

DIVING INTO THE WRECK: BP AND KENNETH FEINBERG'S GULF COAST GAMBIT

by George W. Conk*

Since the United States Supreme Court in *Amchem Products v. Windsor*¹ effectively ruled out class actions in mass tort claims, the federal courts have continued to develop systems for management of large-scale claims. Sometimes styled quasi-class actions, the classic model is the consolidation of the discovery process, followed by bellwether trials, and global settlement. The process has been well described by Judge Eldon Fallon, whose management of the Vioxx litigation in the Eastern District of Louisiana is an exemplar of a successfully litigated global settlement.²

In the aftermath of the Deepwater Horizon catastrophe³ BP moved dramatically to get control of the process - hoping to use the prestige, creativity, and capability of Kenneth Feinberg and his firm to effectively pre-empt the complex, protracted, and costly litigation process.⁴ The purportedly independent method developed by BP and Feinberg could be labeled “the pseudo-fund model” of global settlement.

When in April 2010 the Deepwater Horizon rig burned and the Macondo well it served began to spew thousands of gallons of crude oil in what would be the world's largest oil spill, it was clear to the well's developer/owner BP that massive damage claims would also flow. The Oil Pollution Act of 1990 (OPA) charged BP with strict liability for the costs of clean-up and the duty to pay partial interim as well as final damages claims.⁵

BP moved boldly to gain control of the process. At a June 16, 2010 White House event, BP committed twenty billion dollars in assets to meet its obligations to be paid over a four-year period, and this amount is to be neither a floor nor a ceiling.⁶ It was apparently a guesstimate of

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¹ 521 U.S. 591 (1997). The court rejected an asbestos class action saying that individual issues such as proof of causation of disease predominated over common issues of fact. *Id.* at 628. Although it did not formally declare that Federal Rule of Civil Procedure Rule 23 class actions could not be used in personal injury claims, it put an end to them as a practical matter. *See id.* at 628-29.

² Eldon Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2323 (2008). *See generally*, DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LIGATION (4d ed. 2011).

³ *See Final Report*, THE NATIONAL COMMISSION ON THE BP HORIZON OIL SPILL AND OFFSHORE DRILLING (Jan. 11, 2011), <http://www.oilspillcommission.gov/final-report> (reporting on key events in the BP oil spill disaster).

⁴ *See, e.g.*, Molly K. Hooper, *Feinberg Ordered by Obama to get BP Claims Paid 'Quickly'*, THE HILL, (June 20, 2010, 4:30 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/104367-feinberg-ordered-by-obama-to-get-bp-claims-paid-quickly> (documenting Kenneth Feinberg's appointment to oversee the oil spill compensation fund).

⁵ *See* 33 U.S.C. §§ 2702, 2705 (2006).

⁶ Jesse Lee, *A New Process and a New Escrow Account for Gulf Oil Spill Claims from BP*, THE WHITE HOUSE BLOG, (June 17, 2010, 2:35 PM), <http://www.whitehouse.gov/blog/2010/06/17/a-new-process-and-a-new-escrow->

what might be needed, though by January 11, 2011 BP had already reimbursed the United States \$606 million for clean-up costs, and BP now estimates its total liability at forty-one billion dollars.⁷ The process would be managed by a lawyer of solomonic reputation – Kenneth Feinberg. He built that reputation beginning with the Agent Orange settlement in the 1980’s and culminating in his volunteer service as government-appointed Special Master of the September 11 Victims Compensation Fund. His law firm Feinberg Rozen bills itself as specialists in “comprehensive negotiations strategy,” a firm which has “redefined the practice of law,” lawyers “preeminent” in “preventing years of protracted, costly and uncertain litigation.”⁸ BP needed just that. With President Obama blessing the commitment and the selection of Feinberg, BP set about the task of reaching an early global resolution.

Oversell and misrepresentation began from the first. Feinberg sought from the first to wear the cloak of the public fund he had administered. Four days after the White House appearance, speaking on Meet the Press he said:

Now, I'm confident – as with the 9/11 fund – that if claimants enter this fund voluntarily they will be treated fairly. They're treated in a comprehensive way, they will be given emergency payments with no requirement in terms of waiving your right to sue. These emergency payments are without condition. And then I think [we'll] be able to treat everybody fairly . . . I must make sure that this \$20 billion fund provides for prompt payment, full compensation. It's an independent program. I'm not beholden to the administration or BP.⁹

He was certainly not “beholden” to the Obama administration. A full year later, Attorney General Holder noted in a written letter to Feinberg only Feinberg’s voluntary agreement to an “independent audit” of the entity, which he leads for BP – the Gulf Coast Claims Facility (GCCF).¹⁰ Because BP is statutorily compelled to satisfy interim claims – a task for which mass tort litigation is unequipped – Feinberg’s claims payment “facility” has been the main focus of activity. But, because the GCCF is private and unregulated its criteria and performance are difficult to gauge and it remains un-monitored. Though often referred to as a “fund,” it is in fact only a set-aside or promised commitment of assets by BP in an amount that on its face appeared to be roughly sufficient to settle governmental and private claims

account-gulf-oil-spill-claims-bp.

⁷ JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41679, LIABILITY AND COMPENSATION ISSUES RAISED BY THE 2010 GULF OIL SPILL 1, 11 n.64 (2011), available at http://assets.opencrs.com/rpts/R41679_20110311.pdf.

⁸ Feinberg Rozen, LLP’s website declares:

The firm has redefined the practice of law, bringing opposing sides of legal disputes together. It is the nation’s foremost law firm for mediation, arbitration, other forms of alternative dispute resolution, and negotiation strategy. From cases that affect only a few, to the largest, most complex disputes of our time, the firm consistently bridges the gap between parties by creating imaginative and satisfying solutions. Time and again, the firm is able to achieve settlements that are in every party’s best interests, thus eliminating the need for costly litigation

About Feinberg Rozen, LLP, FEINBERG ROZEN, LLP, www.feinbergrozen.com (also click “About Us”) (last visited October 1, 2011) (emphasis added).

⁹ Hooper, *supra*, note 4. Feinberg, of course, was not “ordered” by Obama to do anything.

¹⁰ See Letter from Eric H. Holder, Attorney General, Office of the Attorney General, to Kenneth Feinberg, Gulf Coast Claims Facility (July 20, 2011) (on file with author), available at media.al.com/live/other/Holder%20letter.pdf.

arising from the spill. Like actual “funds,” the GCCF is a mechanism that seeks to resolve claims without resort to the courts, as Feinberg urged. But, unlike litigated and mediated funds there is no highly elaborated grid to guide the consensual administration and determination of awards to claimants.¹¹

Although a “procedure for the payment or settlement of claims for interim, short-term damages” is mandated by § 2705 of the OPA,¹² there is otherwise a regulatory vacuum. The private operation functions through its own “protocols,” which it promulgates in language reminiscent of that of a public entity. The GCCF has in fact been refractory to efforts to supervise it. Plaintiffs’ lawyers in the Multi-District Litigation (MDL) venued in Louisiana have twice moved to “supervise” BP and Feinberg’s dealings with members of the “putative class.”¹³ The first motion yielded an order by Judge Barbier compelling Feinberg to stop calling himself independent and to identify himself as an agent of BP.¹⁴

We begin with a look at the history of mass torts and some of the reforms that have moved us away from the common law system of trial by judge and jury. The GCCF is unlike workers compensation systems, the administrative fund claims for childhood vaccine injuries, the mass tort global settlements of drug product liability cases, and the World Trade Center cleanup workers cases. All of those yield awards that are the product of open and adversarial processes with transparent measures of damages. But the GCCF is entirely private, its liability principles obscure, and its damages measures stated with such generality as to leave the Administrator with wide discretion.¹⁵ Like the September 11 Victims Compensation Fund to which it is otherwise inaptly compared, the GCCF is characterized by the broad, generally undefined discretion exercised by its administrator: Kenneth Feinberg.

Since the GCCF is a private claims settlement agency owned by the payor, none of the settlements, nor their basis is disclosed, a process which has continued to draw complaints from

¹¹ See e.g., *Examples of Claim Valuation Calculations*, VIOXX SETTLEMENT DOCUMENTS, <http://www.officialvioxxsettlement.com/documents/Claimant%20Valuation%20Examples.pdf> (last visited Sept. 26, 2011). In the World Trade Center Disaster cleanup cases a complex grid was devised to determine awards. See *World Trade Center Settlement Process Agreement, As Amended*, <http://www.scribd.com/doc/46144665/WTC-9-11-Cleanup-cases-Final-Settlement-Agreement-as-amended> (last visited Oct. 12, 2011).

¹² 33 U.S.C. § 2705 (2006).

¹³ See Memorandum in Support of Rule 59(E) Motion to Alter or Amend Judgment Denying Copeland’s Motion for Temporary Restraining Order and Preliminary Injunction, and for Court Supervision at 18, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Aug. 19, 2010) ECF No. 44-1; Plaintiffs’ Supplemental Brief in Support of Supervision over the BP Interim Claims Process at 1-2, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. July 25, 2011).

¹⁴ *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179, 2011 U.S. Dist. LEXIS 10497, at *23-25 (E.D. La. Feb. 2, 2011). Feinberg was ordered to “[r]efrain from referring to the GCCF, Ken Feinberg, or Feinberg Rozen, LLP (or their representatives), as “neutral” or completely “independent” from BP. It should be clearly disclosed in all communications, whether written or oral, that said parties are acting for and on behalf of BP in fulfilling its statutory obligations as the ‘responsible party’ under the Oil Pollution Act of 1990.” *Id.* at 24.

¹⁵ See, e.g., *Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology*, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/methodologylanding> (last visited Oct. 13, 2011) (describing methodology for claims determinations).

the plaintiffs who have filed suit against BP in actions consolidated under MDL 2179 in Louisiana's Eastern District,¹⁶ and interested public officials like Mississippi Attorney General Jim Hood,¹⁷ and other Gulf Coast Attorneys General.¹⁸ The plaintiffs lawyers, have asserted that delay in the interim claims process has been a method of manipulating claimants desperate for cash who snap up so-called quick payments (for which a general release of BP is required) and forego the partial or interim claims to which the statute entitles them without prejudice to making future claims for permanent loss.¹⁹

Ironically, one year after the White House ceremony, the Gulf Coast plaintiffs lawyers asked that MDL Judge Carl Barbier to

appoint a Special Master to supervise the BP/GCCF claims process in order to: (i) assure compliance with OPA; (ii) ensure accurate and appropriate communication with claimants; (iii) make findings and/or recommendations regarding the satisfaction of OPA's presentment requirements; and (iv) make findings and/or recommendations regarding the scope and/or efficacy of releases.²⁰

Thus, after one year, the GCCF has failed to garner the credibility as a neutral forum that BP sought, federal public regulatory authority has been faint, and state regulation has consisted of Attorneys Generals' laments.²¹ By default the MDL court has been pressed into service by

¹⁶ The wrongful death, personal injury, and Oil Pollution Act claims arising from the April 2010 sinking of the rig were consolidated. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 731 F. Supp. 1352, 1355 (2010).

¹⁷ See, e.g. Statement of Interest on Behalf of the State of Mississippi, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (E.D. La. filed Jan. 24, 2011) ECF No. 1060 ("The GCCF is nothing more than a surrogate for BP in the administration of the claims process that BP is required to provide claimants under the Oil Pollution Act. . . . From the outset of the Deepwater Horizon oil spill disaster in the Gulf, the Gulf Coast State Attorneys General have attempted to monitor and improve the manner in which the BP Oil Spill claims process has been conducted. Their efforts began before the GCCF was created and have continued thereafter, and have been undertaken on behalf of all Gulf State citizens, even those who are not putative class members. These communications have been composed of regular and ongoing meetings, negotiations, and correspondence with BP and Mr. Feinberg for the purpose of compelling BP to bring the GCCF claims process into compliance with the requirements of federal law, including OPA, and the prior commitments made by BP, the GCCF and Mr. Feinberg. These good-faith discussions have unfortunately met with only limited success."); Press Release, Mississippi Attorney General, Attorney General Seeks Court Action to Compel GCCF and Feinberg Compliance of Subpoena (July 12, 2011), *available at* http://www.ago.state.ms.us/index.php/printer_friendly/releases/attorney_general_seeks_court_action_to_compel_gccf_and_feinberg_compliance. ("Mr. Feinberg and the GCCF have continually made promises of compliance, but have failed to fully provide necessary information despite our repeated requests and reasonable efforts to resolve the issues. . . . All they have managed to do is delay, deny, deceive and dissemble.")

