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Anatomy of a Blowout: A Post-Mortem

Kenneth M. Klemm

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I. Introduction

An oil or gas well blowout can be a scary event both during the blowout and, from a legal and economic perspective, subsequent to the blowout. During the blowout, the well control specialists take control and attempt to regain control of the well in the most expeditious, safe manner possible. The aftermath of the blowout does not present such a clear path in terms of the “specialists” needed to deal with the myriad of legal issues facing an operator. Multiple causes from simple human error to failure of equipment located thousands of feet in the ground can result in the loss of well control. To investigate and provide sound legal advice to an operator after a blowout, an attorney must approach the situation much like a coroner approaches an autopsy or post-mortem examination. The initial action involves an external examination to document what occurred, preserve evidence and generally assess the resulting damages. Subsequent to this initial investigation, the attorney must look deeper, or like a coroner, conduct an internal examination to find the evidence that establishes the specific causes and the particular damages resulting from the blowout. Upon completion of the external and internal examinations, the attorney must reconstruct, or again like a coroner, reconstitute the body of evidence for the operator and others to examine.

This article seeks to provide practical advice on how to conduct a blowout investigation and the legal issues arising from such an event. In particular, the article will discuss the types of consultants needed for an investigation, issues of privilege during such an investigation and the desired results of such investigation. The article also will explore the legal issues and theories surrounding the potential prosecution of a claim to recover expenses and damages resulting from a blowout. Finally, the case law concerning the types of damages to which an operator may be exposed as a result of a blowout will be discussed. Therefore, while not exhaustive, this article hopefully will provide the reader with an overview of the legal issues arising from an oil or gas well blowout and with practical information on what can be a complex factual and legal event.
II. Discussion

A. The “External” Examination

The first and foremost priority of any operator after a blowout usually involves (and should be) protecting human life. In addition, the operator normally attempts to mitigate damage to surrounding property until such time as the well control specialists regain control of the well. Nevertheless, the operator, its personnel and even the well control specialists need to be cognizant of the fact that litigation most likely will ensue from a blowout event. Thus, while the priorities of the response to a blowout should not change, the operator or other involved parties should be aware of issues surrounding evidence collection and preservation, witness statements and the general information needed to conduct a more in-depth examination of the event after “the noise, the rattling, [and] the shaking” stops at the well site.

1. Evidence Collection and Preservation

An operator, attorney, consultant or other involved party must investigate, collect, document and store potential evidence, including any potentially defective equipment that may have contributed to a blowout, with the prospect of litigation in mind. Not only is it critical to preserve the evidence for a proper examination by experts or consultants, but unpreserved evidence could have drastic consequences at trial and, in fact, even could lead to liability being imposed for the damages of third-parties.

First, and most obvious, a failure to preserve evidence could impact its probity at trial. In Louisiana, some courts have recognized a theory of spoliation of evidence under which a court may exclude evidence that has not been preserved properly or, alternatively, apply an adverse presumption that the party spoiled the evidence because it established facts unfavorable to such party’s case.1 Indeed, under certain circumstances, a custodian’s improper handling of evidence critical to prospective litigation can provide a cause of action for spoliation to a third-party who shares an interest or right in the litigation.2 Thus, a claimant with an interest in potential litigation related to a well blowout could conceivably sue an operator or other involved party who improperly handles evidence critical to proving the claimant’s case.

The collection and preservation of evidence after a blowout sometimes can be difficult depending on the condition of the equipment,

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1 Everhardt v. Louisiana Dept. of Transp. and Development, No. 07-0981 (La. App. 4 Cir. 2/20/08); 978 So.2d 1036, 1044.
2 See Robertson v. Frank’s Super Value Foods, Inc., No. 08-592 (La. App. 5 Cir. 1/13/09); 7 So. 3d 669, 673 (recognizing causes of action for intentional and negligent spoliation of evidence where defendant has notice of potential lawsuit and a duty to preserve the evidence).

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the work needed to regain control of a blowout and the well site conditions after a blowout. In each instance, a blowout usually presents a unique chain of events (from simple human error on the surface to downhole conditions several thousand feet underground) leading to the uncontrolled flow, and the collection and preservation of evidence generally needs to be tailored to the circumstances. Operator personnel, onsite contractors, well control specialists and consultants, however, usually can assist with identifying the equipment or conditions that should be preserved for future examination. For example, if an issue exists as to whether pressure may have existed in a certain area or piece of the well equipment, the well control specialists or operator personnel can be asked to document valve positions or gauge measurements in their work logs or daily activities reports prior to altering or removing this equipment. Photographs also can be taken in some cases to preserve this type of information. If a party fails to preserve this evidence, the ability to determine the cause for a blowout at a later date to defend against potential liability, prosecute an action for recovery of expenses or determine what happened for future prevention could be lost forever and also could lead to liability independent of the blowout itself.

