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Introduction

Beginning with the famous (or infamous) case of *Fletcher v. Rylands*,[1] courts have struggled with the concept of strict liability for harm resulting from "abnormally dangerous activities."[2] The basic premise is relatively simple: persons who profit from engaging in unusual and dangerous activities should be responsible for resulting damages if such damages are certain to occur. However, in practice, courts have found it exceedingly difficult to draw the line between those activities dangerous enough to warrant strict liability and those that should remain subject to ordinary tort principles requiring proof of negligence.

The activity most often associated with this form of strict liability, and quite possibly the only clear case of an abnormally dangerous activity, is blasting. In fact, almost every court that has accepted the principle of strict liability for abnormally dangerous activities has begun with a case involving blasting, leading many defendants to argue that the doctrine should only apply to blasting cases.[3] On the other hand,

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1. Fletcher v. Rylands, (1866) 1 L.R. Exch. 265, 278, *aff'd*, House of Lords, 3 H.L. 330 (1868).

2. "Abnormally dangerous activities" are also referred to as "inherently dangerous activities" or "ultrahazardous activities" but the terms are often used interchangeably today.

3. A few courts have even accepted this argument and limited the use of strict liability for abnormally dangerous activities to blasting. *See, e.g.*, Ameritrust Co. Nat'l Ass'n v. Lamson & Sessions Co., No. 1:92CV80087, 1992 U.S. Dist. LEXIS 22647 (N.D. Ohio May 21, 1992); Gaines-Tabb v. ICI Explosives USA, Inc., 995 F. Supp. 1304, 1327 (W.D. Okla. 1996) (noting that Oklahoma has not extended the doctrine of

plaintiffs, emboldened by the potential prize of escaping the difficult task of proving negligence, have brought abnormally dangerous activity claims in cases involving everything from cooking wontons to committing suicide.[4]

Extreme cases aside, numerous courts have recognized that the principles behind the doctrine of abnormally dangerous activities are readily applicable to a wide variety of cases.[5] In particular, plaintiffs attempting to recover for damages resulting from environmental contamination have become increasingly likely to add a count in strict liability.[6] While plaintiffs have asserted such claims for a wide variety of environmental harms, cases involving contamination from leaking underground storage tanks, or "USTs," are the most common. While this article will focus on the issue of whether underground storage tanks constitute an abnormally dangerous activity, the analysis is typical of that for most abnormally dangerous activity claims involving environmental contamination.

The Second Restatement Approach

The Restatement (Second) of Torts presents the most comprehensive and widely accepted formula for determining whether a particular activity is abnormally dangerous and therefore appropriate for the application of strict liability.[7] Comments to the Restatement (Second) summarize the strict liability rule: "The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition

abnormally dangerous activities beyond "explosive users").

4. Blotnick v. Young-Spitzer, No. 94-4935, 1996 Mass. Super. LEXIS 454, at *10 (Super. Ct. Mass. May 29, 1996) (holding that the cooking of wontons "do[es] not even approach the type of dangerous activities previously held to warrant the imposition of strict liability"); Laterra v. Treaster, 844 P.2d 724, 731 (Kan. 1992) (holding that committing suicide by operating a car inside a closed garage is an abnormally dangerous activity subject to strict liability).

5. Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry., 842 F. Supp. 475, 478 (D.N.M. 1993). Most courts recognize that the RESTATEMENT factors would be superfluous if the doctrine were limited to certain contexts.

6. In what has been referred to as the "seminal case" of strict liability for environmental contamination, the Supreme Court of New Jersey began the expansion of strict liability: "We recognize that one engaged in the disposing of toxic waste may be performing an activity that is of some use to society. Nonetheless, 'the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.'" Dep't of Envtl. Prot. v. Ventron Corp., 468 A.2d 150, 160 (N.J. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 520 cmt. h at 39 (1977); *see also* Yommer v. McKenzie, 257 A.2d Md. 138, 140 (Md. 1969) (invoking strict liability for underground storage tank leakage).