¹⁸ See Correspondence from Gulf Coast State Attorneys General to Kenneth Feinberg, attached as Exhibit A to Statement of Interest on Behalf of the State of Mississippi, *supra* note 17.

¹⁹ See Plaintiffs' Supplemental Brief in Support of Supervision over the BP Interim Claims Process, *supra* note 13, at 8 & n.21, 9.

²⁰ *Id.* at 20.

²¹ See Letter from Gulf Coast States Attorneys General to Rupert Bondy, Grp. Gen. Counsel, BP P.L.L.C., Stephen R. Winters, Esq., Assoc. Gen. Counsel, Refining and Mktg., Global BP Am. Inc, and Doug Suttles, Chief Operating Officer, BP Exploration & Prod. Inc. (undated), *available at* [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-856MR6/\\$file/StatesLetterBP.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-856MR6/$file/StatesLetterBP.pdf); Sabrina Canfield, *AGs Claim BP Given Pass to 'Distort' & 'Subvert'*, COURTHOUSE NEWS SERVICE, (April 11, 2011, 3:40 PM), <http://www.courthousenews.com/2011/04/11/35663.htm>.

private litigants. That government which governs least has not governed best.

We turn now to a historical survey of efforts to mold, modify, and replace the tort system to provide prompt and effective compensation to those who have suffered losses due to mass disasters, unsafe workplaces, or heedlessly marketed products. From that experience we conclude that the pseudo-fund model is an inadequate mechanism for the Gulf Coast oil spill claimants, and that stronger federal government regulation is warranted - particularly for the partial and interim claims process mandated by the Oil Pollution Act of 1990.

The emergence of mass tort claims: Industrial illness - a modern epidemic

We have been troubled by mass torts for over a hundred years. Tort reform arose in the early twentieth century when the emerging labor movement and social reformers forged a response to the grievous epidemic of industrial accidents.²² The common law presented formidable obstacles to employer liability for industrial accidents. But, driven by the railway workers unions' political force, Congress in 1908 passed the first Federal Employers Liability Act.²³ "[It] was designed," wrote Justice William O. Douglas "to put on the railroad industry some of the costs for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for the Act did not make the employer an insurer. The liability which [FELA] imposed was the liability for negligence."²⁴

FELA expanded the bases for liability by striking common law defenses like the fellow servant rule, assumption of the risk, and contributory negligence. It allowed apportionment of liability based on fault, assigning the duty to the jury. It preserved the jury system and the requirement that the injured workers prove that the injury was the fault of another, and it allowed claims to be brought in local or state court – at the election of the worker. The FELA reached only railroad workers but it provided the template for the 1920 Jones Act²⁵ under which claims have been made for seamen injured and killed in the Deepwater Horizon disaster.

Although FELA was the first modern tort reform measure, it was an anomalous one. The much broader thrust was one that bypassed the jury system: state workers' compensation laws. Social reformers and the labor movement, inspired by German social insurance funds, lobbied in the first two decades of the twentieth century for state workers' compensation laws. The second decade of the twentieth century saw the triumph of this movement in the broad embrace of workers' compensation laws, which removed workplace injuries from the common

²² See, e.g., *Railroad Workers Injuries – Federal Employers' Liability Act (FELA) Claims*, ASHCRAFT & GEREL LLP, <http://www.ashcraftandgerel.com/practiceareas/railroad-worker-injuries-federal-employers-liability-act-fela-claims/> (last visited Oct. 1, 2011) (noting that the passage of the Federal Employers' Liability Act was motivated out of a concern for injury and death associated with railroad work).

²³ 45 U.S.C. §§ 51–60 (2006).

²⁴ *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

²⁵ 46 U.S.C. § 30104. This section allows for recovery for injury to or death of seaman:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

Id.

law courts and spared workers from the obstacles of the common law defenses such as contributory negligence and the fellow servant rule.²⁶ The state workers' compensation statutes laws at first covered only accidental injury. But recognition of occupational diseases with insidious onset, such as the silicosis that afflicted the granite cutters of Barre, Vermont, led to a steady and widespread expansion of coverage to include occupational diseases.²⁷ Thus, workers' compensation largely replaced the jury trial system with a no-fault or strict liability system administered by administrative law judges. It abolished the defenses of negligence of a fellow employee, or that the injured employee assumed the risks inherent in or incidental to or arising out of his employment, or the failure of the employer to provide and maintain safe premises and suitable appliances. It modified the burden of proving proximate cause by use of the phrase "arising out of and in the course of employment" to describe the requisite causal link to the employment.²⁸

Unlike the common law tort system with its lump sum awards at the conclusion of the litigation, workers compensation systems assured injured workers of receiving interim wage loss claims during treatment and recovery for work-related injuries. It provided a reasonably efficient system of paying for their medical bills, replacing their wages during the time of their injury, and finally compensating them for permanent loss (partial or total) of working ability. Although the adjudication systems are administrative, not common law, they are generally adversarial systems with both employer and worker represented by counsel.²⁹

Though workers' compensation is often described as a tradeoff, because wage replacement was only partial for high-wage workers, reliable provision of benefits to injured workers was its overwhelming characteristic. Workers' compensation and Social Security disability benefits were the major means of sustenance for the workers sickened by the massive epidemic of asbestos disease documented by the heroic labors of Dr. Irving Selikoff and his colleagues.³⁰ The heedless use of asbestos was finally stemmed by the passage of the

²⁶ JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* *passim* (2004).

²⁷ See GEORGE ROZEN, *A HISTORY OF PUBLIC HEALTH* 408-415 (1993); See generally DAVID ROSNER & GERALD MARKOWITZ, *DEADLY DUST: SILICOSIS AND THE POLITICS OF OCCUPATIONAL DISEASE IN TWENTIETH-CENTURY AMERICA* (1991).

²⁸ See, e.g., *Romeo v. Romeo*, 418 A.2d 258, 265 (N.J. 1980) ("[I]t is to be borne in mind that the act we are considering is one of social insurance . . . designed to place the cost of work-connected injury on the employer who may readily provide for it as an operating expense.' The fundamental principle underlying workers' compensation is that of compensating an injured employee. The statutory scheme was designed '[t]o overcome the harsh common law rules which often resulted in a denial of recovery to injured workmen or their dependents where death or injuries occurred from the work-connected accidents . . .'" (citations omitted).

²⁹ LEX K. LARSON, *WORKERS' COMPENSATION LAW* § 2.08 (1997) (Every state in the United States has adopted a workers compensation system, as has the United States); *HR Executive Education*, MICHIGAN STATE UNIVERSITY SCHOOL OF HUMAN RESOURCES AND LABOR RELATIONS, http://hrlr.msu.edu/hr_executive_education/wcid/wc_state.php (last visited Nov. 12, 2011) (linking to administrative agency and procedures for each state in the United States). The federal employees program, allows for attorneys fees but does not make direct payments to the attorney, however, the conditions are generally so onerous that attorneys only infrequently represent workers. See 5 U.S.C. § 8127 (2006).

³⁰ See I.J. SELIKOFF, ET AL., *Biological Effects of Asbestos*, 132 *ANNALS N.Y. ACAD. SCI.* 1 *passim* (Harold E. Whipple, ed., 1965).

Occupational Safety and Health Act of 1970,³¹ on the authority of which the United States Department of Labor quickly banned use of the once ubiquitous mineral.³²

In the 1970's, modern mass tort claims arose when a liberal spirit encouraged third party litigation against asbestos product manufacturers.³³ Claims were founded on a liability theory first embraced by the great Republican Judge John Minor Wisdom of Louisiana in *Borel v. Fibreboard Paper Products Corp.*³⁴ Though the court labeled Borel's claim as one in strict liability, review of the facts recited by the court shows the judgment to be equally grounded on the demonstrable history of disregard of the health effects of asbestos, which could support findings of negligence and recklessness.

As the massive epidemic manifested itself, workers compensation and third-party tort causes of action arose against dozens of asbestos-containing product manufacturers and the companies that used their products. They were handled one by one, primarily in state workers compensation and trial courts. Thousands of cases were tried before juries, and thousands were settled. Delays were substantial due to heavy trial calendars, legal obstacles, vigorous defense tactics, and then, the insolvency of many manufacturers, some of which collapsed under the weight of their liability to injured workers.³⁵ The force of these claims pushed relentlessly toward aggregate settlements, rather than the individual case-by-case resolution, which still characterizes workers' compensation claims, as well as tort claims for medical malpractice, and automobile accident injuries.³⁶

³¹ 29 U.S.C. § 654 (2006) ("Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this Act.").

³² See 40 C.F.R. §§ 763.167, 1910-1001 (2010).

³³ See generally George W. Conk, *Punctuated Equilibrium: Why Section 402A Flourished and the Third Restatement Languished*, 26 REV. LITIG. 799 (2007) (arguing that the 1964 Second Restatement's duty-charged declaration of liability to the consumer for injury due to product defect even if "the seller has exercised all possible care" is muted in the defense-inclined 1998 Products Liability Restatement) [hereinafter *Punctuated Equilibrium*].

³⁴ 493 F.2d 1076, 1105 (5th Cir. 1974) ("The [sellers] are in the anomalous position of arguing that (1) the danger was obvious; (2) yet they issued no semblance of a warning and they posted diluted 'cautions' which might alert the contractor-purchasers, but not the workers, the final users; and (3) all admit that they never conducted any tests to determine the extent of the danger. In their original briefs, on the issue of liability they seem to rely primarily on the 'cautions' to the independent contractors, the purchasers, as if their potential liability ceased to exist before their products reached the ultimate users. That is not the law. We agree with the Restatement: a seller may be liable to the *ultimate* consumer or user for failure to give adequate warnings. The seller's warning must be reasonably calculated to reach such persons, and the presence of an intermediate party will not by itself relieve the seller of this duty.").

³⁵ Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 262, 269-72 (2006); see also Anita Bernstein, *Asbestos Achievements*, 37 SW. U. L. REV. 691, 715 (2008) ("Asbestos liability... reveals clients who were retained and compensated. Antagonists were won over. Claims were strengthened by aggregation. Settlements were negotiated. Procedural hurdles were overcome. Evidentiary rules were made more permissive. Statutes of limitation, the province of legislatures, were revised by judges in a plaintiff-favoring direction. Hazards were exposed. Large business corporations were brought to their knees."); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 582-83 (2008) (reflecting on the process of trying thousands of asbestos cases).

³⁶ See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 Vand. L. Rev. 1571, 1625-26, 1634 (2004); see also RICHARD A. NAGAREDA, MASS

Focused mass tort claims

Occupational injury and disease cases unfolded in a diffuse way. But in the past thirty-five years much of the attention has been on events with a very specific origin. In 1975, the United States accepted all liability for the adverse health consequences of the Swine Flu Vaccine campaign, immunizing the manufacturers of the product, because the government had undertaken a mass inoculation campaign, which sought, initially, to vaccinate everyone in the country.³⁷ In 1986, Congress established the National Vaccine Injury Compensation Program.³⁸ The Act immunized manufacturers through an administrative mechanism, which provided medical benefits, compensation for economic loss, and for pain and suffering. Non-economic losses were capped at \$250,000, which has become an iconic number. The Vaccine Act preserved a narrow tort option, which the United States Supreme Court virtually closed in the recent case, *Bruesewitz v. Wyeth*,³⁹ where it granted vaccine manufacturers the immunity from design defects that they had long – and unjustly – sought.⁴⁰ The Court held that by using the phrase “unavoidable,” Congress meant to foreclose all but failure to warn claims against vaccine manufacturers.⁴¹

Financed by an excise tax on the mandatory childhood vaccines,⁴² the National Vaccine Injury Program was the first fund established for the resolution of tort claims.⁴³ Administered by the United States Department of Health and the United States Court of Federal Claims, the Vaccine Act is perhaps the most successful new mechanism for removing from the common law courts of general jurisdiction tort claims, which, though few, were prominent because vaccine manufacturers had successfully demanded they be immunized as the price of agreement to manufacture the swine flu vaccine. That leverage was again exercised to remove from the tort system claims like those arising from live-virus polio vaccine.⁴⁴ Although it sacrifices the community judgment element of tort, the childhood vaccine program provides a tolerably adequate remedy for vaccine-related injuries for which there is substantial scientific evidence.