A chain of custody also should be established starting from removal of the equipment at the well site to delivery for examination by a third-party consultant. While most of us probably know about the importance of the “chain of custody” from watching the crime scene investigations on various television programs, such procedures also can be an important part of effectively preserving and ultimately presenting evidence in a court concerning a blowout's cause. An operator or other party involved in a blowout must be able to demonstrate to a court that opinions being offered by experts or facts being offered by other witnesses were based upon the condition of equipment as of the blowout event or that any alterations or modifications to the equipment have been taken into account by the witness offering testimony. A chain of custody can be established easily through documenting conditions on normal reports or, in the best case scenario, using forms tailored for such purpose. Thus, although not a difficult procedure to follow, many parties involved in blowouts simply do not take the time to document chain of custody and, by doing so, risk having evidence excluded or having potential liability imposed in a later proceeding (whether civil, criminal or administrative) for alteration or destruction of evidence.

2. Investigative Materials

The collection of evidence subsequent to a blowout also may include incident or accident reports, witness statements, photographs, video, audiotapecs and the like as well as the mental impressions or opinions of the person collecting such information. While these methods should be used to examine a blowout, one also must be aware of how
courts and other tribunals may treat the discovery of these materials at a later date. Some differences in such treatment exist between state and federal courts in Louisiana to further complicate matters. Therefore, although the objective of collecting this evidence remains a good one, it should be done in a manner that recognizes the potential for having to produce such evidence to adversaries at a future date.

Witness statements taken by an attorney, the operator or a third-party investigator can be a good way to preserve information for a more in-depth investigation on a later date, but certain caveats exist to the collection of evidence in this form. Under certain circumstances, witness statements following an accident, including incident reports created by an employer, may be protected by the work product and/or anticipation of litigation doctrines. For example, in Cooper v. Public Belt Railroad, the court initially denied production of the affidavit of an eyewitness (as well as the defendant's investigative report) holding that Article 1424 precluded discovery of the affidavit based on privilege. Under Article 1424(A),

[t]he court shall not order the production or inspection of any writing, or electronically stored information, obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice.

Thus, some measure of protection exists under Louisiana law for an operator to collect information from witnesses and to protect such writings from discovery at a later date.

The operator and other involved parties, however, must remember that the privileges under Louisiana state law protecting from disclosure attorney work product or information obtained in anticipation of litigation only apply to statements reduced to writing. In particular, Louisiana law does not protect from disclosure materials such as videotapes, films, photographs, audiotapes and other like tangible things. Louisiana state courts also will order production of statements if not obtained by one of the persons enumerated in Article 1424(A). Additionally, pursuant to the opinion of at least one Louisiana appellate court, investigative reports prepared pursuant to a company policy do not

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3 02-2051 (La. App. 4 Cir. 1/22/2003); 839 So.2d 181.
4 Id. at 181-84.
6 Moak v. Illinois Cent. R.R., 93-0783 (La. 1/14/94); 631 So.2d 401, 404.
7 Whittenburg v. Zurich Am. Ins. Co., 00-0697 (La. App. 4 Cir. 4/18/01); 786 So.2d 163, 166 (finding an insurance investigator not enumerated in Article 1424(A)).
meet the standard for being considered privileged material under the work-product rule. Finally, at least one Louisiana state court held that materials other than writings must be produced even if prepared by an attorney or party representative in anticipation of litigation or the materials otherwise contain mental impressions, conclusions, opinions, or theories of the investigator. Consequently, the operator or other party involved in investigating a blowout must carefully consider how to conduct an investigation and how to record the results of such investigation, particularly when recorded at a time contemporaneous with the event.

The state and federal courts in Louisiana remain reluctant to protect from discovery statements given by witnesses contemporaneous or close in time to an accident. In particular, “[t]here is now substantial authority for the proposition that statements taken from witnesses close to the time of the occurrence are unique, in that they provide an immediate impression of the facts.” Although proximity in time to an incident is not dispositive, “this circumstance combined with other factors, e.g., a witness’ unavailability, reluctance, hostility, lapse of memory or apparent deviation from his prior statement, may produce a substantial likelihood that a litigant will be forced to trial without information in possession of his adverse party which appears reasonably calculated to lead to admissible evidence.” The federal court, in *Hamilton v. Canal Barge Co., Inc.*, echoed these same principles when it stated:

> It is important to note, however, that mere lapse of time should normally be enough to require production only of statements given at almost the same time as the accident. Were a statement given a week, or two weeks, after the accident at issue, the court might well require counsel to demonstrate — as they did with respect to the witness in Scotland — that the witness was not available for deposition without undue hardship. If the witness were available, the court might then require counsel to depose him and demonstrate to the court with some specificity just why they expect his statement to supply information his deposition did not.

