which may also be reconceptualized as a design defect case.[510] In December of 2011, BP entered into a settlement agreement for $250 million to settle all claims it had with Cameron, the maker of the failed BOP, with neither party admitting liability.[511] BP may assert only those rights held by Cameron against third parties, subject to any defenses of the third party against the BOP maker.

BP's settlement agreement with Cameron "results in the discontinuance of any [products litigation] between BP and Cameron, including [the federal] Multi-District Litigation."[512] "BP and Cameron have agreed to mutual releases of potential claims against each other, and BP has agreed to indemnify Cameron for compensatory claims resulting from the accident . . . relating to pollution damage . . . or . . . to natural resources."[513] The indemnity

507. *Id.*

508. *See* Press Release, *supra* note 57.

509. *See* Spear, *supra* note 379.

510. *Id.* In most products liability cases, courts will evaluate multiple factors such as (1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design. Denny v. Ford Motor Co., 622 N.E.2d 730, 735 (N.Y. 1995); *see* Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 544–45, 547 (N.J. 1982).

511. Cain Burdeau, *BP Settles with Maker of Failed Blowout Preventer*, WASH. TIMES (Dec. 16, 2011), http://www.washingtontimes.com/news/2011/dec/16/bp-settles-maker-failed-blowout-preventer/.

512. *BP, Cameron Settle Macondo Claims, Legal Proceedings Between the Companies*, OFFSHORE (Dec. 16, 2011), http://www.offshore-mag.com/articles/2011/12/bp--cameron-settle.html.

513. *BP, Cameron Settle Deepwater Horizon Claims*, FLOW CONTROL (Dec. 19, 2011), http://www.flowcontrolnetwork.com/applications/fluid-handling/article/bp-cameron-settle-deepwater-horizon-claims.

agreement between BP and Cameron "exclude[d] civil, criminal or administrative fines and penalties, claims for punitive damages, and certain other claims."[514] The immediate impact of the settlement is that BP and Cameron will discontinue MDL claims against each other, and BP will step into the shoes of Cameron and pay all products liability claims arising out of the failure of the BOP.[515] Nevertheless, if the federal court were to award punitive damages in products litigation or under a general maritime claim for negligence, Cameron would pay that award.[516]

It is unlikely that BP could face products liability for its own operational decisions. Rather, BP's separate liability will likely be based upon its questionable operational decisions. However, it is arguable that BP ignored a developing profile of danger when it failed to take prompt remedial measures in the aftermath of the discovery of a leak in the BOP's hydraulic valve.[517]

BP allegedly employed a less safe "'one-pipe' method, rather than a 'two pipe' method to reach the oil and gas reservoir below the *Deepwater Horizon.*"[518]

> As the Deepwater Horizon sank, it broke off the riser, leaving the pipe leaking oil out of its now-open end . . . . [The] emergency valve, installed on the wellhead for just such a disaster, failed to seal the wellhead as it should have, leaving the well spewing oil into the Gulf waters.[519]

If the maker of the BOP knew that BP intended to use it in an unreasonably dangerous manner, the supplier of the component part, as well as the assembler (in this case BP), would be jointly and severally liable.[520]

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514. *Id.*

515. Burdeau, *supra* note 511.

516. *BP, Cameron Settle Deepwater Horizon Claims*, *supra* note 513.

517. A BP employee reported that *Deepwater Horizon* "workers detected a leak in the hydraulic system" controlling the BOP. BP neither reported the problem to the MMS nor stopped drilling, thus violating federal regulations. Ben Casselman, *BP Supervisor Says Rig Safety Device Flawed*, WALL ST. J. (July 21, 2010), http://online.wsj.com/article/SB10001424052748704723604575379451589727916.html.

518. Complaint—Class Action and Demand for Jury Trial, *supra* note 453, ¶ 109 ("According to [the] *New York Times*, Defendant BP concluded that the one-pipe option was the 'best economic case' despite having 'some risk' of leaving an open path for gas to travel up outside the well. The two-pipe method, according to some experts, is 'more or less the gold standard,' especially for high-pressure wells such as the one below the *Deepwater Horizon*.").

519. Complaint, *supra* note 232, ¶ 2.

520. *See* KEETON ET AL., *supra* note 108, § 100, at 706 (explaining strict liability as it pertains to makers of component parts).

d. Cameron International: Maker of the BOP. Although the MDL will be brought in Louisiana federal court, Judge Barbier recognizes that it is an admiralty case subject to federal maritime law.[521] Cameron is the leading products liability defendant in the state AGs' products liability actions brought under federal maritime law. The BOP that failed to prevent the *Deepwater Horizon* oil well blowout was designed by Cameron.