But vaccine claims are few and if pursued as product liability claims, the plaintiffs’ prospects were highly uncertain. If lawsuits had been filed in the tort system, few would have

TORTS IN A WORLD OF SETTLEMENT ix-xx (2007) (suggesting that mass settlements have transformed the legal system so acutely that rival teams of lawyers operate as sophisticated governing powers rather than litigators, and advocating a private administrative framework to address both current and future claims).

³⁷ George W. Conk, *Will the Post-9/11 World be a Post-Tort World?*, 112 PENN ST. L. REV. 175, 236-248 (2007) [hereinafter *Post 9/11 World*].

³⁸ 42 U.S.C. §§ 300aa-10-300aa-34 (2006).

³⁹ 131 S. Ct. 1068 (2011).

⁴⁰ *See id.* at 1075; *see also* George W. Conk, *The True Test: Alternative Safer Designs for Drugs and Medical Devices in a Patent-Constrained Market*, 49 UCLA L. REV. 737, 781 (2002).

⁴¹ *Bruesewitz*, 131 S. Ct. at 1075-76.

⁴² 26 U.S.C. §§ 4131, 9510-11 (2006).

⁴³ The 1976 Swine Flu vaccination campaign gave rise to many claims, but the vaccine makers were immunized, as the United States agreed to stand in the shoes of the vaccine manufacturers and defend the “strict liability” claims. 42 U.S.C.S. § 247b (West, Westlaw through Oct. 2011).

⁴⁴ *See* George W. Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?*, 109 YALE L.J. 1087, 1114-1117 (2000).

been paid because product liability law accepts an adequate warning as a defense to liability.⁴⁵ The vaccine compensation program is best understood as a way to encourage citizens to accept the risk of vaccine-related injury, while relieving the burdens and risks of tort liability from manufacturers of drugs with generally irreducible side-effects. Vaccine injury claims, if treated as tort claims, would not challenge the administrative capabilities of the common law courts in the way that mass disasters or massive waves of industrial disease have. In thirty-two years, only 12,937 vaccine-related claims have been filed. Of those, 2,845 were compensated and 7,309 dismissed.⁴⁶ In 2005, adult claims arising from flu vaccines were added. Although the numbers compensated are small (only about 150 per year) the program, like state workers' compensation systems, shows that administrative mechanisms can satisfactorily provide an alternative to tort litigation through a sort of statutory strict liability that accepts certain categories of injuries as compensable without consideration of fault as a qualifying factor (excluding, of course, self-inflicted injury).

Vioxx: Global settlement after case management and bellwether trials

In the past twenty-five years, some of the most difficult mass tort claims have been associated with heedless mass marketing of little-studied drugs⁴⁷ like the diet drug fen-phen,⁴⁸ Zyprexa,⁴⁹ and Vioxx.⁵⁰ In those cases, thousands of events were aggregated through litigation, thrusting thousands of litigants into an unexpected and complex group dynamic, which tested the outside limits of the individual claim model of tort litigation.⁵¹ Courts responded with consolidation techniques like the federal MDL panels and state mass tort courts. The result was the now familiar pattern of case management, consolidated discovery, bellwether trials, and

⁴⁵ See, e.g., RESTATEMENT (SECOND) OF TORTS, § 402A, cmt. j, k (1965); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §§ 2, 6 (1998).

⁴⁶ *Statistics Report: Claims Filed and Compensated or Dismissed by Vaccine*, U.S. DEPT. OF HEALTH AND HUMAN RES. (Nov. 3, 2011), <http://www.hrsa.gov/vaccinecompensation/statisticsreports.html#Claims>.

⁴⁷ INST. OF MED. OF THE NAT'L ACADEMIES, *THE FUTURE OF DRUG SAFETY*, 17 (2006) ("The Committee on the Assessment of the U.S. Drug Safety System believes that as more drugs are being approved faster with less time to intensively investigate premarketing safety data, FDA does not have adequate resources or procedures for translating preapproval safety signals into effective postmarketing studies, for monitoring and ascertaining the safety of new marketed drugs, for responding promptly to the safety problems that are discovered after marketing approval, and for quickly and effectively communicating appropriate risk information to the public.").

⁴⁸ See, e.g., *In re Diet Drugs*, Nos. 1203, 99-20593, 2000 WL 1222042, at *1 (E.D. Pa. Aug. 28, 2000) (approving class action settlement and establishment of settlement trust for resolution of thousands of injury claims).

⁴⁹ See, e.g., *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596, 2005 WL 3117302 (E.D.N.Y. Nov. 22, 2005) (approving Final Settlement Protocol for Zyprexa claims).

⁵⁰ See generally SNIGDHA PRAKASH, *ALL THE JUSTICE MONEY CAN BUY: CORPORATE GREED ON TRIAL* (2011) (viewing the Vioxx Litigation and Settlement through the lens of a single trial); *Punctuated Equilibrium*, *supra* note 33, at 861-869 (surveying weaknesses of FDA regulation in light of Vioxx experience).

⁵¹ See Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 2-6 (2009); see also Ed Silverman, *Merck, Vioxx & The Legal System: Snigdha Explains*, PHARMALOT (June 9, 2011 7:52 AM), <http://www.pharmalot.com/2011/06/merck-vioxx-and-the-legal-system-snigdha-explains/> (commentary by NPR reporter Snigdha Prakash who was embedded with plaintiffs' lawyers in a key Vioxx trial); Ed Silverman, *Law Prof on Vioxx Deal: A Good Gamble for Merck*, PHARMALOT (Nov. 9, 2007 1:52 PM), <http://www.pharmalot.com/2007/11/legal-expert-on-vioxx-deal-a-good-gamble-for-merck> (commentary by law professor Benjamin Zipursky).

settlement grids.⁵² Despite the formation of judicially administered ad hoc litigation-management bureaucracies laden with lawyers, through selected bellwether trials juries have continued to provide an important measure of community judgment of the conduct of claimants and defendants in such mass tort pharmaceutical product liability cases.

But the pressures toward aggregation are enormous. Mass marketing done heedlessly yields mass litigation. Thus it was with the anti-inflammatory medicine Vioxx that was approved for marketing by the FDA in April 1999. The mass marketing campaign was very successful (sales reached two billion dollars per year). But anecdotal reports of heart attacks among users turned into a tsunami of epidemiological reports and meta-analyses dissecting the risk factors and results among Merck's millions of arthritic customers. Merck announced a "try every case" strategy. Merck's lawyers focused on the difficulties of proof of causation in each individual case – the drug's users were, after all, an older, arthritic, and therefore sedentary group. Merck's defense otherwise mirrored its aggressive sales strategy: its drug was good, there was some slight risk after eighteen months of use, we studied the drug's uses carefully, and prudentially withdrew it from the market.⁵³

But the evidence showed that its marketing-led pharmaceutical division had downplayed dramatic evidence of health risks, concealed data from a medical journal and the FDA, and had tenaciously – and largely successfully – fought every effort by the FDA to warn patients of the growing evidence of elevated risk of heart attacks and strokes.⁵⁴ The result was a record at trial of two-thirds won by Merck (twelve out of eighteen).⁵⁵ Most defense victories were on individual causation. There were four punitive damages awards and five major awards of compensatory damages, three awards of consumer fraud damages and attorneys' fees. With defense costs approaching \$200 million per year and thousands of cases in the hopper – each theoretically entitled to a trial by jury – Merck finally conceded and offered \$4.85 billion for a global settlement.⁵⁶

The Vioxx litigation and settlement is an exemplar of successful consolidated case management.⁵⁷ After the \$4.85 billion settlement was announced in November 2007, as of

⁵² See Fallon, *supra* note 2, at 2326-2330; MANUAL FOR COMPLEX LITIGATION (FOURTH) *passim* (2004); see also Lahav, *supra* note 35, at 637-38 (describing history of bellwether trials and finding they result in rough justice).

⁵³ See generally, Prakash, *supra* note 48.

⁵⁴ See e.g., *McDarby v. Merck*, 949 A.2d 223, 229, 243-44 (N.J. Super. Ct. App. Div. 2008) (holding that a jury could reasonably conclude that market pressures led Merck to unreasonably and successfully resist FDA pressures to warn of cardiac risks of anti-arthritic drug Vioxx).

⁵⁵ This figure was derived from a survey of plaintiffs' lawyers in Vioxx cases conducted by this author; see also Alexandra D. Lahav, *Vioxx Verdicts*, MASS TORT LITIGATION BLOG (October 29, 2009), http://lawprofessors.typepad.com/mass_tort_litigation/2009/10/vioxx-verdicts-.html.

⁵⁶ David Voreacos & Allen Johnson, *Merck Paid 3,468 Death Claims to Resolve Vioxx Suits*, BLOOMBERG (July 27, 2010 5:27 PM), <http://www.bloomberg.com/news/2010-07-27/merck-paid-3-468-death-claims-to-resolve-vioxx-suits.html>; see also Settlement Agreement between Merck & Co. and Plaintiffs' Counsel (Nov. 9, 2007), available at <http://www.scribd.com/doc/60282334/Vioxx-Final-agreement-signed>.

⁵⁷ See Alexandra D. Lahav, *Rough Justice*, 2, 36-41 (March 2, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1562677> (surveying mass settlements in Vioxx and other cases and concluding that rough justice is not only efficient, but fair).

February 29, 2008, more than 44,000 of 47,000 eligible claimants had enrolled in the program.⁵⁸ That constitutes over ninety-three percent of all eligible claimants. In order for Merck's offer to vest, plaintiffs' lawyers had to recommend the settlement to every client and achieve acceptance by eighty-five percent of those who claimed they had suffered a heart attack, stroke, or over twelve (12) months usage of Vioxx.⁵⁹ If a client rejected the recommendation the lawyer was bound to withdraw from further representation. The phrase "offer that cannot be refused" comes to mind. Indeed the Vioxx settlement has been sharply criticized for granting so much leverage to the lawyers who struck the bargain that client consent was improperly compromised.⁶⁰

A special challenge to the plaintiffs' lawyers was the eighty-five percent acceptance threshold. That necessity – and the promise to recommend the settlement to every client – compelled aspects of the settlement that underlie the BP/Feinberg strategy: even weak claims have value. In order for the plaintiffs' lawyers to be able in good faith to recommend the settlement to every client there had to be something in it for everyone. One cannot get a release in exchange for nothing. In the Vioxx settlement even short-term users were entitled to an award from the settlement fund. The Vioxx settlement fund, it is important to note, reflected the experience of the eighteen trials. Although extrapolating lessons from a relatively small base is a challenge to statisticians, it is less of a challenge to trial lawyers. The lawyers work from a larger base of information. The actual experience of trial, and of preparation for trial, concentrates the mind. The settlement therefore established a point system which took into account the length of use, the total dose, the severity of the heart attack or stroke, and then discounted for risk factors: diabetes, tobacco smoking history, alcohol abuse, and certain illegal drug use. Even a single cigarette smoked after a heart attack reduced the value of a claimant's settlement amount by fifty percent, not because any of the trials had shown it, but because both plaintiffs' and defense's lawyers believed that risk-takers were unlikely to prevail at trial.⁶¹

The success of the plaintiffs' lawyers in selling the global settlement to their clients has many causes. But high among them is the experience of the bellwether trials. Through that experience, counsel for both plaintiffs and defendants learned something of their strengths and weaknesses. Their clients saw that the cases had been presented and tested vigorously, and that they were met with explainable success and failure. The settlement offers therefore (even though a dollar figure could only be guessed at by the client) were recommended by someone whose credibility was high, having been earned on the field of battle, as it were. And the judgments were not those of someone on the payroll of lawyers or of Merck. They reflected the judgments of an undeniably independent group: the eighteen civil juries who actually deliberated and delivered their verdicts. It was, thus, the jury verdicts that were the ultimate

⁵⁸ See OFFICIAL VIOXX SETTLEMENT, <http://www.officialvioxxsettlement.com> (last visited Nov. 12, 2011) (website of the Vioxx MDL Plaintiffs Steering Committee).

⁵⁹ Id.

⁶⁰ See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 320-21 (2011) (arguing that mass tort settlements such as that in Vioxx cases place excessive power in the hands of lawyers, and that such mechanisms, which empower plaintiffs' lawyers to deliver closure, downplay the importance of client consent).

⁶¹ See, e.g., OFFICIAL VIOXX SETTLEMENT CALCULATOR, <http://www.officialvioxxsettlement.com> (last visited Sept. 26, 2011).

guarantor of the legitimacy of the settlement.