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8 See *Simmons v. Transmit Management of Southeast Louisiana, Inc.*, 00-2530 (La. App. 4 Cir. 2/7/01); 780 So.2d 1074, 1076-78.
9 *Landis v. Moreau*, 00-1157 (La. 2/21/01); 779 So.2d 681, 697-698.
10 *Id.* at 959 (quoting Wright, *Law of Federal Courts*, §82, at 367 (2d ed. 1971)).
11 *Id.*
13 395 F. Supp. at 978. See, e.g., *Ogea v. Jacobs*, 344 So. 2d 953 (La. 1977) (employer’s refusal to require disclosure of executive’s report related to job-site accident on oil rig would unfairly prejudice employee; the report incorporated an almost contemporaneous investigation of the accident and due to executive’s lapses of memory, the employee could not obtain equivalent data); *Whittenburg*, 786 So.2d at 166.
Thus, when an operator or other involved party takes a written witness statement contemporaneous with a blowout, it becomes much more likely that such statement will be discoverable at a later date even if considered to be privileged under state and federal procedural rules.

The federal courts in Louisiana do take a somewhat different approach to investigative materials in that "[p]hotographs and videos have been deemed work product where they were created in anticipation of litigation." In general, the federal rules do not limit to writings the privilege afforded to materials deemed to be work product and/or collected in anticipation of litigation, which causes a broader application of these privileges in federal court. Both state and federal courts in Louisiana, however, generally follow the same principles in deciding whether materials considered to be within the scope of the respective procedural rules should be produced. More specifically, the party seeking to invoke the work product or anticipation of litigation privileges first must make the threshold showing that the written materials were obtained or prepared in anticipation of litigation or in preparation for trial. For example, in the Simmons case discussed above, the court specifically found that a report created in the normal course of a company's business could not have been prepared in anticipation of litigation. Nevertheless, if the party opposing discovery meets this threshold, the burden shifts to the proponent to demonstrate the following:

(1) That he has a substantial need for the materials in the preparation of his case, and,

(2) That he is unable to obtain a substantial equivalent of the materials by other means without undue hardship.

(Transcripts of audio taped witness statements taken by insurer for employer were not protected from discovery, as claimant would not be able to prove her claim without them); Sass v. National Union Fire Ins. Co., 96-2332 (La. App. 4th Cir. 3/5/97), 689 So.2d 742, 743 (Trial court abused its much discretion when it ordered driver and his employer to produce statement given by driver to employer's agent on day of accident and written report made by driver and mailed to employer within days of accident, as defendants established that statement and report were prepared in anticipation of litigation, and motorists failed to allege any reason that denial of production was prejudicial or would cause undue hardship or injustice; although some time had elapsed since accident, motorists did not argue that they could not remember facts and circumstances surrounding accident or that driver did not recall accident).

16 780 So.2d at 1076-78.
Therefore, although the meaning of “undue hardship” may be imprecise, the case law developed under the federal and state procedural rules provides guidance to an operator or other party involved in a blowout as to what types of information will be discoverable and, if desired, the manner in which certain information can be protected from involuntary disclosure at a later date.

The “external” examination of a blowout usually involves onsite activities and evidence collection done in the context of ongoing operations at a well site. While certainly not the primary focus of any operator after a blowout, this examination, or investigation, must collect and preserve evidence or information for later use to conduct a more in-depth review of what took place. The failure to recognize the need for these activities and, moreover, the manner in which investigative activities should be undertaken could result in increased liability exposure, failure to preserve evidence necessary for a recovery action and other undesired ramifications. Consequently, it remains in the interest of parties involved in a blowout situation to consider not only who to employ to regain control of a well but also who to call and what to do to conduct a proper investigation.

B. The “Internal” Investigation

The next phase or step of a blowout investigation normally requires the operator or other involved party to conduct the “internal”, or more in-depth, investigation to determine what went wrong and the potential liability arising from the blowout. Although some aspects of this phase or step overlap with the investigation normally conducted at the well site contemporaneous with the blowout, this in-depth investigation will extend into the future after regaining control of the well. It requires the proper consultants to continue the investigation and consideration of the issues that arise from the use of such consultants. Moreover, it requires consideration of the goals to be attained through the in-depth investigation. The following discussion focuses on these issues and other related issues in the context of conducting an in-depth examination into a blowout and its aftermath.

1. The Use of Consultants and Litigation Experts

The retention of third-party consultants obviously may vary depending on the circumstances of each blowout. For example, in some instances where the operations taking place may be at issue as a potential cause, a petroleum engineer with hands-on field experience may be the best person for the job. Some events involve highly-specialized operations or equipment and a petroleum engineer or other consultant with general experience in the oil and gas industry may not be sufficiently qualified for the task at hand. As a result, the attorney or other person charged with leading the investigation must cast a broader net and find the person who has the experience and knowledge uniquely
suited for the task at hand. Moreover, blowout events commonly cause surface damage to third-party property owners, and consultants such as general adjusters for oilfield equipment and residential property, foresters and remediation experts may be needed. A metallurgist or failure analysis consultant also may be needed for certain aspects of an investigation. Finally, the loss of reserves or delayed production resulting from a blowout may require the retention of a reservoir engineering consultant for the purpose of calculating a claim. The proper consultants will provide guidance for collecting, preserving and analyzing the evidence left in the aftermath of a blowout event, will help minimize the liability exposure faced by an operator and, in many cases, will support efforts to recover from parties responsible for causing the blowout. Hence, the selection of consultants and litigation experts to assist an operator sometimes can set the course for the myriad of events that ensue from a blowout event.