7. Hicks v. Humble Oil & Refining Co., 970 S.W.2d 90, 97 (Tex. App. 1998). Texas has repeatedly refused to accept the Restatement approach.

of strict liability for the harm that results from it, even though it is carried on with all reasonable care."[8]

While § 519 establishes strict liability for abnormally dangerous activities,[9] the real meat of the doctrine is spelled out in § 520, which lists six factors to be considered in analyzing abnormally dangerous activities.[10] Recognizing the interplay of the various factors, § 520 acknowledges that is not possible to reduce abnormally dangerous activities to any single definition. Rather, the comments section of the Restatement (Second) provides some guidance, directing that all of the factors are important and that a single factor acting alone is unlikely to be sufficient.[11]

The first factor considers whether the activity presents a high degree of risk of some harm, essentially focusing on the probability of the occurrence of any harm. The second factor, often treated simultaneously with the first,[12] considers whether the harm that occurs has the potential to be great. Thus, the first two factors measure the expected magnitude of the harm.

The third factor inquires as to whether the risk of harm remains despite the exercise of due care. This factor is often the crux of the case, since courts have logically recognized that the exercise of due care can often control the analysis of the first two factors. In other words, even if there is a high degree of risk of grave harm, if a court finds that such risk can be eliminated by the exercise of due care, the court will almost always hold that strict liability is inappropriate and require proof of

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

9. *Id.* § 519. Section 519 states the general principle as follows:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous. *Id.*

10. *Id.* § 520.

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes. *Id.*

11. *Id.* § 520 cmt. f.

12. Even the comments section of the Restatement considers these two factors under one heading. *See id.* § 520 cmt. f.

negligence under traditional tort principles.[13]

The fourth factor considers whether the activity is one of common usage. According to the comments of the Restatement (Second), if the activity is customarily carried on by the great mass of mankind or by many people in the community, it is not abnormally dangerous.[14] While some courts define "common usage" as "not uncommon," others follow a more literal approach by focusing the language of the Restatement implicating the "great mass of mankind."

The fifth factor considers whether the activity is inappropriate in relation to the location where it occurs. Location can be an extremely important factor since some courts have recognized that even blasting, the clearest case of an abnormally dangerous activity, should not fall under the regime of strict liability if performed at a sufficiently remote location.[15]

Finally, the sixth factor directs the court to balance the value of the activity to the community against the risk of harm the activity creates. The Restatement (Second) seems to afford this final factor considerable weight; the comments seem to suggest that an activity of sufficient value to the community may be inappropriate for strict liability, regardless of the outcome of the analysis of other factors.[16]

Comment l is also essential to the Restatement (Second) formula, commanding that the weighing of the six factors is a job for the court to decide as a matter of law.[17] However, due to the factual nature of the analysis, courts must often deny motions to dismiss in favor of developing a more complete record for disposition upon motions for summary judgment.[18]

Application of the Restatement (Second) Factors to USTs

Beginning with the first Restatement factor, regarding a "high degree of risk of some harm," courts have varied widely in their assessment of the risks of USTs. While some courts have held that UST accidents occur with notable frequency, others have held that leaks only occur through the operation of an outside force; therefore, spills are far

13. *See, e.g.,* Phillip Morris Inc. v. Emerson, 368 S.E.2d 268 (Va. 1988) (finding that, with the exercise of due care, pentaborane can be handled safely even though brief exposure to 5 parts per billion of pentaborane is fatal).

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

15. Daigle v. Shell Oil Co., 972 F.2d 1527, 1544 (10th Cir. 1992).

16. RESTATEMENT (SECOND) OF TORTS § 520 cmt. k (1977).

17. *Id.* § 520 cmt. l; *but see* Curran v. Mass. Turnpike Auth., No. 92-3002-A, 1994 Mass. Super. LEXIS 546, at *12 (Mass. Sup. Ct. June 6, 1994) ("It is for the factfinder to determine whether the underground storage of large quantities of gasoline at the [site] is abnormally dangerous").

18. Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716, 722 (W.D. Pa. 1994).

from certain to occur.[19] Likewise, as to the second factor, courts have disagreed as to whether contamination resulting from a leaking UST will result in harm sufficiently "grave" enough to meet the Restatement (Second) test.[20]

Despite the disagreements over the first two factors, courts often allow the third factor to control the first two since, logically, the exercise of due care can control the probability and magnitude of the resulting harm. In almost every single case where a court has recognized the effectiveness of due care to eliminate the risk posed by USTs, the court has rejected claims that the USTs involve an abnormally dangerous activity.[21]

However, arguing the third factor can be tricky for both parties where plaintiffs, following the "everything and the kitchen sink" approach to pleading, will often assert both negligence and strict liability claims. In such a situation, plaintiffs may be forced to make inconsistent arguments because, (1) in order to argue that the defendant is negligent, plaintiffs must assert the defendant failed to take a necessary precaution, and (2) in order to argue for strict liability, plaintiffs must argue that even necessary precautions would be ineffective to prevent the accident.[22]