9/11 Victims Compensation Fund: secrets of its success

The next example of successful global settlement is the September 11, 2001 Victims Compensation Fund, which Kenneth Feinberg served as Special Master. The success of that project boosted Feinberg to iconic status as a Solomon among lawyers, a compassionate judge, a sort of Walter Cronkite swimming among the sharks. The reputation was well-earned.⁶²

Congress responded to the entreaties of the airlines in the days after the catastrophe. The air carriers were insured for negligence verdicts involving passenger deaths, but were utterly unprepared for the deaths of the victims on the ground. That there would be evidence of negligence, of sleeping at the switch, no one doubted. The airline manufacturers and airlines had reflexively resisted regulators who sought to require hardened cockpits for fear an airplane would be hijacked by terrorists. As one historian observed, “[I]n the face of a clear warning, alert measures bowed to routine.”⁶³ Congress responded with the Air Transportation System Stabilization and Safety Act.⁶⁴

The third “S” is a sop. It was system stabilization that drove the Congress to authorize the Attorney General to name one person who would, without budgetary limit, achieve a global settlement, which would save the airlines and our national passenger airplane manufacturer, Boeing, from insolvency. That person, as we all know, was Kenneth Feinberg. He achieved nearly complete acceptance of his offers of settlement, and he did it without interference from the courts, without trials by jury, in an administrative process that proceeded parallel to the multi-district litigation managed by Judge Alvin Hellerstein (another Solomonic sort) in the federal district court in lower Manhattan. As time went on and Feinberg got signatures on bottom lines, the numbers of plaintiffs on Hellerstein’s 9/11 catastrophe docket dwindled.⁶⁵

When making settlement offers, the statute directed the Special Master to consider:

“(i) the extent of the harm to the claimant, including any economic and non-economic losses; and (ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.”⁶⁶

⁶² Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims – A Fund Too Far*, 71 LA. L. REV. 819, 820 (2011) (“The appearance of Feinberg as the heroic savior in the Gulf oil calamity was, in no small measure, a consequence of a persona whose reputation has indeed assumed mythic proportions in the public consciousness.”); *see also Post 9/11 World*, *supra* note 37, at 182-88.

⁶³ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 344 (2004), *available at* <http://www.p-11commission.gov/report/911report.pdf>.

⁶⁴ *See* 49 U.S.C. §§ 40101-40129 (2006); *Post 9/11 World*, *supra* note 37, at 182.

⁶⁵ The final wrongful death lawsuit settled on Monday, September 19, 2011. Benjamin Weiser, *Family and United Airlines Settle Last 9/11 Wrongful Death Lawsuit*, N.Y. TIMES, Sept. 19, 2011, at A29, *available at* http://www.nytimes.com/2011/09/20/nyregion/last-911-wrongful-death-suit-is-settled.html?_r=2.

⁶⁶ *See* Henry Cohen, *The September 11 Victim Compensation Fund of 2001*, in FOCUS ON TERRORISM, VOLUME 2

Feinberg faced formidable obstacles in designing a scheme of compensation for the 9/11 victims. Although the national treasury was his for the purpose, Congress had constrained Feinberg in certain respects: he was required to make individually tailored awards and deduct from each anything received from a collateral source, which Congress defined broadly to include life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments. Feinberg, as Special Master, was a one-man federal administrative agency.⁶⁷ He interpreted the statute very loosely, concluding that “all” life insurance proceeds did not include the cash value that employee contributions represented in the life insurance policy benefits.

Death claims accounted for \$5.99 billion of the \$7 billion total claims paid.⁶⁸ Forty-three percent of that went to claimants whose deceased victims earned under \$100,000.⁶⁹ Over thirty percent went to families who had incomes in excess of \$200,000.⁷⁰ The awards highlighted the distribution of wealth and income in our society and led to recriminations by some who asked why they, whose husband or father, son, or daughter “died a hero,” should receive a lesser award than a hedge fund trader’s family. Feinberg set the top presumed economic loss at the 98th percentile of household income (\$231,000), which actually significantly lowered many awards.⁷¹ But the presumed awards were not true caps – each claimant was afforded the opportunity to be heard on whether there should be a deviation from the presumed norm Feinberg had established.⁷²

Kenneth Feinberg’s ninety-seven percent success rate established him as the master of the global settlement.⁷³ Working with virtually complete autonomy he had resolved the 9/11 claims through the flexibility shown in his willingness to relax statutory provisions, meet with claimants face to face, and set flexible, little-specified norms in order to accomplish both distributional equity and complete closure.

41 (Edward V. Liden ed., 2002) (describing the compensation fund established by the Air Transportation System Stabilization and Safety Act) (citation omitted).

⁶⁷ See, e.g., George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527, 544 (2003) (“[T]here is no constraint on awards under the September 11th Fund. Its budget is unlimited, and its definitional principles vague.”); see also Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 725-726 (2003) (arguing that the 9/11 Fund is not a true fund, but a public benefit program with a private law gloss: “[T]he scheme falls short in one of the main goals of a procedural system – convincing participants that they should accept the outcome because their claims have been determined through the dispassionate application of general principles to their particular circumstances. In both the substantive standards and the procedural model, the spotlight remains focused on the personal choices and values of Special Master Feinberg himself. Regardless of how capable and well-intentioned the Special Master, the Fund vests too much discretion in a single individual with little means of accountability and oversight.”).

⁶⁸ See KENNETH R. FEINBERG, FINAL REPORT OF THE SPECIAL MASTER, SEPTEMBER 11 VICTIM COMPENSATION FUND OF 2001, VOLUME I, DEPARTMENT OF JUSTICE 106 (Nov. 2004), available at http://www.justice.gov/final_report.pdf.

⁶⁹ *Id.* at 103.

⁷⁰ *Id.*

⁷¹ *Id.* at 8.

⁷² *Id.* at 13.

⁷³ See *id.* at 1.

Feinberg's now peerless prestige as healer/lawyer who had served the nation pro bono, brought his next high profile public service appointment – by President Obama as the (nearly powerless) “payroll czar” for companies receiving Troubled Asset Relief Program “bailout” subsidies after the financial crisis of 2008.

The BP Deepwater Horizon Catastrophe: GCCF - the Pseudo-fund model

When on April 20, 2010 the Deepwater Horizon rig burned and the largest oil spill in history began, BP was designated a “responsible party” by the Coast Guard under the OPA.⁷⁴ BP's statutory obligations ranged from cleanup to interim and final payments to those who suffered losses due to the spill. The country was transfixed and BP was in its sights. While oil still flowed from the blowout well, BP announced that it would commit twenty billion dollars to meeting its statutory obligations under the OPA. When the spill erupted BP soon saw the value in the brand-name Feinberg had developed. BP decided to hire Kenneth Feinberg to administer its compensation plan. President Obama concurred in BP's decision to hire Feinberg to carry out its duties as a “responsible party” under the OPA. BP's appointment of Feinberg was said by the White House to be a guarantee of independence.⁷⁵

With that decision BP signaled its intention to seek a global solution to claims arising from the still untamed spill. Feinberg would be the independent claims administrator.⁷⁶ But unlike special masters appointed by courts or legislators, Feinberg's operation – the Gulf Coast Claims Facility (GCCF) answers only to BP, which was obligated to answer to the nation under the OPA, which imposed strict liability for the spill's consequences.

⁷⁴ 33 U.S.C. §§ 2701-2720 (2006).

⁷⁵ The White House blog reported that “[a] new, independent claims process will be created with the mandate to be fairer, faster, and more transparent in paying damage claims by individuals and businesses,” with the following features:

To assure independence, Kenneth Feinberg, who previously administered the September 11th Victim Compensation Fund, will serve as the independent claims administrator[;] [t]he facility will develop standards for recoverable claims that will be published[;] [a] panel of three judges will be available to hear appeals of the administrator's decisions[; and] [t]he facility is designed for claims of individuals and businesses who have been harmed by the oil spill; local, state, tribal, and federal government claims will continue to be handled directly by BP.

Jesse Lee, *A New Process and a New Escrow Account for Gulf Oil Spill Claims from BP*, THE WHITE HOUSE BLOG (Jun. 17, 2010, 2:35 PM), <http://www.whitehouse.gov/blog/2010/06?page=3>; see also Katelyn Sabochik, *The President's Meeting with BP Executives: “An Important Step Towards Making the People of the Gulf Coast Whole Again”*, THE WHITE HOUSE BLOG (Jun. 16, 2010, 3:51 PM), <http://www.whitehouse.gov/blog/2010/06?page=3>.

⁷⁶ Mullenix, *supra* note 62, at 819-820. Mullenix described BP's decision to hire Feinberg as an act in a morality play:

In the morality play of the Deepwater Horizon oil spill, BP assumed the Promethean role of modern energy-bringer to mankind. In its arrogance for attempting to expropriate energy from miles below the ocean floor and bring oil to mankind, BP precipitated a massive calamity. As a consequence, BP faced the eternal punishment of being lashed to the American Caucasus of never-ending civil litigation, perpetually to be pecked away by claimants. Rather than endure this interminable retribution, BP instead chose to terminate its own agony as quickly as possible by creating a fund. And, Hercules – in the form of the heroic Ken Feinberg – appeared to BP just in time to slay the civil litigators and liberate BP. For his efforts at enabling the BP rescue, BP rewarded Feinberg.

Id.

Funds have been (or will be at the anticipated rate of five billion dollars per year) transferred to bank accounts owned by BP and announcements made on what has been paid, but there is no “fund” if what one means by a fund is an entity with meaningful juridical independence, such as a trust fund. Here the obligations remain BP’s and any funds that remain at the close will revert to BP.⁷⁷

Although the “Gulf Coast Claims Facility” which Kenneth Feinberg operates is commonly referred to as a “fund” there is in fact nothing to make that so. There is no escrow, no supervision, no accounting, no independent review, no regulatory oversight, no regulations with which the GCCF must comply. There is only the commitment to “pay all legitimate claims” – a meaningless statement since the company, designated as a “responsible party” under the OPA, is legally obligated to pay all legitimate claims.

Only if BP defaults on its obligations will the Coast Guard-administered Oil Spill Liability Trust Fund come into play to pay for “uncompensated” damages and clean-up costs.⁷⁸ So long as BP is paying claims it operates free of government supervision.

The OPA establishes strict liability for oil pollution. A party designated by the Coast Guard as “responsible” can claim the benefit of a seventy-five million dollar cap, unless there have been violations of regulatory requirements or reckless conduct, in which case the cap is lifted. BP waived the statutory cap defense while denying that it had been reckless.⁷⁹

It was clear from the beginning then that BP had to establish a substantial claims adjusting bureaucracy to administer the flood of claims sure to emerge. Like workers compensation systems, and unlike ordinary common law tort actions, the OPA mandates interim payments:

The responsible party shall establish a procedure for the payment or settlement of claims for interim, short-term damages. Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.⁸⁰

The nature and extent of the claims to be recognized are dictated by the OPA, which provides for payment of: “(d)amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural

⁷⁷ See Sabochik, *supra* note 75; see also *Claims Information*, BP, <http://www.bp.com/sectiongenericarticle.do?categoryId=9036580&contentId=7067577> (last visited September 24, 2011).

⁷⁸ See 33 U.S.C. §§ 2713(e), 2714 (2006); 33 C.F.R. §§ 138.10-138.240 (2011).

⁷⁹ Statement of BP Exploration & Production Inc. re Applicability of Limit of Liability under Oil Pollution Act of 1990 at 1-2, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179, (E.D. La. Oct. 18, 2010) ECF No. 559, *available at* <http://www.laed.uscourts.gov/OilSpill/Orders/BPStatement.pdf>.

⁸⁰ 33 U.S.C. § 2705 (2006).

resources, which shall be recoverable by any claimant.”⁸¹ BP had to decide if it would administer the claims process itself or hand the management of it over to someone else. BP opted for outsourcing the job. Feinberg’s firm Feinberg Rozen, LLP took on that job.