2. Privilege Issues Arising from Use of Consultants and Litigation Experts

It probably comes as no surprise that additional privilege issues arise when an operator or its attorney retain a consultant to assist, for example, in determining the cause of a blowout. Undoubtedly, this process will require consideration of both the attorney-client and work product privileges.

a. The Attorney-Client Privilege

Louisiana law sets forth certain circumstances under which the attorney-client privilege allows the client to refuse to disclose communications:

(1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer.
(2) Between the lawyer and a representative of the lawyer.
(3) By the client or his lawyer, or a representative of either, to a lawyer, or representative of a lawyer, who represents another party concerning a matter of common interest.
(4) Between representatives of the client or between the client and a representative of the client.
(5) Among lawyers and their representatives representing the same client.
(6) Between representatives of the client's lawyer.

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18 Louisiana laws governing the attorney-client privilege apply in diversity actions arising from incidents in the State of Louisiana and, thus, will govern the vast majority of blowout cases. See Fed. R. Evid. 501.
19 La. Code Evid. art. 506(B).
The Louisiana Code of Evidence further defines a "representative of the client" as:

(a) A person having authority to obtain professional legal services, or to act on advice so obtained, on behalf of the client.

(b) Any other person who makes or receives a confidential communication for the purpose of effectuating legal representation for the client, while acting in the scope of employment for the client. 20

Likewise, a "representative of the lawyer" is defined as "a person engaged by the lawyer to assist the lawyer in the lawyer's rendition of professional legal services." 21 Therefore, in the blowout context, communications between a lawyer and an expert engaged to investigate the accident will be privileged only if the expert was "engaged or employed by counsel to assist in the rendition of legal services" as opposed to the expert simply being "used by" counsel to provide reports for the rendition of legal services. 22

The court's decision, in *Kiln Underwriting Ltd. v. Jesuit High School of New Orleans*, 23 provides a useful illustration. In this case, the court first addressed whether certain communications between plaintiffs' counsel and an adjusting company retained to assess certain damages to insured property were protected by the attorney-client privilege. The court concluded that the adjusting company was not a "representative of the plaintiffs" because the plaintiffs made no demonstration that the company exercised "authority to obtain professional legal services or to act on legal advice so obtained on behalf of the plaintiffs," nor was there any evidence that the company "had the authority to retain counsel for [plaintiffs]." 24 Nevertheless, the court did find that communications between plaintiffs' counsel and two engineering firms hired to assess the damage were protected:

[T]he Plaintiffs retained [the engineers] on August 17, 2006, a significant time after suit was initiated and after they retained counsel on March 1, 2006. These experts did not independently work with the Plaintiffs before the filing of suit, but rather were retained specifically for expert services in connection with the case. The Court therefore finds that they have a direct and substantial relationship in the rendering of legal services because they were

24 Id. at *5.
hired to assist with determining the cause of damage to the Defendant's property. 25

The general principle of this case will apply to personnel such as insurance adjusters who may investigate a blowout and issue reports concerning the blowout. In most instances, the law will require production of such reports because an insurance company, not an attorney, retained the adjuster's services. Thus, unless an attorney independently retains a consultant and controls the work done by such consultant, it remains more than likely that the consultant's reports will be discoverable by an adversary in any type of later proceeding.

b. Work Product/Anticipation of Litigation Privileges

The scope of what becomes discoverable changes after the institution of litigation. Perhaps foremost, counsel may retain an expert in anticipation of or in the course of litigation, who is not intended to be or ultimately called on to testify at trial (that is, non-testifying or confidential consultants). Louisiana law generally provides that a party opponent may not discover facts acquired by the expert in the course of an investigation or consultation unless the opponent demonstrates “exceptional circumstances under which it is impracticable . . . to obtain facts on the same subject by other means.” 26 A party seeking to show exceptional circumstances under Article 1425 of the Louisiana Code of Civil Procedure or Rule 26(b) of the Federal Rules of Civil Procedure “carries a heavy burden.” 27 Such a showing may be challenging, especially during litigation, because facts ascertained by an expert in the course of an investigation or consultation typically remain available through other means of discovery. 28

25 Id. at *6. Contra Hoerner, 729 So. 2d 640 (Attorney-client privilege did not protect medical reports prepared by patient's physician and directed to patient's counsel, as patient did not claim that physicians were “engaged” or employed by counsel to assist in rendition of legal services, but that physicians were “used by” counsel to assist in rendition of legal services and that reports were requested by attorney for purpose of rendition of legal services: “a representative of the lawyer is not merely one from whom the attorney requests information, but rather, involves a more direct and substantial relationship with the rendition of legal services”).