On the other hand, defendants may also fall into this quagmire by arguing that all necessary precautions were taken. If defendants convince the court they did not fail to exercise due care, then plaintiffs

19. *Compare* In re Tutu Wells Contamination, 846 F. Supp. 1243, 1270 (V.I. 1993), *with* Grube v. Daun, 570 N.W.2d 851, 857 (Wis. 1997) (holding USTs are not inherently dangerous since "[a]bsent negligence or application of an outside force, use of a UST does not create a high degree of risk of harm to the person, land or chattels of another").

20. *Compare* Smith v. Weaver, 665 A.2d 1215, 1220 (Pa. 1995) ("[A]lthough the harm which may result from a leak may be great, this one factor pales in comparison to the others which point in favor of our ruling that the storage of petroleum products in underground storage tanks is not abnormally dangerous."), *with* Nat'l Tel. Coop. Ass'n v. Exxon Corp., 38 F.Supp.2d 1, 18 (D.C. Cir. 1998) (finding the harm anticipated from USTs will not be grave).

21. Arlington Forest Assoc. v. Exxon Mobil Corp., 774 F. Supp. 387, 390 (E.D. Va. 1991) (finding that "maintained, monitored, and used with due care," USTs "present virtually no risk of injury" and thus USTs were not abnormally dangerous); Hudson v. Peavey Oil Co., 566 P.2d 175, 178 (Ore. 1977) (deciding that the frequency of harm is not as important as risk which cannot be alleviated and that the risk associated with USTs can be eliminated with reasonable care); *but see* Peters v. Amoco Oil Co., 57 F. Supp. 2d 1268, 1287 (holding that plaintiff successfully plead strict liability claim for damage from leaking UST even though the activity could be performed safely).

22. *See* City of LaGrande v. Union Pac. R.R., No. CV-96-115-ST, 1997 U.S. Dist. LEXIS 23939, at *54 (D. Ore. July 18, 1997) ("plaintiffs' own evidence is that the harm they suffered could have been averted if defendant had used reasonable precautions"); Dominick's Finer Foods v. Amoco Oil Co., No. 93 C 4210, 1993 U.S. Dist. LEXIS 17668, at *20 (N.D. Ill. Dec. 15, 1993) (noting that plaintiffs' failed to allege "that, despite the exercise of due care, petroleum storage tanks are highly likely to leak onto other properties" but rather that "the complaint indicates otherwise in that it is alleged that defendants were negligent in maintaining and operating the storage tanks").

seem well positioned to argue a strict liability claim since damage presumably occurred in spite of adequate precautions.[23] However, assuming that the court looks at the activity in the abstract as directed by the Restatement (Second), defendants' are in a better position to argue against strict liability because the actual exercise of due care is irrelevant in analyzing whether an activity is abnormally dangerous.[24]

Additionally, the existing regulatory structure may also affect the analysis of the third factor since such regulations require certain precautions that may reduce the risk associated with USTs. However, courts are divided since the presence of a strict regulatory scheme may either support strict liability (by indicating that the activity is dangerous) or militate against it (by indicating that the activity can be undertaken safely if in compliance with regulations).[25] Still other courts have held that whether an activity is regulated is "a decidedly different question from that presented in determining whether an activity is abnormally dangerous."[26] Therefore, even though the third factor can render a disagreement over the first two factors moot, the third factor itself contains significant uncertainties that can control the outcome of the case.

The fourth factor also receives its fair share of debate. Like the factors discussed thus far, the question of whether the storage of gasoline in USTs is an example of common usage has been answered differently by different courts. The outcome of a fourth factor analysis depends on how a court defines "common usage." Some courts suggest that neither "the great mass of mankind" nor "many people in the community" are involved in the storage or sale of gasoline.[27] Other courts take a broader view and consider whether the activity is uncommon in the community as a whole.[28] Adding to the complexity, the commonness of the activity must be considered from the point of view of the community at the time the activity was undertaken.[29]

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23. *LaGrande*, 1997 U.S. Dist. LEXIS 23939 at *54 ("[P]laintiffs argued that they anticipate that defendant will present testimony at trial that it conducted its railyard in accordance with accepted practices and procedures, and that spillage of diesel under such circumstances is inevitable regardless of the precautions taken").