Cameron describes itself as a company that "designs, manufactures, markets and services equipment used by the oil and gas industry and industrial manufacturing companies."[522] The company is "a leading international manufacturer of oil and gas pressure control and separation equipment, including valves, wellheads, controls, chokes, blowout preventers and assembled systems for oil and gas drilling, production and transmission used in onshore, offshore and subsea applications and provide oil and gas separation, metering and flow measurement equipment."[523]

A huge number of plaintiffs have named Cameron as a strict products liability defendant for having "designed, manufactured and supplied the defective BOP that was used [as a component part] on Deepwater Horizon and failed to operate as intended."[524] Commercial fishermen, shrimpers, and oystermen are suing Cameron on the theory that its BOP was defectively designed, which "was a proximate cause of the . . . oil spill and the [resultant] economic injuries."[525] Rebecca Bratspies describes the proximate cause problem as stemming from the BOP failure:

> The Deepwater Horizon was considered among the most technologically advanced drilling platforms in the world. Yet this advanced technology—including its blowout protector—failed to prevent a torrent of oil from being unleashed into the Gulf. . . . [A] series of poor choices on the Deepwater Horizon was the proximate cause of the blowout preventer's failure. However, a full understanding of what went wrong must also examine the agency's regulation, or lack thereof, of this critical safety device that is supposed to perform flawlessly regardless of drilling conditions.[526]

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521. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 808 F. Supp. 2d 943, 951, 954 (E.D. La. 2011).

522. Cameron Int'l Corp., Prospectus (Form S-3ASR), at 1 (Dec. 22, 2011).

523. *Id.*

524. Plaintiff's Original Complaint ¶ 8.2, Le v. BP, P.L.C., No. 4:10-cv-02619 (S.D. Tex. July 23, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 3496.

525. *Id.* ¶¶ 1.1, 8.2.

526. Bratspies, *supra* note 506, at 31.

Proximate cause incorporates two elements, foreseeability and cause in fact. Cameron also is being sued for defective design of its BOP in Texas under Alabama's products liability statute.[527] Another Florida class action contended that Cameron was liable under a design defect theory under Florida's products liability statute.[528] The public policy underlying this products liability action is to hold the equipment manufacturers accountable and to incentivize them to invest in greater testing and other remedial measures, especially where the welfare of the Gulf region is at stake. The widespread use of chemical dispersants may create the need for a fund for medical monitoring.[529]

V. CONCLUSION

This Article has examined the complex issues surrounding what may be the largest product ever considered in a products liability case; an object whose failure led to one of the largest human-caused environmental disasters in world history. Judge Barbier has cleared the way for a products liability action by the Gulf States to recover economic, environmental, and public or societal damages.[530] This complex litigation demonstrates the instrumental role of tort law in reallocating the cost of wrongdoing to the least cost avoiders. By allowing the state AGs

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527. Cameron is being sued in Texas under Alabama's Extended Manufacturer's Liability Act. Plaintiff's Original Complaint ¶ 7.2, at 9, Mai v. BP, P.L.C., No. 4:10-cv-02621 (S.D. Tex. July 23, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 3497, at *11.

528. Complaint—Class Action and Demand for Jury Trial ¶ 33, McCarthy v. BP P.L.C., No. 4:10-cv-10068-JLK (S.D. Fla. July 8, 2010), 2010 U.S. Dist. Ct. Pleadings LEXIS 4879, at *15.

529. The Plaintiffs' Master Complaint alleges that numerous plaintiffs were "exposed to harmful chemicals, odors and emissions" found within or emanating from oil, dispersants (chemicals used to break up an oil slick by making oil more soluble in water), or a mixture of oil and dispersants. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., MDL No. 2179, 2011 U.S. Dist. LEXIS 113424, at *4–5 (E.D. La. Sept. 20, 2011). Medical monitoring is a remedy for latent diseases that develop decades later. Ervin A. Gonzalez & Raymond W. Valori, *Medical Monitoring Claims Are Viable in Florida*, 75 FLA. B.J. 66, 66 (2001). The argument that exposure to dispersants may lead to latent injuries or long-term problems, diseases, and medical conditions creates the need for medical monitoring.