27 Hoover v. United States Dept of the Interior, 611 F.2d 1132, 1142 n. 13 (5th Cir.1980).

28 See Dept. of Transportation and Development v. Stumpf, 458 So.2d 448, 452 (La. 1984) (non-testifying expert could not be deposed on facts underlying his opinion because they were reflected in construction sheets, engineering data and other documentation already exchanged in discovery); Crews v. Nabrico, No. 99-3254, 2001 WL 46878 (E.D. La. Jan. 18, 2001) (subpoena issued by defendant to metallurgist who was consulted by an employers’ insurer following an employee’s work-related death was quashed; the information regarding the site conditions would be accessible through depositions of fact witnesses, physical inspection, and photographs).
Article 1425(D)(1) of the Louisiana Code of Civil Procedure governs testifying experts and authorizes discovery of their opinions, the facts underlying their opinions and any writings reflecting same. On the other hand, Article 1425(E)(1) also contains a limited exception to this general rule prohibiting the discovery of drafts of expert reports and related communications “that would reveal the mental impressions, opinions, or trial strategy of the attorney for the party who has retained the expert to testify.” Unlike Louisiana state courts, federal courts have been less than clear on whether expert report drafts may be discovered by opposing parties. Federal courts generally require testifying experts to produce drafts of reports and, under some authority, preclude discovery of non-testifying expert reports. Nevertheless, proposed amendments to Rule 26 of the Federal Rules of Civil Procedure have been published that would protect against discovery of draft expert reports in federal proceedings. Among other things, an amendment to Rule 26(b)(4) adds a new Rule 24(b)(4)(B) to provide work product protection for draft reports, regardless of the form in which the report is recorded. Thus, if adopted by the Judicial Conference of the United States in December 2010, Louisiana state courts and federal courts will provide similar treatment to discovery of draft expert reports.

3. Investigation Goals

The principles above govern the circumstances in most blowout investigations because the extent of an operator's exposure may not be known until the investigation concludes. In addition, it remains more than likely in today's climate that someone will sue for damages arising from a blowout. The goal in these types of cases requires a balancing act between determining the root cause of the event and also limiting the amount of exposure to be faced by the operator. Nevertheless, in some situations, the operator may not face any liability and a third-party from which to recover expenses from the blowout may not exist. The investigation simply may be conducted to determine what caused an event and how to prevent it in the future. These latter situations arise infrequently and, even if such a circumstance does arise, the lessons

30 See Elm Grove Coal Co. v. Director, O.W.C.P., 480 F.3d 278, 302 (4th Cir. 2007) ("Any such draft reports or attorney communications made or provided to non-testifying or consulting experts should be entitled to protection under the work product doctrine."); Colindres v. Quijeflex Mfg., 228 F.R.D. 567, 571 (S.D. Tex. May 26, 2005) ("Courts have required disclosure of 'drafts of reports or memoranda experts have generated as they develop the opinions they will present at trial.' . . . An expert's consideration of a particular issue does not become privileged or beyond the scope of expert disclosure by virtue of its omission from the expert report.") (quoting B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y.1997)).
31 8 Wright & Miller, Federal Practice and Procedure §2016.5 (3d ed.).
32 Id.
learned from such an incident still could be sought by a future claimant in an unrelated event. Consequently, the balancing act between a full examination of the evidence and the protection of such examination's findings that takes place during the investigation of a blowout holds relevance even in situations where an operator believes that no litigation will ensue from that particular event.

C. Reconstruction

The last phase of a blowout investigation necessarily requires an attorney or other person investigating a blowout to reconstruct, or reconstitute, the body of evidence for the operator and, ultimately, a court in which litigation may ensue. In this instance, the investigation turns to examining the causes for and legal liability arising from the event. The costs and damages incurred from losing control of a well even for a short period of time invariably rise into the millions of dollars. Moreover, some blowouts unfortunately result in the loss of human life or severe personal injuries to workers at the site. Workers and/or their families of course sue the operator seeking compensation for their injuries or losses. Surrounding landowners often sustain (or claim to have sustained) physical injury, inconvenience and mental distress from blowouts. Furthermore, surface land and/or mineral interest owners claim property damage, loss of royalties from production and other economic loss. Finally, the contractual terms and conditions governing the work taking place at the time of the blowout often result in disputes over defense, indemnity and other obligations for the damages caused by the blowout. Thus, it should come as no surprise that blowouts commonly result in numerous and costly lawsuits including class actions or multidistrict litigation, and the necessity to present evidence for a court to determine who should be held at fault.