24. *Id.* "Plaintiffs' argument misses the point. The question of whether an activity is abnormally hazardous is one for the court, and is not dependent upon a jury's determination as to negligence at trial." *Id.*

25. *See* Port of Portland v. Union Pac. R.R., No. CV-98-886-ST, 1998 U.S. Dist. LEXIS 21741 at *36-37 (D. Ore. Oct. 15, 1998).

26. Ahrens v. Superior Court, 197 Cal. App. 3d 1134 (Cal. Ct. App. 1988).

27. Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716, 722 (W.D. Pa. 1994).

28. Nat'l Tel. Coop. Ass'n v. Exxon Corp., 38 F.Supp.2d 1, 18 (D.C. Cir. 1998).

29. Grube v. Daun, 570 N.W.2d 851, 857 (Wis. 1997) (noting that "while USTs are not as popular today as they once were ... use of USTs on farms in the 1970s was a common occurrence").

With regard to the fifth factor, which takes into account the appropriateness of the location of the activity, there are two main issues: first, whether the UST is located in residential or commercial areas, and second, whether the UST is located near a sensitive water source. If a leaking UST is near residential areas, it is more likely to be seen as inappropriate to the location, a factor weighing heavily in favor of strict liability.[30] However, most courts have accepted the argument that gas stations with USTs are appropriate to residential areas due to the large demand for convenient access to gasoline.[32] Therefore, courts are more likely to institute strict liability when a UST is located near a sensitive aquifer.[34]

In contrast to the first five factors, courts tend to agree on factor six, which directs the court to balance the value of the activity with its potential risks. Like "common usage," the determination of the value of an activity to the community should be measured at the time the activity was undertaken.[35] Almost every court, even those holding that a UST is an abnormally dangerous activity, has recognized that gasoline is integral to today's modern society.[36] On the other hand, some courts blend the "value" factor with the "location" factor, framing the analysis as whether the value of an activity *at its location* outweighs the risk involved to the surrounding area.[37]

In addition to the six factors discussed in § 520 of the Restatement

30. Yommer v. McKenzie, 257 A.2d 138, 141 (Ct. App. Md. 1969) ("[T]he storage of large quantities of gasoline immediately adjacent to a private residence comes within [the rule of strict liability]"); Curran v. Mass. Tpk. Auth., No. 02-3002-A, 1994 Mass. Super. LEXIS 546 at *12 (Super. Ct. Mass. June 6, 1944); Northglenn v. Chevron U.S.A., Inc., 519 F. Supp. 515, 516 (D. Colo. 1981).

32. Arlington Forest Assoc. v. Exxon Mobil Corp., 774 F. Supp. 387, 391 (E.D. Va. 1991) ("Clearly, filling stations are very appropriate in and near residential areas. They provide residents with necessary, desired, and convenient sources of fuel for their vehicles"); *see also* Martin v. Shell Oil Co., 180 F. Supp. 2d 313, 325 (D. Conn. 2002).

34. In re Tutu Wells Contamination, 846 F. Supp. 1243, 1269 (V.I. 1993); *Yommer*, 257 A.2d at 140. ("[W]hen the operation of such activity involves the placing of a large tank adjacent to a well from which a family must draw its water for drinking, bathing and laundry, at least that aspect of the activity is inappropriate to the locale").

35. *Grube*, 570 N.W.2d at 857.

36. Dominick's Finer Foods v. Amoco Oil Co., No. 93 C 4210, 1993 U.S. Dist. LEXIS 17668, at *22 (N.D. Ill. Dec. 15, 1993) ("Petroleum products are necessary for the functioning of our present society....").

37. *In re Tutu Wells*, 846 F. Supp. at 1270.

(Second), § 519 contains a somewhat hidden limitation that courts have found significant in the context of UST litigation. Section 519 establishes strict liability for abnormally dangerous activities that result in harm, but the section describes "harm" as that "to the person, land or chattels *of another.*"[38] These last two words have convinced several courts that the regime of strict liability is unavailable to the purchaser of property contaminated by a leaking UST.[39]

Since a large majority of UST cases involve claims from subsequent purchasers of property containing a UST, many of these cases are short-circuited before even reaching an analysis of the Restatement (Second)' six-factor test. Several courts have explained that this result is the proper one since, unlike neighboring property owners, subsequent purchasers have the opportunity to inspect the property prior to purchase.[40]

The Restatement (Third)