Although the Gulf Oil Spill claims arise from a single event caused, in part, by regulatory failure and industrial malpractice, and the claims were principally going to be for economic losses, BP faced substantial uncertainty regarding how far liability would extend. The OPA’s reference to losses suffered due to loss or destruction of a “natural resource” or that “results from” an oil spill is an invitation to a maze. Claims differ in the directness of their causal relationship to the event. Historically judges have been reluctant to extend the reach of tort liability beyond those who suffered personal injury or property damage. But courts had made an exception for fishermen. Even though they did not own the fish affected by a spill, their rights to the lost catch had often been recognized by courts.⁸²

But identifying who in litigation decides the limits of liability is far more complex and uncertain. Courts have oscillated between either assigning the issue to the jury as a fact question or deciding the issue themselves by declaring the limits of liability to be a duty or legal question to be decided by the judge.⁸³ Such questions abound in the first year curriculum of American law schools as fuel spills, careening barges, falling lumber, unexpected explosions, and their consequences yield a flood of metaphors about directness, proximity, foreseeability and the like.

By issuing only oracular protocols and guidelines Kenneth Feinberg has kept vague the line-drawing process, maximizing his own discretion. For example, he explained in an October 2010 press release:

“I have heard from elected officials in Florida, including Governor Crist, Attorney General McCollum, CFO Sink and others, about their concerns regarding Floridians’ proximity to the spill and how, regardless of distance, there has been economic impact beyond the areas closest to the spill. After listening to these concerns, I have concluded that a geographic test to determine eligibility regarding economic harm due to the oil spill is unwarranted.” Feinberg continues to review each claim on a case-by-case basis and claimants must prove damages resulting from the spill itself and not other causes, but “physical proximity from the spill will not, in and of itself, bar the processing of legitimate claims,” he said.⁸⁴

This case-by-case vagueness concentrates knowledge and discretion in Feinberg’s hands, unbounded by regulatory, judicial, or jury supervision. Because he is dispensing the

⁸¹ 33 U.S.C. § 2702(b)(2)(E) (2006).

⁸² See *Louisiana ex rel. Guste v. M/V Testabank*, 752 F.2d 1019, 1021-28 (5th Cir. 1985) (en banc) (surveying origin and exceptions to “economic loss rule,” the doctrine that no recovery in tort is permitted absent damage to the property or person of the victim).

⁸³ W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, B.U. L. Rev. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851316.

⁸⁴ Press release, Gulf Coast Claims Facility, Feinberg Announces Clarification Regarding Geographic Proximity (Oct. 4, 2010), <http://www.gulfcoastclaimsfacility.com/press7.php>.

statutorily obligated interim payments, a process which government neither regulates nor reviews, it is impossible to know with any certainty where he is drawing the line. And the same will hold true for “final” payments, which are conditioned on general release of claims, not only in favor of BP, but a whole raft of unspecified BP-affiliated entities.⁸⁵

In establishing the GCCF and giving Feinberg an apparently free hand to accomplish the company’s objectives, and meet its statutory obligations, BP had to ask itself, would courts, as they had in the Exxon Valdez spill in Alaska, refuse to compensate others who make their living from the sea, like the wholesalers, processors, cannery employees, and tenderers who had been thrown out of court?⁸⁶ Would the charterers, fishing guides, boat renters, and shoreline hotels, whose businesses suffered, be denied as they had been in Alaska? Or would the courts embrace the dissent by the great Louisiana Judge John Minor Wisdom, of the United States Court of Appeals for the Fifth Circuit in New Orleans? In 1985, Wisdom had declared by dissent in *Louisiana ex re. Guste v. M/V Testabank* that compensation for a maritime tort should extend to all who “make use of the sea.”⁸⁷ On the Gulf Coast that describes a lot of people.

BP hoped to avoid the uncertainty of judges and juries by its bold move to hire Feinberg, grant him substantial settlement authority and a twenty billion dollar commitment, a sum plausibly sufficient to satisfy the claims that are overwhelmingly for economic loss, though wrongful death and personal injury claims are also within the GCCF’s scope. The fund will also be depleted by clean-up costs incurred by federal and state governments.

In February 2011, Feinberg released his “final methodology,” in which each claim would be “reviewed and evaluated on its own merits and specific circumstances.” The authority asserted has the aura of an official proclamation⁸⁸:

The Gulf Coast Claims Facility (“GCCF”) hereby announces its Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology (“Final Rules”). The GCCF is acting for and on behalf of BP in fulfilling its statutory obligations as a “responsible party” under the Oil Pollution Act of 1990. All claimants have the right to consult with an attorney of their own choosing prior to accepting any settlement or signing a release of legal right.⁸⁹

Feinberg has been exercising this broad settlement authority within the scope of the Oil Pollution Act and general tort law in exchange for an initial \$850,000 per month flat fee, now

⁸⁵ GULF COAST CLAIMS FACILITY, SAMPLE RELEASE AND COVENANT NOT TO SUE, 2, 4-5, http://www.gulfcoastclaimsfacility.com/sample_release.pdf (last visited Sept. 25, 2011).

⁸⁶ See *In re Exxon Valdez*, No. A89-0095-CV, 1994 U.S. Dist. LEXIS 20555, at *7 (D. Ala. Jan. 26, 1994).

⁸⁷ *Louisiana ex rel. Guste*, 752 F.2d at 1044 n.23 (Wisdom, J., dissenting).

⁸⁸ *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179, 2011 U.S. Dist. LEXIS 10497, at *23-25 (E.D. La. Feb. 2, 2011) (ordering that Feinberg represent himself as an agent of BP).

⁸⁹ GULF COAST CLAIMS FACILITY, FINAL RULES GOVERNING PAYMENT OPTIONS, ELIGIBILITY AND SUBSTANTIATION CRITERIA, AND FINAL PAYMENT METHODOLOGY 1, 4 (2011), *available at* http://www.gulfcoastclaimsfacility.com/FINAL_RULES.pdf.

increased to \$1,250,000 per month. Feinberg has devoted the efforts of his law firm, his judgment, and deployed his considerable reputation to successful management of the massive undertaking of overseeing BP's claims-processing centers.⁹⁰ In March 2011, Feinberg announced that:

“Since the end of the Emergency Payment period on November 23, 2010, the GCCF has received approximately 256,000 individual and business claims seeking Final Payments, Interim Payments or Quick Payments.” The GCCF had processed 138,874 (54.2%) of these claims.⁹¹

Employing the same liberal claims settlement stance he wielded with great skill in the 9/11 Fund, Feinberg has preserved for himself a good deal of flexibility regarding what claims he is going to recognize. There are no OPA enforcement regulations of any use. Those adopted in 1992 for interim claims to the Oils Spill Liability Trust Fund say only that one need not own the damaged asset and the loss must be a result of the spill.⁹² To assist him in this task, Feinberg elicited a report from Harvard torts professor John Goldberg on liability for economic loss in connection with the BP oil spill.⁹³ In that report, Goldberg emphasized the causal terms “results from” and “due to,” which give Feinberg a great deal of flexibility under the OPA. Although the United States Department of Justice has complained that Feinberg is using an unreasonably restrictive “direct cause” standard rather than a “results from” standard, any distinction between the two is obscure. The fishermen are the easy case, but other shoreline businesses have more attenuated relationships to the sea, and maritime tort is generally the guiding source when, as here, a vessel sinks. Feinberg has shown in his “final protocol” an intention to permit claims well beyond those of the fishermen who, along with owners of damaged property, were the sole beneficiaries of private claims in the Exxon Valdez spill. He has indicated a willingness to compensate businesses dependent on tourism if they can show cancellations or other solid evidence linking lost revenue to the spill.⁹⁴

⁹⁰ A March 22, 2011 memorandum to Feinberg Rozen by former Attorney General Michael Mukasey recites the scope of the BP claims operation and declares reasonable the fees charged by the firm. *See* Memorandum from Michael B. Mukasey to Kenneth R. Feinberg, 1-8 (Oct. 7, 2010), *available at* http://motherjones.com/files/gulf_coast_claims_facility_feinberg_rozen_llps_compensation_october_8_201011.pdf. This is an odd document in that it does not cite any authority for determining the reasonableness of the fees. *See id.* Notably it does not cite the criteria of Rule of Professional Conduct 1.5, though it addresses the rule's concerns. *See id.* The omission is presumably in aid of Feinberg's insistence that he does not have an attorney-client relationship with BP and is not its agent.

⁹¹ Press Release, Gulf Coast Claims Facility, Gulf Coast Claims Facility Announces an Important Milestone: Over Half of All Interim and Final Claims Submitted to the GCCF Have Been Processed (Mar. 14, 2011), *available at* <http://www.gulfcoastclaimsfacility.com/press18.php>.

⁹² *See* 33 U.S.C. § 2713 (2006) (providing that one can bring a lawsuit if a claim is denied or not paid within 90 days, and may present a claim to the Oil Spill Liability Trust Fund if “full and adequate compensation is unavailable” as might occur in case of insolvency or if the applicable spill liability cap has been reached); *see also* 33 C.F.R. §§ 136.1-136.313 (2010) (setting forth procedures for claims to Oil Spill Liability Trust Fund).

⁹³ *See* Memorandum from John C. P. Goldberg, Professor of Law, Harvard Law School to Kenneth R. Feinberg (Nov. 22, 2010), *available at* <http://www.gulfcoastclaimsfacility.com/Goldberg.Memorandum.of.Law.2010.pdf>.

⁹⁴ *See, e.g.*, GULF COAST CLAIMS FACILITY, FINAL RULES GOVERNING PAYMENT OPTIONS, ELIGIBILITY AND SUBSTANTIATION CRITERIA, AND FINAL PAYMENT METHODOLOGY, ATTACHMENT D 1 (2011), *available at* http://www.gulfcoastclaimsfacility.com/FINAL_RULES_D.pdf.

Future loss claims

The causal relationship and estimation of future losses is a difficult proposition. Catch landings are reported to have been high for the latter part of 2010, when the fisheries were reopened, according to a report by a Texas A&M scientist. Feinberg has offered final settlements to fishermen of double their demonstrated 2010 loss. The report estimated certain fisheries will recover by 2012.⁹⁵

Feinberg therefore has estimated – with evidence that would ordinarily not be admissible because it is excessively speculative – that the fisheries will be at thirty percent of normal in 2011, at seventy percent of normal in 2012, and 100 percent of normal the year after that. He has therefore offered double the 2010 loss in exchange for a general release in favor of BP.

In comments posted online by the GCCF (with identifiers redacted) BP protested Feinberg's alleged generosity. But its continued retention of Feinberg and his firm indicates a recognition that if defendants want to settle early, they must settle on the high side.

Feinberg and his law firm took over management of a massive effort. As of March 19, 2011, the thirty GCCF offices had received 828,225 claims, the bulk of them for emergency assistance and other interim claims. The services rendered by Feinberg Rozen for BP's "Gulf Coast Claims Facility" have been broad in scope. The firm undertook, pursuant to its contract with BP, claim intake, review, evaluation, settlement, and payment services, and "[c]laim administration services including maintenance of appropriate databases and information technology systems therefor." The GCCF has done that work and has processed a huge number of claims. As of March 11, 2011, total payments were said to be approximately one billion dollars.

Kenneth Feinberg – Agent of BP

The BP Feinberg Agreement⁹⁶ and the establishment of the Gulf Coast Claims Facility as BP's statutorily-required process for satisfying damage and clean-up claims were plainly inspired by the hope of a global settlement or something approaching it. The company sought to trade on Feinberg's reputation for independence to enhance its chances of resolving claims efficiently, and Feinberg stubbornly insisted that he was independent, not an agent and not an attorney for BP. Unfortunately, as we shall see, those representations of independence were misleading and were repudiated by the United States District Judge overseeing the parallel MDL.

⁹⁵ JOHN W. TUNNELL JR., AN EXPERT OPINION OF WHEN THE GULF OF MEXICO WILL RETURN TO PRE-SPILL STATUS FOLLOWING THE BP DEEPWATER HORIZON MC 252 OIL PPILL 25-26, 36 (2011), *available at* http://www.gulfcoastclaimsfacility.com/exhibit_d.pdf.

⁹⁶ See Agreement attached as Exhibit A to BP's Memorandum in Opposition to "Plaintiffs' Motion to Supervise Ex Parte Communications Between BP Defendants and Putative Class Members," *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL NO. 2179 (E.D. La. Jan. 10, 2011) ECF No. 963*, *available at* <http://www.scribd.com/doc/47227618/Agreement-BP-and-Kenneth-Feinberg-law-firm> [hereinafter Agreement between BP Exploration and Production Inc. and Feinberg Rozen, LLP].