1. Surrounding Residents and Businesses

Litigation commonly arises from surrounding residents and businesses, although courts have imposed limitations on the scope of


34 See Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995) (512 plaintiffs seeking damages from well operators for property damage, exposure to toxic fumes, and wide-ranging physical and mental injuries); Cf. In re 1994 Exxon Chemical Plant Fire, No. 94-MS-3-C-M1, 2004 WL 5670389 (M.D. La. Sept. 27, 2004) (class action was brought against the oil refinery plant by hundreds of people in the community claiming physical injuries due to exposure to hazardous chemicals and mental distress damages).

35 See Coon v. Placid Oil Co., 493 So. 2d 1236 (La. App. 3 Cir. 1986).

36 See In re Incident Aboard D/B Ocean King, 758 F.2d 1063 (5th Cir. 1985).
these claims. In addition to claims for property and personal injury damages, individuals living in the vicinity of a blowout have sought damages for mental anguish or inconvenience allegedly sustained from the accident or their alleged fear of continuing to reside near the well (that is, of a similar incident occurring in the future). While any property damage or personal injuries directly sustained from exposure to a release of gas is compensable, the courts generally place distinct restrictions on claims for non-economic damages absent a showing of personal injury or property damage. For example, Louisiana courts addressing well blowouts and other similar accidents affecting a range of people (such as chemical releases) seem reluctant to award mental distress damages to plaintiffs who simply witnessed the accident and/or fear a similar reoccurrence.37 Similarly, in a case decided during 2009, a federal court in Louisiana refused to award damages to local business owners suing for loss of business opportunity resulting from a blowout under the “economic loss rule,” which precludes recovery for economic loss absent physical injury.38 The drilling of wells in the vicinity of urban areas such as Shreveport could make the “economic loss rule” important in terms of limiting the extent of an operator's exposure to surrounding businesses and residents for a blowout. Hence, as wells continue to proliferate in or near communities, it should not be a surprise that the sheer number of claims arising from a blowout may increase.39

2. The Potential for Recovery of Blowout Expenses

The reconstruction phase also requires assembling the facts and law that may allow an operator or other interested party to bring suit for recovery of losses arising from a blowout against the contractors and equipment manufacturers or suppliers. In such a recovery action, the damages awarded may include well control costs, environmental remediation costs, property damage and repair costs, delayed production and lost profits, costs incurred from third-party claims and litigation and

37 In re 1994 Exxon Chemical Plant Fire, No. 94-MS-3-C-M1, 2004 WL 5670389 (M.D. La. Sept. 27, 2004) (class plaintiffs that could not prove they were physically injured by a release at a chemical plant were barred from seeking recovery for mental anguish damages); see also Dumas v. Angus Chemical Co., No. 31400 (La. App. 2 Cir. 1/11/99), 728 So.2d 441.

38 See TS&C Investments, LLC v. Beusa Energy, Inc., 637 F. Supp. 370 (W.D. La. 2009) (economic loss rule precluded local business owners from recovering purely economic damages against oil companies that were involved in placement and drilling of an oil well, based on losses allegedly sustained after an oil well blowout caused closure of a nearby interstate highway; owners had no propriety interest in property damaged and alleged no injuries to themselves or their properties).

39 This article will not address the issues surrounding defense and indemnity provisions found in many master service agreements and similar contracts. Suffice to say, the applicable contracts must be analyzed thoroughly in the context of the applicable factual situation and jurisdiction's law to arrive at a conclusion as to the validity of such provisions.
other consequential damages. Theories of recovery hinge on the nature of relationship between the well operator and other interested parties and the prospective defendants.

a. Theories of Recovery Based in Contract or Quasi-Contract

A master services agreement or like contract commonly governs the relationship between the operator and a drilling or other well contractor. In many cases, such contracts contain choice of law provisions that may stipulate to the laws of other jurisdictions, which may dictate applicable rules of interpretation along with the availability of potential quasi-contractual claims.

Contractual remedies also may arise from provisions contained in the agreements expressly warranting that all work and services provided pursuant to the contract will be performed with due diligence and in a workmanlike manner. In addition, many master service agreements further warrant that all equipment sold or otherwise provided shall be in good working order and free from defects. Thus, if a blowout can be attributed to the failure to meet these broad contractual duties, a claim may be asserted for breach of contract to recover all incidental and consequential damages proximately caused by the accident.

Notably, in contrast to Louisiana, some jurisdictions, like Oklahoma and Texas, have enacted statutory provisions permitting the recovery of attorneys’ fees as part of a breach of contract claim, despite the absence of such a provision in the agreement. On the other hand, master services agreements sometimes may contain waivers of any express or implied warranties or likewise contain disclaimers of liability for latent defects in products provided in the course of a contractor’s work, which, in turn, almost undoubtedly will create involved disputes concerning their interpretation. For instance, Louisiana law imposes heightened form requirements applicable to the purported waiver of the warranty against redhibition, and Oklahoma law imposes similar provisions applicable to the warranty of merchantability and fitness based on the Uniform


41 See, e.g., Anderson-Prichard Oil Corporation v. Parker, 245 F.2d 831 (10th Cir. 1957) (plaintiff awarded $301,127.51, plus attorney fees in the sum of $7,500 in action on contract for drilling of oil and gas in connection with blowout of well).