530.

> Oxford Economics estimated the losses to the Gulf Coast tourism industry from the BP oil spill by measuring the duration and scale of negative impacts on tourism of comparable prior disasters. Duration was measured as the time from the start of each disaster to the point when the number of visitors and spending return to pre-disaster levels.

Lawrence C. Smith, Jr., L. Murphy Smith & Paul A. Ashcroft, *Analysis of Environmental and Economic Damages from British Petroleum's* Deepwater Horizon *Oil Spill*, 74 ALB. L. REV. 563, 573 (2010).

to recover full societal damages, the court permits the states to send the deep-sea oil drilling industry a deterrent message that they must exercise the utmost care in testing, designing, and operating equipment.[531]

This litigation will lead academics and policymakers to re-evaluate the controversial role that state AGs should play in using their *parens patriae* powers in future environmental disasters. Unlike the amorphous tort of nuisance, products liability is more likely to help the Gulf States recoup the true costs of the equipment and operational errors that devastated their economies. Unlike the Rhode Island lead paint litigation or the Big Tobacco products liability lawsuits, the oil industry defendants will not be likely to allocate the cost of wrongdoing to the victims because the Gulf States were neither contributorily negligent nor did they assume the risk of the failure of the BOP. Unlike the lead paint cases, the instrumentality for harm was solely in the hands of the operators of the *Deepwater Horizon* semi-submersible oil-drilling platform. It is possible that other oil industry defendants will join Cameron to settle all claims. If there is no global settlement, the Gulf States will have their day in court to vindicate their sovereign interests in protecting their habitats and other societal interests.

In the prior state AG public health torts, government lawyers bypassed products liability in favor of the ancient law of nuisance. For the state AGs, a products liability approach meshes well with the underlying facts of the *Deepwater Horizon* disaster, while nuisance is not cognizable under maritime law. The oil rig's defective component part, the BOP, is clearly a product for the purposes of products liability. The state AGs will not be defeated by user defenses such as contributory negligence, assumption of risk, or the duty to mitigate. Nor do the redhibitory defenses block recovery. Still, the state AGs face formidable obstacles in proving that the blowout preventer was the cause in fact of the oil spill.

The Gulf States AGs should easily be able to establish that the failure of the BOP was at least a substantial factor in the

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531. On December 28, 2011, Judge Barbier ordered that the BP oil industry defendants create an escrow fund of

> 4%[ ] of the . . . monetary settlements, monetary judgments or other monetary payments made on or after November 7, 2011, by . . . one or more Defendants to the State of Alabama or the State of Louisiana, or to [pay] any of their . . . governmental entities, arising out of the Macondo / *Deepwater Horizon* disaster.

In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179, 2011 U.S. Dist. LEXIS 148937, at *18 (E.D. La. Dec. 28, 2011). The court refused to "reserve[ ]" or hold back payments to the states in an effort to motivate the parties to settle. *See id.* at *19 & n.4.

explosion and sinking of the *Deepwater Horizon* oil rig and that the consequential environmental damages were not unforeseeable. The states will likely contend that the *Deepwater Horizon*'s fate was sealed because of over-dependence on the single-shear ram design when a reasonable alternative of a backup shear ram was easily available. A state-of-the-art defense will be a spear, rather than a shield, for the defense. It is axiomatic that *parens patriae* products litigation reduces the sum of the costs of accidents and of the costs of avoiding future accidents in the risky world of offshore oil exploration. For oil industry defendants such as Cameron, BP, Transocean, and Halliburton, specific deterrence requires them to pay the price of wrongdoing. A *parens patriae* action based on products liability sends the deterrent message to those oil industry defendants who abdicated their duty to the states—"to teach a wrongdoer that *tort does not pay*."[532] The lesson of the *Deepwater Horizon* products litigation is that it is tort law, not federal regulators, which once again serves as the chief guardian of the institutions central to American civilization. The availability of punitive damages reflects the salutary principle that not even multibillion dollar corporations, no matter how powerful or how able to capture the regulatory process, are above the law.

532. Lord Devlin in *Rookes v. Barnard* stated that exemplary damages were recoverable for the "oppressive, arbitrary or unconstitutional action by the servants of the government" and sent the laudatory message "that tort does not pay." Rookes v. Barnard, [1964] A.C. 1129 (H.L.) 1226–27 (appeal taken from Eng.).