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## BP Oil Spill: Compensation, Agency Costs, and Restitution

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# BP Oil Spill: Compensation, Agency Costs, and Restitution

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## *I. Introduction*

The British Petroleum (BP) Oil Spill and Restitution are irresistible topics for exploration. Just as systems errors combined to cause the disaster in the Gulf of Mexico,<sup>1</sup> the most human of institutions, the law, has

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1. Peter Elkind, David Whitford & Doris Burke, *An Accident Waiting to Happen*, FORTUNE, 163(2), 105–32 (2011). Only a year later were the causes being isolated to show design failures inherent in blowout preventers throughout the industry. Final Report for United States Department of the Interior, Forensic Examination of Deepwater Horizon Blowout Preventer, Report No. EPO30842, 20 Mar. 2011; ROBERT CAVNAR, DISASTER ON THE HORIZON: HIGH STAKES, HIGH RISKS, AND THE STORY BEHIND THE DEEPWATER WELL

struggled to find a proper way to respond. After the blowout, BP struggled to find a solution to an ongoing disaster of immense proportions.<sup>2</sup> Over the next six months, before BP was finally able to seal the deepwater well, more than four million barrels of oil gushed into the Gulf of Mexico,<sup>3</sup> coating the ocean floor with oil,<sup>4</sup> drenching birds and other wildlife in oil,<sup>5</sup> and depositing oil and tar balls on the beaches of Louisiana, Mississippi, and Texas.<sup>6</sup> Responding to this unprecedented disaster, the press bayed, victims cried for relief, and the wider American public was galvanized to demand "justice," "retribution," and "accountability." The Federal government, chastened by the pinch of public opinion, as well as by the demands of the affected states who were clamoring to satisfy their citizens'

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BLOWOUT (2010). The United States Coast Guard and the Bureau of Ocean Energy Management, Regulation & Enforcement (BOEMRE) completed their joint investigation into the explosion and fire on board the Deepwater Horizon. Deepwater Horizon Joint Investigation Team, Final Investigative Report (Sept. 14, 2011), <http://www.deepwaterinvestigation.com/go/doc/3043/1193483> (last visited Sept. 20, 2011) (on file with the Washington and Lee Law Review). The BOEMRE report, dated September 14, 2011, states that the accident and the subsequent pollution "were the result of poor risk management, last-minute changes to plans, failure to observe and respond to critical indicators, inadequate well control response, and insufficient emergency bridge response training by companies and individuals responsible for drilling . . . [and operations]." *Id.* vol. II, at 1–2.

2. See Frank James, *Burning Oil Rig Sinks in Gulf of Mexico; 11 Still Missing*, National Public Radio (Apr. 22, 2010), [http://www.npr.org/blogs/thetwo-way/2010/04/burning\\_oil\\_rig\\_sinks\\_in\\_gulf.html](http://www.npr.org/blogs/thetwo-way/2010/04/burning_oil_rig_sinks_in_gulf.html) (last visited May 18, 2011) (describing the explosion and sinking of the rig and the initial failure to stop the leaking of oil) (on file with the Washington and Lee Law Review).

3. See Richard Harris, *Scientists Find Thick Layer of Oil on Ocean Sea Floor*, National Public Radio (Sept. 10, 2010), <http://www.npr.org/templates/story/story.php?storyId=129782098> (last visited May 18, 2011) (on file with the Washington and Lee Law Review).

4. See *id.* (detailing the scientific studies of the Gulf of Mexico, which revealed that the escaped oil covered the ocean floor up to two inches in some areas).

5. See Elizabeth Shogren, *Plight for Pelicans: Oil Puts Nesting Season at Risk*, National Public Radio (June 9, 2010), <http://www.npr.org/templates/story/story.php?storyId=127579474> (last visited May 18, 2011) (describing the rescue efforts to save birds and other wildlife affected by the oil spill) (on file with the Washington and Lee Law Review).

6. See NPR Staff & Wires, *Way Too Early for Optimism on Oil Spill, Obama Says*, National Public Radio (June 4, 2010), <http://www.npr.org/templates/story/story.php?storyId=127396580> (last visited Oct. 5, 2011) (stating that tar balls were washing up on the beaches of Louisiana and Florida) (on file with the Washington and Lee Law Review); David Schaper, *Tar Balls From Gulf Spill Wash Up on Texas Coast*, National Public Radio (July 5, 2010), <http://www.npr.org/templates/story/story.php?storyId=128321208> (last visited May 18, 2011) ("The area of the Gulf Coast now affected by oil from the still gushing blown-out BP well now stretches 550 miles east to west, from the Florida Panhandle to Galveston.") (on file with the Washington and Lee Law Review).

demands and avoid economic imposts, was under great pressure to respond. Eventually the well was capped with impressive engineering feats at a depth challenging the limits of technology.