Kenneth Feinberg presented himself in a mode similar to the way Justice Louis Brandeis famously described himself when confronted at his confirmation hearing with the welter of interest conflicts in his law practice: he was the “lawyer for the situation,” he said brushing off the conflict of interest dust on his suit.⁹⁷ But such a breezy escape was not available for Feinberg. For the BP Gulf oil spill Kenneth Feinberg is not an “administrator,” representing the public, as he was for the September 11 Fund. The facts show that he is a lawyer for BP who has been given substantial settlement authority, though his authority is limited to obtaining voluntary settlements and he does not represent BP in court or before any governmental agencies. Such contractual limitations of a lawyer’s services are contemplated by the disciplinary rules. Model Rule of Professional Conduct 1.2(c) provides that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”⁹⁸ In the preamble to the Model Rules of Professional Conduct, the American Bar Association describes the work of lawyers. Feinberg and his law firm, working for BP, play every role listed save that of advocate:

*As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.*⁹⁹

Settlement of claims, and justification of those settlements to the client, requires Feinberg to negotiate, and to evaluate claims, and to advise BP of the bases for the settlements reached on liability and damages, which, by Agreement, must comport with the OPA.¹⁰⁰ All these contracted functions are those of a lawyer. That BP could have contracted with a non-lawyer third party administrator to provide such services does not change the fact that it chose to hire a law firm (Feinberg Rozen) to oversee the process. By doing so BP availed itself of the lawyer’s duties of confidentiality (Rule 1.6), loyalty (Rule 1.7) competence (Rule 1.1), diligence (Rule 1.3), and communication “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation” (Rule 1.4), such as whether the law firm is exercising its settlement authority within the agreed scope.¹⁰¹

⁹⁷ Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U.L. REV. 377, 377 (2004).

⁹⁸ MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2009).

⁹⁹ MODEL RULES OF PROF’L CONDUCT Preamble ¶ 2 (2009) (emphasis added).

¹⁰⁰ This is particularly plain as to settlements especially at or above the 500,000 dollar threshold and as to the settlement of the wrongful death and personal injury claims, which arise under maritime law, not the Oil Pollution Act, in which case the BP-Feinberg Rozen Agreement provides for appeal by BP to a panel of arbitrators, and in settlement of the wrongful death and personal injury claims which arise under maritime law, not the Oil Pollution Act. *See Gulf Coast Claims Facility Protocol for Interim and Final Claims*, GULF COAST CLAIMS FACILITY (February, 8, 2011), http://www.gulfcoastclaimsfacility.com/proto_4 (last visited Sept. 23, 2010).

¹⁰¹ These references are to the Louisiana Rules of Professional Conduct, which in all material respects here relevant are identical to the ABA’s Model Rules of Professional Conduct. *See* MODEL RULES OF PROF’L CONDUCT R. 1.1-1.7 (2009); *see also* LA. RULES OF PROF’L CONDUCT R. 1.1-1.7 (2011), *available at* <http://www.ladb.org/Publications/ropc.pdf>.

As administrator Feinberg reported that as of March 14, 2011,¹⁰² the GCCF had received “256,000 individual and business claims seeking Final Payments, Interim Payments or Quick Payments.”¹⁰³ The GCCF has processed 138,874 (54.2%) of these claims.¹⁰⁴ That work certainly involved much work as evaluator and negotiator – seeking “result[s] advantageous to the client but consistent with requirements of honest dealings with others,” as the ABA Preamble puts it.

James Caldwell, the Louisiana Attorney General, who had reviewed the November 10, 2010 “Protocol for Interim and Final Claims,” promptly complained, citing the “public perception of your role as an attorney for BP.”¹⁰⁵ He demanded that Feinberg “secure approval” for the Protocol from the State’s Office of Disciplinary Counsel. Feinberg insisted that he was neither agent nor attorney for BP, hiring legal ethics specialist Stephen Gillers of NYU Law School who penned a letter proclaiming Feinberg to be “independent” and endorsing the proposition that Feinberg is neither an agent of BP nor in an attorney-client relationship with BP:

You are not in an attorney-client relationship with BP. You are an independent administrator and owe none of the attributes of the attorney-client relationship (e.g., loyalty, confidentiality) to BP. By “independent” I mean (and I think the context is clear) that you are independent of BP. You are not subject to its direction or control. . . . The “Gulf Coast Claims Facility Protocol for Interim and Final Claims” similarly recognizes that you are “a neutral fund administrator” and the GCCF “is an independent facility.”¹⁰⁶

Professor Gillers also asserted, “[t]he fact that BP has an interest in the success of the GCCF does not make you its agent or its lawyer. Nor does the fact that BP is paying you for your

¹⁰² Gulf Coast Claims Facility Announces an Important Milestone, *supra* note 91.

¹⁰³ *Id.* Interim payments are made without prejudice to future damage claims. *See* GULF COAST CLAIMS FACILITY, FINAL RULE GOVERNING PAYMENT OPTIONS, ELIGIBILITY AND SUBSTANTIATION CRITERIA, AND FINAL PAYMENT METHODOLOGY, *supra* note 89, at 2. Quick Payments are final and include a general release. *See id.*

¹⁰⁴ The Gulf Coast Claims Facility reports that

Some of the key statistics are as follows: . . . 99,905 Quick Payments (\$5,000 for an individual; \$25,000 for business). . . . In less than one month since the February 18, 2011 formal announcement of the GCCF Final Rules, the GCCF has made Final Payment offers to 18,562 claimants totaling \$174,018,282.00; 6,632 claimants have accepted these Final Payment offers totaling \$66,612,269.00. The remaining claimants have 90 days from the date of their Final Payment offer to make a decision. . . . In less than one month since the announcement of the Final Rules, 2,763 claimants were paid Interim Payments totaling \$36,976,875.00. . . . In less than one month since the announcement of the Final Rules, 19,413 claimants have received a deficiency letter requesting additional information, informing the claimant that the submission of inadequate documentation prevents the accelerated processing of their claims. . . . 2,277 claimants received notification that their reviewed claim resulted in a “0” loss determination. . . . 3,100 claims have been officially denied. . . . 117,889 claims (46%) remain to be processed by the GCCF (hundreds of claims continue to be filed on a daily basis).

Gulf Coast Claims Facility Announces an Important Milestone, *supra* note 91.

¹⁰⁵ *See* Letter from Stephen Gillers, Prof. of Law, New York Univ., to Kenneth Feinberg, Administrator, Gulf Coast Claims Facility (Dec. 28, 2010), *available at* http://www.gulfcoastclaimsfacility.com/Gillers_Feinberg_Doc_2010.pdf.

¹⁰⁶ *Id.* (quoting *Gulf Coast Claims Facility Protocol for Interim and Final Claims*, GULF COAST CLAIMS FACILITY (November 22, 2010), <http://www.scribd.com/doc/45804679/BP-facility-claims-protocol>).

services do so.”¹⁰⁷ One is struck by such a breezy dismissal of the obvious: that Kenneth Feinberg, the lawyer, represents BP and is its agent to help it to meet its statutory obligations under the Oil Pollution Act. That statutory duty cannot be transferred to a third party. BP’s employment of Feinberg Rozen as its agent is permissible but BP is obligated to make sure that Feinberg meets the company’s responsibilities. To that end, Protocols have been developed by Feinberg, whose settlement authority is tied by his Agreement with BP to the terms of the Oil Pollution Act.¹⁰⁸

Although Feinberg’s settlement authority is relatively broad, it is constrained in important ways. Perhaps the most important is that in order to obtain a final settlement from BP, a claimant must give up all claims against all parties arising from the Deepwater Horizon catastrophe.¹⁰⁹ The prescribed form of release specifies that Feinberg may not settle a claim against BP without also obtaining for BP an agreement that the claimant shall pursue no other claims against any other party arising from the Gulf oil spill.¹¹⁰ As Professor Geoffrey Hazard pointed out in a declaration under oath in January 2011 (submitted in support of the motion to supervise), the release encompasses punitive damages claims, a category of damages that the BP/Feinberg Agreement does not permit Feinberg to offer.¹¹¹

Yet BP and Feinberg have, despite BP’s statutory duties, its ownership of the assets, and its general control of the claims process, called Feinberg a “neutral fund administrator.”¹¹² In an affidavit Geir Robinson, director of BP Claims, asserted that Feinberg was “jointly appointed by the White House and BP”¹¹³ – a claim the White House never made.

¹⁰⁷ *Id.*

¹⁰⁸ GULF COAST CLAIMS FACILITY, FINAL RULE GOVERNING PAYMENT OPTIONS, ELIGIBILITY AND SUBSTANTIATION CRITERIA, AND FINAL PAYMENT METHODOLOGY, *supra* note 89, at 1.

¹⁰⁹ The GCCF claims protocol provides that

By applying for a Final Payment, an applicant is seeking to resolve all claims including any claims for future damages resulting from the Spill. A Final Payment constitutes a complete and final resolution of all claims for any past, current, or future losses that a Claimant has or may have with regard to the Deepwater Horizon incident and oil spill against BP and all other potentially liable parties, except as otherwise noted in [] this Protocol. Accepting a Final Payment requires the Claimant to sign a release of past and future claims. . . . In determining the Final Payment, the GCCF will take into account and offset prior payments by BP, the GCCF, and collateral sources.

Gulf Coast Claims Facility Protocol for Interim and Final Claims (Feb. 8, 2011), *supra* note 100.

¹¹⁰ *See id.*

¹¹¹ *See* Declaration Of Geoffrey C. Hazard, Jr. at 5, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf Of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Jan 17, 2011), *available at* <http://www.courthousenews.com/2011/01/21/Expert.pdf>.

¹¹² The Gulf Coast Claims Facility Protocol for Interim and Final Claims, November 10, 2010 declared:

The GCCF is administered by Kenneth R. Feinberg (“the Claims Administrator”), a *neutral fund administrator* responsible for all decisions relating to the administration and processing of claims by the GCCF. While the GCCF is an independent facility, it is important that the views of all stakeholders be considered. All stakeholders, including claimants, government entities, and BP, may provide input and comments regarding the GCCF process.

Gulf Coast Claims Facility Protocol for Interim and Final Claims, *supra* note 100 (emphasis added).

¹¹³ *See* Declaration Of Geir Robinson at 2, *In Re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Jan. 7, 2011) (asserting that there is no attorney-client relationship between BP and Feinberg); *see also* Letter from Stephen Gillers, Prof. of Law, *supra* note 105.

In his advice to Feinberg in response to the plaintiffs' motion for supervision¹¹⁴ by the MDL judge in the putative class action pending in federal court in Louisiana, Gillers stretches the meaning of "independent" and "neutral" beyond plausibility, writing that the GCCF's self-proclaimed Protocol for Interim and Final Claims provides

that BP may appeal any of your awards over \$500,000. . . . These provisions are wholly inconsistent with the notion that you are BP's lawyer or its agent. Principals do not appeal the decisions of their agents. *Agents exist to serve the interests of principals within the scope of the agency. The fact that BP has an interest in the success of the GCCF does not make you its agent or its lawyer.* Nor does the fact that BP is paying you for your services do so. While payment to a lawyer can be some evidence of a professional relationship with the payer, payment is neither sufficient by itself nor necessary to create an attorney-client relationship. In fact, payment from BP, rather than from the fund itself, avoids a conflict between the interests of those who seek compensation from the fund and your interests if you were also relegated to compensation from the very same fund.¹¹⁵

But a fair reading of the provision and the BP Feinberg Agreement¹¹⁶ demonstrates the opposite:

- The "fund" has no independent existence: any funds deposited in an escrow account belong to BP until they are lawfully committed to a claimant.
- BP retains a right to terminate the Agreement if it does not conform to Protocols.

¹¹⁴ See Motion to Supervise *Ex Parte* Communications Between BP Defendants and Putative Class Members, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" In The Gulf Of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La Dec. 21, 2010), available at http://graphics8.nytimes.com/packages/pdf/national/20101221_SUPERVISE_MOTION_DOC.pdf.

¹¹⁵ Letter from Stephen Gillers, *supra* note 105 (emphasis added).

¹¹⁶ See Agreement between BP Exploration and Production Inc. and Feinberg Rozen, LLP, *supra* note 96.