While the Restatement (Second) is the most widely accepted authority for the proper analysis of abnormally dangerous activities, the Tentative Draft No. 1 of the Restatement (Third) of Torts contains a substantially different scheme.[41] The most notable change is the brevity of the section on abnormally dangerous activities. Recognizing the

38. Emphasis has been supplied by the author.

39. 325-343 56th St. Corp. v. Mobil Oil Corp., 906 F. Supp. 669 (D.D.C. 1995); Busch Oil Co. v. Amoco Oil Co., No. 5:94-CV-175, 1996 U.S. Dist. LEXIS 4705 at *30 (W.D. Mich. Feb. 20, 1996); Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 102 (D. Mass. 1990); Cross Oil Co. v. Phillips Petroleum Co., 944 F. Supp. 787, 790 (citing Wellesley Hills, and agreeing "it would be nonsensical to even formulate a rule that an actor is strictly liable for harm inflicted on his or her own property or person").

40. Rosenblatt v. Exxon Co., 642 A.2d 180, 187-88 (Md. Ct. App. 1994) ("[I]t would be unreasonable to hold the prior user liable to remote purchasers or lessees of commercial property who fail to inspect adequately before taking possession of the property"); *see also* Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 12 F. Supp. 2d 391, 420 (M.D. Pa. 1998) ("New Jersey appears to be unique in recognizing a cause of action in strict liability assertable by subsequent owners"). *But see* Amland Properties Corp. v. ALCOA, 711 F. Supp. 784, 802 (D.N.J. 1989) (holding that where purchaser did not have actual knowledge of contamination, strict liability was appropriate); G.J. Leasing v. Union Elec., 825 F. Supp. 1363 (S.D. Ill. 1993) (citing Amland and holding that "the Illinois Supreme Court would impose [strict] liability on successive landowners").

41. Section 20 of the THIRD RESTATEMENT, combines the elements of §§ 519 and 520 of the SECOND RESTATEMENT, and reads as follows:

> (a) A defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
> (b) An activity is abnormally dangerous if:
> (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
> (2) the activity is not a matter of common usage.

RESTATEMENT (THIRD) OF TORTS § 20 (2001).

complexity of a six-factor test, the Restatement (Third) contains only two factors for a court to consider: whether the activity, even when exercised with reasonable care by all actors, creates a foreseeable and highly significant risk of physical harm even (essentially a combination of the first three factors of the Restatement (Second)) and whether the activity is a matter of common usage. The omission of "location" and "value to the community," while potentially significant, are not necessarily so since elements of these factors can be easily incorporated into an analysis of the two factor formula of the Restatement (Third).

Of further interest is the Restatement (Third) omission of the limitation found in § 519 of the Restatement (Second). In the Restatement (Third), the phrase establishing liability is not limited to harm to the person, land or chattels "*of another,*"[42] raising the intriguing question of whether courts that have refused to allow recovery for subsequent purchasers of property containing a leaking UST will consider eliminating this limitation. Unfortunately, the approach courts may take is unclear; only a Florida appellate court has cited the Restatement (Third) standard for abnormally dangerous activities, and it did not analyze the differences between the Second and Third Restatements.[43]

Beyond the Restatements

While the above analysis describes the most common issues under the two Restatement tests, it is apparent that even though courts purport to adopt the Restatement (Second) approach, their analysis depends largely on the subjective opinions of individual judges. Moreover, since the Restatement (Second) test directs a holistic view, blending of the factors is accepted and common, providing even more analytical elasticity to the guidelines. Thus, while most courts profess to base their decisions on an assessment of the six Restatement (Second) factors, and indeed frame their opinions in the Restatement (Second) format, the analysis of the factors is often dependent on issues beyond the scope of the six-factor formula. Instead, the outcome of many cases can be attributed to two issues not addressed in the Restatement (Second).

In an abnormally dangerous activity case, the court must first determine the activity at issue. For instance, if a court defines the activity as "the operation of a leaking UST," application of the Restatement (Second) factors is a foregone conclusion since there is no way to make a "leaking UST" safe, make it a matter of common usage,

42. Emphasis has been supplied by the author.

43. Burch v. Sun State Ford, Inc., No. 5D02-2807, 2004 Fla. App. LEXIS 6 at *14-15 (Ct. App. Fla., 5th Dist. Jan. 2, 2004).

or make it appropriate for any location.[44] On the contrary, if a court defines the activity in question as "the sale of gasoline," the court is unlikely to find such activity to be so unusual or dangerous as to warrant the imposition of strict liability. Since the maintenance of the UST would only be considered a small component of "the sale of gasoline," normal tort principles would apply to determine whether use of the UST was actionable negligence.