Commercial Code. A common issue that arises in this context occurs when a contractor tenders an invoice to the operator that acknowledges the sale of certain well equipment but also purports to waive or otherwise limit a cause of action arising out of a defect in the equipment or related services. These purported waivers often will not be reconcilable with an integration clause in the master services agreement and, therefore, likely will not be enforceable as a matter of law.

Other quasi-contractual theories of recovery also may be available for recovering costs of a blowout attributed to defective equipment. For instance, Louisiana recognizes a warranty against redhibitory defects, which allows a buyer of defective equipment to recover both damages and attorneys' fees from a manufacturer or supplier of a defective product. If the master services agreement stipulates to another state's law, this could operate as a waiver of potential claims in redhibition. Nevertheless, common law states adopting the Uniform Commercial Code usually have enacted similar warranties of sale, such as the warranty of merchantability and fitness, that may apply. Hence, depending on the particular provisions of any contractual provisions governing a relationship, a breach of contract claim against the party responsible for causing a blowout offers an operator one avenue for recovery of its expenses.

b. Theories of Recovery Based in Products Liability and/or Tort

Potential theories of recovery in products liability or tort also depend on the particular facts against whom a claim may be brought. In many instances, blowouts occur due to a defect in or a failure of equipment. Any tort remedy against a “manufacturer” of a defective well product would be limited in large part to the Louisiana Products Liability Act (“LPLA”) by virtue of the statute’s exclusivity provisions.

44 See La. Civ. Code art. 2548; see also Jackson v. Gifford, 264 P.2d 313 (Okl. 1954) (disclaimer on a “load out sheet” given to purchaser after the sale not part of the contract of sale).
46 See Delhomme Indus., Inc. v. Houston Beechcraft, Inc., 669 F.2d 1049, 1057-1058 (5th Cir. 1982) (finding that a choice of law provision in a sales contract effectively waived a buyer’s redhibitory rights because the clause “substituted Kansas law for Louisiana law, and redhibitory rights are available only under Louisiana law.”).
47 See, e.g., 12A Okt. St. §2-314; 12A Okt. St. §2-315.
48 A “manufacturer” under the LPLA is defined as “a person or entity who is in the business of manufacturing a product for placement into trade or commerce. ‘Manufacturing a product’ means producing, making, fabricating, constructing, designing, remanufacturing, reconditioning or refurbishing a product.” La. Rev. Stat. 9:2800.53(1).
49 To state a claim under the LPLA, a plaintiff must demonstrate (1) that the defendant is a manufacturer; (2) that the product was “unreasonably dangerous” and (2)
The LPLA provides the exclusive theory of liability in Louisiana for claims against "manufacturers" due to damages caused by defects in their products. Although the LPLA does provide exceptions for claims under redhibition and breach of contract theories of liability, an operator otherwise may not recover from a manufacturer on the basis of any theory of liability not set forth in the LPLA, including strict liability, negligence, or intentional torts. Damages under the LPLA include "all damage caused by a product" including damage to the product itself and economic loss arising from a deficiency in or loss of use of the product. Nevertheless, unlike claims based in redhibition against a manufacturer, the LPLA does not provide for an award of attorneys’ fees. Consequently, the LPLA certainly affords a remedy but, in reconstructing a blowout, one must be aware of the specific types of "defects" for which claims may be made under the Louisiana products liability law.

Damages against non-manufacturing parties, such as strict suppliers of defective well equipment, also may be recovered pursuant to general tort law. Most obvious, an operator could sue a responsible party for negligence. For example, if the cause of the blowout can be traced to a defective product supplied by a contractor and/or the contractor otherwise could have prevented the accident through the exercise of reasonable care, the contractor is answerable for the damages caused by its negligence, including (without limitation) lost production and earnings and consequential damages. Other potential bases for a

that the plaintiff's damages were proximately caused by the dangerous characteristic of the product. Stahl v. Novartis Pharmaceuticals Corp., 283 F.3d 254, 261 (5th Cir. 2002).