- BP has specified a right of appeal to a panel of arbitrators if Feinberg settles a case in excess of \$500,000.¹¹⁷
- Feinberg is obligated to abide by the OPA. If a Final claim “presents an issue of first impression under OPA”, Feinberg may “grant” BP a “right of appeal.”
- BP is statutorily obligated to pay interim and final damage claims and the costs of cleanup by state and federal authorities. Delegation of these duties to an “independent contractor” cannot change the fact of BP’s strict and vicarious liability as a responsible party under the OPA.
- BP is therefore obligated to oversee Feinberg’s performance since BP’s satisfaction of its duties cannot be avoided by pointing to breaches of duty by Feinberg.
- BP not only pays Feinberg directly, it has agreed to fully indemnify him and his firm for any liabilities they incur in carrying out BP’s statutory obligations (save for misconduct).
- The BP- Feinberg Rozen Agreement allows Feinberg Rozen to use “BP assets” such as “computers, equipment, furniture, properties, infrastructure and other assets” - without charge.
- BP owns the information developed by Feinberg Rozen including its attorney work product and its claims evaluations. The Agreement provides that upon termination “Feinberg Rozen shall return, and shall cause its Subcontractors to return, to BP any and all Claims Information in its and their possession or control as to which Feinberg Rozen has concluded making all independent judgments regarding the processing of Claims.”
- BP may terminate the agreement on 30 days notice in the event of a “material[] breach” and on 10 days notice if Feinberg Rozen “breaches its fiduciary obligations . . . to administer and resolve Claims in accordance with the Claims Protocols.”¹¹⁸

Despite these unmistakable indicia of agency, BP and Feinberg in their Agreement had declared:

At the request of the White House and BP, Kenneth R. Feinberg (“Feinberg”), acting through and as a partner of Feinberg Rozen, has established the Gulf Coast Claims Facility (“GCCF”) to independently administer and where appropriate settle and authorize the payment of certain Claims asserted against BP as a result of the explosion at the Deepwater Horizon rig and consequent spillage of oil into the Gulf of Mexico (the “Event”).

Independent of whom? Of BP who funded the operation? Of BP on whose behalf Feinberg was obtaining general releases and freedom from the burden of litigation? BP and Feinberg’s claims of independence earned Bronx cheers from Gulf Coast Attorneys General and plaintiffs’ lawyers.

¹¹⁷ The GCCF’s November 10, 2010 Protocol for Interim and Final claims provides that

The Claimant may appeal a Final Claim determination of the GCCF if a total monetary award (including any Emergency, Interim or Final Payment made by BP or the GCCF) is in excess of \$250,000. BP may appeal a Final Claim Determination of the GCCF if a total monetary award (including any Emergency, Interim or Final Payment made by BP or the GCCF) is in excess of \$500,000. . . . If either the claimant or BP asserts that the Final Claim: a) presents an issue of first impression under OPA; or b) that the determination of the GCCF is inconsistent with prior legal precedent under OPA and that the Final Claim is likely to be representative of a larger category of claims to be considered by the GCCF, then a right to appeal may be granted by the Claims Administrator in his sole discretion.

Gulf Coast Claims Facility Protocol for Interim and Final Claims, *supra* note 100.

¹¹⁸ Agreement between BP Exploration and Production Inc. and Feinberg Rozen, LLP, *supra* note 96, at 1-12 (emphasis added).

The White House, after meetings with BP executives, announced the BP offer to set aside funds to satisfy its claims obligations through a mechanism administered by Kenneth Feinberg. But contrary to the statement's implication, Feinberg did not act as a public agent, though the White House had openly employed Feinberg's aura.¹¹⁹ Nor is it accurate to say that Feinberg "established" the Gulf Coast Claims Facility. BP did. It is BP's money, and Feinberg is BP's lawyer – or one of them. He may, by contract, have defined the scope of his undertaking (perfectly appropriate under Rule 1.2), but an undertaking by a non-lawyer, with the consent of a lawyer, to rely on the professional skills of a lawyer establishes an attorney-client relationship regardless of the subjective beliefs of the parties. The Restatement of the Law (Third): the Law Governing Lawyers explains

The client-lawyer relationship contemplates legal services from the lawyer, not, for example, real-estate-brokerage services or expert-witness services. A client-lawyer relationship results when legal services are provided even if the client also intends to receive other services.¹²⁰

Any consensual undertaking by one for the benefit of another (and certainly all those undertaken for pay) establishes an agency relationship. Here, the principal is BP and Feinberg and his law firm are its agents. The Restatement (Third) of Agency makes this clear:

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.¹²¹

The Feinberg-BP Agreement's self-serving disclaimers of agency, of attorney-client relationship, and its assertion that Feinberg is an independent contractor are not dispositive.¹²² It is the law of agency and the behavior and function of the party that is dispositive, not self-serving language designed to enhance Feinberg's aura and avoid the taint of being BP's lawyer.

It is also noteworthy that the Agreement between BP and Feinberg Rozen for the conduct of "claims settlement services" includes duties of loyalty, and affirms BP's right to terminate the relationship if Feinberg Rozen fails to "perform its obligations hereunder in a manner that is consistent with the principles stated in BP's Code of Conduct, a copy of which has been

¹¹⁹ See Jesse Lee, *A New Process and a New Escrow Account for Gulf Oil Spill Claims from BP*, THE WHITE HOUSE BLOG (June 17, 2010 2:35 PM), <http://www.whitehouse.gov/blog/2010/06/17/a-new-process-and-a-new-escrow-account-gulf-oil-spill-claims-bp>.

¹²⁰ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000).

¹²¹ RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

¹²² The BP-Feinberg Rozen Agreement provides:

INDEPENDENT CONTRACTOR; NO AGENCY[.] It is the express intention of the parties that Feinberg Rozen shall be an independent contractor throughout the Term of this Agreement. Except as otherwise agreed to by the parties, nothing in this Agreement shall in any way be construed to constitute Feinberg Rozen as an agent or representative of BP, and Feinberg Rozen shall otherwise perform the Services hereunder as an independent contractor. The execution of this Agreement shall not be construed to create an attorney-client relationship between BP and Feinberg Rozen, and the provision of Services hereunder shall not constitute, or be otherwise construed to constitute, provision of legal advice from Feinberg Rozen, or any of its partners or employees, to BP.

Agreement between BP Exploration and Production Inc. and Feinberg Rozen, LLP, *supra* note 96, at 10.

provided to Feinberg Rozen, and any revised or successor code of conduct.”¹²³ We have not seen the BP Code of Conduct but faithful service must be one requirement. The duty and expectation of loyalty underlies BP’s commitment to indemnify Feinberg Rozen and its agents. The Agreement provides that:

[T]o the maximum extent permissible by law, Feinberg and Feinberg Rozen shall incur no liability to BP or its Affiliates by reason of acts or things done, suffered or omitted in performing the Services in strict accordance with the terms and conditions of this Agreement, except where the liability arose out of the gross negligence or intentional or willful misconduct of the Feinberg Rozen Indemnitee.¹²⁴

Driven by practical necessity, such as the one year Louisiana statute of limitations for property damage, claimants filed lawsuits, which were consolidated for the enhanced case management of federal MDL procedures.¹²⁵ All such claims were compelled by the OPA to be presented to the designated “responsible party” before suit could be commenced,¹²⁶ so the GCCF was sure to see each new claim. Conventional maritime tort, personal injury and wrongful death actions were filed against BP for damages – both compensatory and punitive. (Although Feinberg did not appear in court to defend such claims, he had the authority to negotiate settlements.) Some claimants sought certification as representatives of a class. Plaintiffs seeking temporary assistance had to apply to the Gulf Coast Claims Facility, which Feinberg managed.

The BP-Feinberg Agreement declared that Feinberg is an “independent contractor,” and that there is no “attorney-client relationship” with BP. But such disclaimers cannot erase the fact that Feinberg and his firm were delegated broad authority to accomplish for BP what lawyers widely do: negotiate claims and obtain general releases freeing the client from the burdens of future or pending litigation. Feinberg’s broad assertions of independence prompted an innovative “motion for supervision” by attorneys for claimants who had filed suit in the federal court actions consolidated in the Eastern District of Louisiana.¹²⁷ The lawyers asked the court to “supervise” Feinberg’s conduct, as a court might do in exercise of its equity powers in a class action.

According to plaintiffs’ lawyers Feinberg and the GCCF often dealt directly with claimants in a way that did not inform claimants that they represented BP – an apparent violation of the Rules of Professional Conduct. Rule 4.3 commands that when dealing with an unrepresented person “a lawyer shall not state or imply that the lawyer is disinterested.”¹²⁸ District Judge Carl J. Barbier, managing the MDL, asserted jurisdiction – over Feinberg and

¹²³ *Id.* at 7.

¹²⁴ *Id.* at 3.

¹²⁵ See e.g., Order, *In re Oil Spill by the Oil Rig “Deepwater Horizon” In The Gulf Of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Aug. 24, 2010) (consolidating a complaint filed by the several of the Deepwater Horizon’s managing owners and operators with the Louisiana Multi-District Litigation).

¹²⁶ See 33 U.S.C. § 2713 (2006).

¹²⁷ See Motion to Supervise *Ex Parte* Communications Between BP Defendants and Putative Class Members, *supra* note 114, at 1.

¹²⁸ MODEL RULES OF PROF’L CONDUCT R. 4.3 (2009).

BP's objections. In granting relief the judge relied alternatively on the fact that some plaintiffs asserted they were members of a class deserving of certification under Federal Rule of Civil Procedure 23 and on the statutory requirement of § 2705 of the OPA that a designated "responsible party" must establish an interim claims process. That duty rests with BP once it has been designated as "responsible party." The duty cannot be delegated because it is a statutory obligation. BP therefore must – and does in its Agreement – require that Feinberg abide by the OPA.¹²⁹ Judge Barbier considered both the Gillers opinion and that of Professor Geoffrey C. Hazard, Jr., who asserted that Feinberg certainly is BP's agent, whether one calls that tie an attorney-client relationship or not.¹³⁰

In my view there is plainly an attorney client relationship. The attorney-client relationship is but a species of the genus principal-agent. An attorney's Rule 1.2 and 1.3 duties of competence and diligence cannot be waived by a client. And the lawyer's duty to maintain confidences is imposed by Rule 1.6 except to the extent waived. The breezy assertion by Professor Gillers that Feinberg owes no duty of confidentiality finds no support in the Agreement between BP and Feinberg Rozen, which explicitly provides for maintenance of confidentiality.¹³¹ Judge Barbier unsurprisingly found as fact

that the hybrid role of Mr. Feinberg and the GCCF has led to confusion and misunderstanding by claimants, especially those who are unrepresented by their own counsel, the Court finds that certain precautions should be taken to protect the interests of claimants – narrowly tailored in accordance with the First Amendment. The clear record in this case demonstrates that any claim of the GCCF's neutrality and independence is misleading to putative class members and is a direct threat to this ongoing litigation, as claimants must sign a full release against all potential defendants before obtaining final payments.¹³²

Judge Barbier ordered Feinberg and BP to, among other things,

Refrain from referring to the GCCF, Ken Feinberg, or Feinberg Rozen, LLP (or their representatives), as "neutral" or completely "independent" from BP. It should be clearly disclosed in all communications, whether written or oral, that said parties are acting for and on behalf of BP in fulfilling its statutory obligations

¹²⁹ See Agreement between BP Exploration and Production Inc. and Feinberg Rozen, LLP, *supra* note 96, at 6.

¹³⁰ See Letter from Stephen Gillers, *supra* note 105; Declaration Of Geoffrey C. Hazard, Jr, *supra* note 111, at 7.

¹³¹ The agreement between BP and Feinberg Rozen sets forth the confidentiality obligations of the parties:

A party (each a "Disclosing Party") may disclose its Confidential Information to the other party (a "Receiving Party") in connection with the performance of their respective obligations under this Agreement. For the purposes of this Agreement, "Confidential Information" shall mean all information revealed by or through the Disclosing Party which the Receiving Party either knows or reasonably should know to be proprietary and confidential in nature including without limitation: (i) information either expressly or implicitly identified as originating with or belonging to the Disclosing Party or marked or disclosed as confidential (including information disclosed to the Disclosing Party by a third party, including a Subcontractor, under an obligation of confidentiality); and (ii) information traditionally recognized as proprietary or trade secrets of the Disclosing Party.

Agreement between BP Exploration and Production Inc. and Feinberg Rozen, LLP, *supra* note 96, at 3.