Despite the logical importance of defining the activity prior to applying the Restatement (Second) factors, few courts have expressly evaluated the proper scope of the activity in question. In *Smith v. Weaver*, the court adequately summed up the quandary:

> The [plaintiffs] would urge us to consider not whether underground tanks are abnormally dangerous, but rather whether underground storage tanks which are leaking a hazardous substance, are abnormally dangerous. By so phrasing the issue the [plaintiffs] are seeking to have us view the results of the activity, instead of the activity itself.[45]

Arlington Forest also provides a good analogy:

> [T]he activity of "driving a car" can be made sufficiently safe by the exercise of reasonable care. But "driving a car at an excessive rate of speed" cannot be made safe except by ceasing to drive too fast. Clearly this approach would extend the reaches of strict liability far beyond the bounds of the law and of common sense.[46]

Thus, it is obvious to see the arguments that both sides are likely to make: plaintiffs will argue for a narrower view of the activity; defendants will argue for a broader view of the activity. Therefore, parties involved in either prosecuting or defending a strict liability claim for abnormally dangerous activities should take care to address this important aspect of the case.[47]

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44. Arlington Forest Assoc. v. Exxon Mobil Corp., 774 F. Supp. 387, 392 (E.D. Va. 1991).

45. Smith v. Weaver, 665 A.2d 1215, 1219 (Pa. Super. Ct. 1995).

46. *Arlington Forest*, 774 F. Supp. at 392.

47. Moreover, in assessing the appropriate activity to analyze, some courts have noted that it is also important to distinguish between a substance and an activity. While this issue is not as prevalent in UST litigation as in other contamination cases, the majority of courts considering the issue have rejected plaintiffs' attempts to equate an "activity" with a hazardous "substance." EVCO Assoc., Inc. v. C.J. Saporito Plating Co., No. 93 C 2038, 1993 U.S. Dist. LEXIS 12423 at *12-13 (N.D. Ill. Sept. 7, 1993) ("[D]efendant's 'use, handling, storage, treatment and disposal' of hazardous materials at the facility occurred as a result of defendant's operation of an electroplating plant. Consequently, the relevant activity here is electroplating and not the handling of the allegedly hazardous substances").

The second important issue revolves around the policy behind strict liability. The comments to § 519 state that the doctrine "is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur."[48] Many courts, however, have taken a more practical approach, choosing whether to impose strict liability by first focusing on whether the law of negligence provides a sufficient remedy.[49]

For example, in *Arlington Forest*, the Eastern District of Virginia court noted that "strict liability is reserved for selected uncommon and extraordinarily dangerous activities for which negligence is an inadequate deterrent or remedy."[50] In similar fashion, a Connecticut trial court recognized the need for restraint in imposing strict liability, stating:

> Defining something as an ultrahazardous activity is a weighty step since if this is done it would seem to me cost of capital might very well increase as well as the cost of insurance coverage of existing businesses. This would be unfortunate if existing common law remedies gave adequate protection to allegedly injured parties.[51]

The undefined and malleable quality of the Restatement (Second) test naturally allows, and indeed specifically requests, a court's judgment on matters of public policy. Thus, parties to a case involving a claim that USTs constitute an abnormally dangerous activity should be cognizant of arguments on both sides regarding whether the law of negligence provides an adequate remedy.

Conclusion

While most certainly a small minority, plaintiffs have occasionally been successful in asserting that the use and maintenance of USTs are abnormally dangerous activities proper for the application of strict liability under the Restatement (Second) test. Even though most courts have generally agreed that strict liability should not be applied to the context of UST litigation, these claims are likely to continue into the future since each case must be decided on its own facts.

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48. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

49. Compounding this issue, of course, is the fact that most plaintiffs will assert both negligence and strict liability counts in a claim for damage resulting from a leaky UST.

50. Arlington Forest Assoc. v. Exxon Mobil Corp., 774 F. Supp. 387, 390 (E.D. Va. 1991).

51. Conn. Water Co. v. Town of Thomaston, No. CV94-0535590S, 1996 Conn. Super. LEXIS 596 at *17 (Super. Ct. Conn. Mar. 4, 1996).