51 Stahl v. Novartis Pharmaceuticals Corp., 283 F.3d 254, 261 (5th Cir. 2002).


53 Id.

54 See, e.g., Mobil Exploration & Production U.S. Inc. v. Certain Underwriters, 01-2291 (La. App. 1 Cir. 11/20/02); 837 So.2d 11 (plaintiffs and the State awarded $17,000,000 for loss of hydrocarbons due to driller's negligence in the blowout of a well); Aladdin Oil Co. v. Rayburn Well Service, Inc., 202 So.2d 477 (La. Ct. App. 1967) (oil well operator and other interested parties awarded $65,426.39 from parties found negligent in causing blowout). But see Commonwealth Ins. Co. v. Halliburton Energy Services, Inc., 03-2490 (La. App. 1 Cir. 12/20/04); 899 So.2d 24 (evidence sufficient to support jury determination that swivel joint not defective and that oil well pumping company that supplied joint not at fault for oil well blowout; company's expert testified that he examined joint after blowout and that it failed as a result of in-service stress rather than as a result of any corrosion or cracks, that impact of plug inside hose hitting joint compromised seal and caused blowout, and that joint failed because of the way it was used, and another expert testified that blowout was caused by weight of attached pipe and by well control specialist's actions); Lancaster v. Petroleum Corp. of Delaware, 491 So.2d 768 (La. Ct. App. 1986) (evidence failed to establish that operating partner negligent or breached the operating agreement in causing oil well blowout; following actions of operator found not to be negligent: in leaving valve open, in failing to keep oil
negligence claim could include a contractors' negligence in deciding to use the particular type or design of well equipment.\textsuperscript{55}

Notably, however, a non-manufacturing supplier may be held liable in tort for the damages caused solely by a defective product "only if [it] knew or should have known that the product sold was defective, and failed to declare it."\textsuperscript{56} Upon concluding an investigation, if the evidence reveals that the blowout may be attributed solely to a latent defect in product, it would be challenging to maintain a negligence claim against a mere supplier of the faulty product. But, again, if the failure of the well equipment otherwise could have been prevented by the exercise of reasonable care on the part of the supplier, an actionable negligence claim exists. Consequently, in some circumstances, the supplier may be held liable for supplying a defective product.

Other potential theories of liability against a supplier not based in general negligence include claims for negligent or intentional misrepresentation (for example, regarding the capabilities of purchased well equipment) and/or claims under Louisiana's redhibition laws.\textsuperscript{57}

\textsuperscript{55} See, e.g., Home Ins. Co. v. Simon, 411 So.2d 1268 (La. App. 3 Cir. 1982) (in denying insurer's motion for summary judgment that activities in connection with reworking of oil well fell within exclusion of general liability policy, the court held: "the evidence does not prove the cause of the packer failure. It could be that the decision to use this particular packer was the negligence that caused the blowout. It could be that the packer itself was defective. Without a trial on the merits, we can only speculate as to the cause of the packer failure."); Meadows & Walker Drilling Co. v. Phillips Petroleum Co., 417 F.2d 378 (5th Cir. 1969) (evidence justified jury's finding that drilling company negligently used defective pipe and that such negligence proximate cause of blowout).

\textsuperscript{56} Wilson v. State Farm Fire & Cas. Ins. Co., 94-1342 (La. App. 3 Cir. 4/5/95), 654 So.2d 385. In this same regard, a non-manufacturing supplier "is not required to inspect a product prior to sale to determine the possibility of inherent vices or defects." Parks ex rel. Parks v. Baby Fair Imports, Inc., 98-626 (La. App. 5 Cir. 12/16/98), 726 So.2d 62, 64.

\textsuperscript{57} Notably, before a claim in redhibition may be asserted against a supplier, as opposed to a manufacturer, it first must be determined if the supplier could be found in "bad faith." La. Civ. Code art. 2545. In Louisiana, the Civil Code defines "bad faith" in the context of redhibition as "[a] seller who knows that the thing he sells has a defect but omits to declare it, or a seller who declares that the thing has a quality that he knows it does not have." \textit{Id.} Without a showing of bad faith, an operator may not recover damages or attorneys' fees but would be limited to recovering the diminution in value of the defective equipment (that is, the difference in value of the product sold in defective condition and its apparent value as warranted by the seller). Verlander v. Hoffer, 351 So.2d 229, 233 (La. Ct. App. 1978). Nevertheless, in its redhibition articles, Louisiana also recognizes an implied warranty that a product sold must be fit for its ordinary and/or specific use, which is separate and distinct from an ordinary redhibition claim. \textit{See} La. Civ. Code art. 2524 ("when the thing sold is not fit for its ordinary use, even though it is
These claims, however, again would depend on the cause and circumstances of the blowout and the knowledge attributable to such supplier. Thus, in general, claims against suppliers may depend, in large part, on the ability to demonstrate or prove active negligence as opposed to merely supplying a defective piece of equipment.

III. Conclusion

The investigation, or anatomy, of a blowout presents a challenging scenario to an operator and any attorney retained to assist in such investigation. In many instances, lives may have been lost and significant personal injuries or property damage may have been sustained as a result of such blowout. The period before specialists regain control of the well commonly involves dangerous conditions where the operator and others involved in well control operations rightfully focus on returning the well to a controlled state. Nevertheless, a post-mortem study of the circumstances leading to the blowout represents a necessary activity to determine the cause and to prepare for claims that most likely will ensue. This study involves being cognizant of a multitude of issues from collecting and preserving evidence to prosecuting claims for recovery of blowout expenses. Thus, while the control of a well may bring smiles, it also represents the beginning of a lawyer's work in reconstructing what took place and how to address it.