¹³² Order and Reasons at 12-13, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" In The Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Feb. 2, 2011) (citation omitted), ECF No. 1098, *available at* <http://www.laed.uscourts.gov/OilSpill/Orders/222011OrderonRecDoc912.pdf>.

as the "responsible party" under the Oil Pollution Act of 1990.¹³³ Feinberg complied, amending the GCCF website and the Protocol to state The GCCF is intended to replace BP's claims facility for Individuals and Businesses. The GCCF and its Claims Administrator, Kenneth R. Feinberg, act for and on behalf of BP in fulfilling BP's statutory obligations as a "responsible party" under OPA. The GCCF (and the protocols under which it operates) are structured to be compliant with OPA.¹³⁴

Barbier's assertion of supervisory jurisdiction over a private claims facility is an innovative step.¹³⁵ But it is of a piece with recent trends by judges who are managing aggregated litigation, as Judge Fallon described in his 2008 essay. Judge Jack Weinstein in the Zyprexa MDL consolidated product liability litigation, characterized the aggregation of product liability claims as a "quasi-class action," which enabled the court to exercise control over attorneys' fees, which are normally the province of private agreement between attorney and client.¹³⁶ Similarly Judge Alvin Hellerstein has asserted the right to control attorneys' fees, and even the terms of settlement, in the consolidated litigation before him arising from 9/11,¹³⁷ including the massive personal injury claims filed by those who worked on the smoking pile of debris without adequate safety equipment.

The Administrator's claims of neutrality and misstatement were a significant misstep. Kenneth Feinberg was judicially compelled to acknowledge that he is not an independent, neutral administrator, but rather that he is BP's agent for claims resolution. Feinberg's offers of early settlement of future loss claims are burdened by the belated and compelled acknowledgment that he is BP's agent. The crown he has worn has been tarnished. Skepticism¹³⁸ greeted his reliance on a report by the Texas A&M scientist John W. Tunnell, Jr. who (quite tentatively) predicted a continued strong recovery of the fisheries. Similarly, demands for more documentation may be greeted with skepticism that he is bending in response to BP's public complaints that he has been

¹³³ *Id.* at 14.

¹³⁴ The February 8, 2011 version of the GCCF Protocol also states:

Whether or not a claim has been presented shall be governed by OPA and applicable law. All documentation submitted by Individuals or Businesses in support of claims filed with the BP Claims Process have been transferred to the GCCF. BP has also authorized the GCCF to process certain non-OPA claims involving physical injury or death. Acceptance of payments offered pursuant to this Protocol shall be wholly voluntary, and participation in the GCCF shall not affect any right that the Claimant would have had absent such participation unless final resolution of the claim is achieved.

Gulf Coast Claims Facility Protocol for Interim and Final Claims (Feb. 8, 2011), *supra* note 84.

¹³⁵ The Manual for Complex Litigation discusses precertification communications with the proposed class. See FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 21.12 (4d ed. 2004). It enjoins "false, misleading, or intimidating information." *Id.* Rule 23 certification of a class is unlikely in the Gulf cases, so Barbier's exercise of supervisory authority is quite bold.

¹³⁶ See *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 262 (E.D.N.Y. 2006).

¹³⁷ See Order Approving Modified and Improved Agreement of Settlement at 2, *In re World Trade Center Disaster Site Litigation*, Nos. 21-MC-100 to -103 (S.D.N.Y. June 23, 2010), ECF No. 3804, available at <http://www.scribd.com/doc/52514730/WTC-cleanup-cases-Order-Approving-Settlement>. See generally *World Trade Center Disaster - 9/11 cleanup cases/Zadroga bill*, TORTS TODAY, <http://tortstoday.blogspot.com/p/world-trade-center-disaster-911-cleanup.html> (last visited Oct. 12, 2011).

¹³⁸ See Editorial, *Gulf Oil Spill Damages, Phase Two*, N.Y. TIMES, Mar. 13, 2011, at A24, available at <http://www.nytimes.com/2011/03/14/opinion/14mon2.html>.

too generous and has demanded too little documentation.¹³⁹

Complaints have persisted. Plaintiffs' counsel have filed a supplemental motion to supervise, seeking the appointment of a special master because they allege that

BP is in violation of OPA's requirement to establish an interim claim process and to pay interim claims; that BP, through its [GCCF], has violated the spirit of the Court's Order seeking to protect plaintiffs and putative class members from confusion and misunderstanding; and that the releases obtained from plaintiffs and other putative class members are invalid and should not be enforced.¹⁴⁰

The GCCF, they assert, has made the interim claims process so slow and burdensome that claimants, desperate for cash, have accepted Quick Payments, which require execution of a general release,¹⁴¹ a process which Gulf Coast Attorneys General have faulted.¹⁴² Yet BP contends that the Gulf economy is strong and Feinberg has been too generous in his settlement offers.¹⁴³

Some Preliminary Lessons of the GCCF Experience

We have long been concerned to establish mechanisms for prompt satisfaction of claims of injury by those who suffered at the hands of others. Workers compensation, FELA, the Jones Act, and common law tort claims have developed in response to that need. One of the most problematic aspects of the ordinary common law tort mechanism is the lump-sum nature of the jury verdict and resulting judgment. Here, the OPA compels a responsible party to develop a mechanism by which interim claims can be met. BP has responded to the statute's commands to pay interim claims. But, the BP GCCF's approach suffers from the vagueness of its "protocol"; its announced standards of judgment. Nor is there any mechanism for public review of whether the polluter is meeting its statutory obligations. Unlike litigated global settlement funds like Vioxx or the World Trade Center clean-up workers' cases, the GCCF is a one-way street. Claimants have a voice but no vote. The assertion of supervisory jurisdiction by MDL Judge Barbier was an important step in clearing the air of self-serving and misleading claims of independence and neutrality, but courts have rightly long been loath to take on substantial management tasks.

¹³⁹ Feinberg invited public comment on his proposed methodology. He posted the responses on the GCCF website, but with names redacted, although at least one appears to be from BP. *See* Comments of With Respect to The Gulf Coast Claims Facility's Draft Proposal Governing Payment Options, Eligibility And Substantiation Criteria, And Final Payment Methodology (Feb. 16, 2011), <http://www.scribd.com/doc/49355938/BP-Comments-on-Feinberg-GCCF-Proposed-Payments-for-Gulf-Oil-Spill>. There was also a flood of public comments. BP has declared that the Gulf Coast has bounced back and complains that Feinberg's offers have been too generous. *See* Campbell Robertson, *No Vacancies, but Some Reservations*, N.Y. TIMES, July 16, 2011, at A8, *available at* <http://www.nytimes.com/2011/07/16/us/16gulf.html>.

¹⁴⁰ Plaintiffs' Supplemental Brief in Support of Supervision over the BP Interim Claims Process, *supra* note 13, at 1.

¹⁴¹ *See id.* at 6-7; *see also* Alejandro de los Rios, *Plaintiffs Challenge GCCF's OPA Compliance Filed in BP Oil Spill MDL*, LOUISIANA RECORD (July 7, 2011, 8:53 PM), <http://www.louisianarecord.com/news/237155-plaintiffs-challenge-gccfs-opa-compliance-filed-in-bp-oil-spill-mdl>; John Schwartz, *Man With \$20 Billion to Disburse Finds No Shortage of Claims or Critics*, N.Y. TIMES, Apr. 19, 2011, at A14, *available at* <http://www.nytimes.com/2011/04/19/us/19feinberg.html?adxnnl=1&adxnnlx=1316875235-SG8J4G9iPDa7Q0VollKTyw>.

¹⁴² *See* Canfield, *supra* note 21.

¹⁴³ *See* Supplemental Comments of BP Exploration & Production Inc. at 2-3, GULF COAST CLAIMS FACILITY (July 7, 2011), http://www.gulfcoastclaimsfacility.com/BP_7_7_11_Supplemental_Comment.pdf.

In the litigated funds provision is made in the settlement for the financing and neutral management of the distribution. Here, there is no such neutral agent. The money and the liability belong to BP. And the litigated/agreed settlement fund customarily contains a “grid,” which provides transparent, objective criteria for determining the share of the fund to which a claimant is entitled.¹⁴⁴ That is both a cost and a benefit of litigation.

Filling the Regulatory Gap

Perhaps the largest failure to date is that of the Executive branch, which has failed to use its statutory authority under the OPA to issue regulations governing such private claims facilities as the GCCF. Because the statute mandates interim benefits, and because the Oil Spill Liability Trust Fund is contingently liable in the event the polluter becomes insolvent, there is ample reason for the Executive to monitor and to set guidelines and transparency requirements from the first.

Although courts, such as the bankruptcy courts, oversee complex corporate transformations, it is strategic decisions, not claim-by-claim management that is the courts’ strong suit. Here we have a mandated process of interim and final claims, but no regular way to determine if that process is being responsibly conducted. In an oil spill, the “debtor” remains in possession and conducts an unsupervised compensatory program – like the GCCF. One cannot say there is a “fund.” There are simply outstanding obligations, which the “responsible party” has begun to meet. Section 2705 of the OPA is a strong enough foundation on which to build a set of regulations that will guide and control entities like BP in the event of a disaster.

The essential elements of a regulatory scheme for Interim Claims is plain enough. Oil companies are strictly liable for oil spills. They are obligated to clean up and restore the environment, and to promptly compensate those who are injured by the spill. Like employers under the workers compensation laws, the OPA requires compensation to be paid during periods of temporary disability and impairment.

If a company designated as a responsible party in an oil spill wants to manage its own response to its statutory obligations, the polluter should be obligated to promptly report its plan for efficient compensation of those who it has harmed to a competent and responsible government agency. Proper disclosure of the interests of all parties would surely be one requirement. There should be clear statements of the legal standards being applied to both extent of liability and to proof of damages, and the financial capacity of the company to satisfy its obligations should also be disclosed, subject to public review and comment, as well as audit by public authority.

Conclusion

Judge Barbier has correctly granted the plaintiffs’ motion to supervise the GCCF. But he

¹⁴⁴ See e.g. VIOXX SETTLEMENT DOCUMENTS, *supra* note 11; *World Trade Center Settlement Process Agreement, As Amended*, *supra* note 11.

needs help. It should come first from the Executive branch, which is the most capable of developing adequate structures for such contingencies as we see in the Gulf. We need to develop a procedure for formalization and regulation of § 2705 spill claims payment schemes like the GCCF. In the coming period, attention should be given to whether the courts in mass tort litigation should exercise direct supervisory control over claims payment procedures such as those mandated by the OPA.

The supervisory power of the MDL court is inevitably ad hoc, case-by-case. Despite agency fragmentation, executive enforcement seems more promising. Executive enforcement of the OPA is divided among agencies. Designation of the responsible party is assigned to the Coast Guard (part of Homeland Security) as well as supervision of the oil spill trust fund pursuant to 26 U.S.C. § 2909; oversight of a restoration plan is assigned to the National Oceanic and Atmospheric Administration (NOAA) (part of the Department of Commerce).¹⁴⁵ Permission to drill and civil penalties for violations are administered by the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) (part of the Department of the Interior).¹⁴⁶ BOEMRE does require, as part of its approval process for a covered offshore facility, proof of financial responsibility. But it does not govern the post-spill administration.¹⁴⁷

The Oil Spill Liability Trust Fund administered by the Coast Guard makes payment of claims only for uncompensated removal costs and damages, research and development. In reviewing the BP Gulf oil spill Congress should look at this regulatory gap. There are no regulations that govern the manner in which a solvent polluter meets its statutory clean-up and compensation responsibilities. There is no audit, no reporting, no monitoring of the company's ability to meet its obligations, no review of its success in doing so. In my view aggregated litigation on the MDL model is an inefficient mechanism for this. Some standing authority is needed. An agency that is competent, willing, and adequately funded to undertake this responsibility needs to be identified. Whether this undertaking can best be met by the Coast Guard or elsewhere in the sprawling Homeland Security department, the Environmental Protection Agency, the Commerce, Justice or Treasury departments is less important than recognition that major environmental spills are likely to occur. We need an administrative framework for oversight of claims processes from the beginning – not just when the responsible party has become insolvent. If the executive branch does not take this up, Congress in its oversight capacity should do so.

¹⁴⁵ NOAA has asserted jurisdiction over post-spill restoration plans, noting that “[t]he goal of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, is to make the environment and public whole for injuries to natural resources and services resulting from an incident involving a discharge or substantial threat of a discharge of oil (incident).” 15 C.F.R. § 990.10 (2011).

¹⁴⁶ 33 C.F.R. 250.1400 (2010).

¹⁴⁷ See 30 C.F.R. §§ 253.1-253.62 (2010); *see also National Pollution Funds Center*, U.S. COAST GUARD, <http://www.uscg.mil/npfc/> (last modified Apr. 15, 2011).