It was in the witches' brew of fraught politics, environmental policy views, overlapping and complex laws, and uncompromising disputation, that BP and the federal government found themselves across a table attempting to cap the stream of vitriol.<sup>7</sup> The result was the much-vaunted BP compensation fund created to compensate those damaged by the spill. Prior to creating the fund, BP had been handling claims in an ad hoc fashion, trying to deliver compensation to victims, to apply resources to spill abatement, and to assist the Coast Guard. BP had also been hemorrhaging from public reactions and missteps that inflamed public opinion, and there was a compelling need for a far-ranging response. The range of potential victims was quite large, with the explosion and leak having caused devastating human and economic losses in the Gulf region. These effects will undoubtedly ripple through the Gulf economy and the court system for years to come. Those most obviously and directly affected were the fishermen and those associated with the tourist industry (e.g., hotels, restaurants, stores) in the area closest to the spill. However, many others have been affected, including oil drillers who are precluded from working, and state and federal governments, which have incurred both clean-up costs for beaches and estuaries and lost revenue from tourism and fishing.

BP and others have been heavily criticized for their lack of preparedness for a major disaster.<sup>8</sup> Government officials, exhibiting much *sturm und drang*, were, in fact, caught completely flatfooted. As we describe in Part II, the parties were faced with overlapping and contradictory liability regimes. The common law rule inherited from *Robins Dry Dock*<sup>9</sup> precluded a broad recovery of economic losses, and most

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7. See Elkind et al., *supra* note 1, at 105–32 (reporting on CEO Tony Hayward's public statements).

8. See *id.* (describing how BP's management did not institute a safety policy designed for large catastrophes). It is noteworthy that the fixing of blame and consequent criminal litigation was still unresolved in April 2011. The Justice Department announced on March 7, 2011, that it was creating a special task force headed by John Buretta. Molly McDonough, *DOJ Quietly Overhauls BP Oil Spill Probe*, ABA J. BLOG (Mar. 25, 2011, 3:00 PM), [http://www.abajournal.com/news/article/doj\\_quietly\\_overhauls\\_bp\\_oil\\_spill\\_probe/](http://www.abajournal.com/news/article/doj_quietly_overhauls_bp_oil_spill_probe/) (last visited Oct. 5, 2011) (on file with the Washington and Lee Law Review). On the issue of criminal prosecutions, the possible bases and their strengths and weaknesses and the rationales are examined by David M. Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413 (2011).

9. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307–09 (1927) (“[A]

of the losses caused by the BP oil spill were of that nature. The Oil Pollution Act<sup>10</sup>—enacted by Congress as a result of the Exxon Valdez spill—established a regime that would allow for a slightly broader recovery capped at \$75 million from a \$1 billion fund from which compensation could be drawn. In the BP situation, politicians knew that something had to be done to "kill" the political carnage, and the \$20 billion fund was designed to achieve that objective—to cut the line and fill it with the heavy mud and cement of a huge funnel. Some order had to be salvaged from the chaos of the ad hoc system that had been put in place.

The BP fund, which was quite large, was to be administered by Kenneth Feinberg, who had been much admired for his work with the 9/11 Fund. The Gulf Coast Claims Facility (GCCF) was created to assist him. We conclude that the fund created a far from perfect solution to a difficult problem. In the stress of the rush to compensate victims, the fund failed to achieve the benefits that the parties desired. Its confused structure instilled suspicion among claimants who are being wooed by an alternative suitor—a large class action lawsuit—in which more lucrative damages are promised.

We argue that the best chance for the GCCF to efficiently attract claimants, and deliver quick compensation, was lost in the very structure of the fund. The "losers" in that system will be claimants and defendants who will be forced to choose between living with the vagaries of the common law system or accepting compensation from the trust fund system. The GCCF, despite its structure as a "Trust Fund," functions as a general pool of money assigned for payment by Mr. Feinberg under his published protocols, and for BP as it decides how to settle claims. From the structure of the arrangement, it appears that Mr. Feinberg is not a true "third-party neutral such as a mediator, arbitrator, or court-appointed special master,"<sup>11</sup> and the Federal District Court administering the class action required BP, through its agents Feinberg and GCCF, to advise claimants of this fact.<sup>12</sup> It should be noted, however, that Feinberg may negotiate and settle claims

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tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.").

10. See Oil Pollution Act of 1990, 33 U.S.C. § 2701 (2010) (extending strict liability on responsible parties for oil spills and establishing a trust fund to reimburse victims).

11. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179, 2011 WL 323866, at \*5 (E.D. La. Feb. 2, 2011).

12. See *id.* at \*7 ("A full disclosure of the relationship between Mr. Feinberg, the GCCF, and BP will at least make transparent that it is BP's interests as the OPA responsible party that are being promoted.").

without BP's assent, a fact that should have been given greater emphasis by Judge Barbier when assessing Feinberg's independence.<sup>13</sup>

In establishing the BP trust fund and the GCCF structure, BP failed to hew to a tenet of ordinary legal arrangements—the need to consider agency costs. BP's ability to draw from the fund and to exercise power over the administrator exacerbates the fears of claimants that settlements will not be maximally for their benefit. A prime reason, we will see, for the law's imposition of strict fiduciary duties, as well as for the Restatement disgorgement provision for opportunistic breach, is to ensure a punctilious respect for the interests of those who are vulnerable in the transactions in question. Thus, under the Restatement, relational contracts are sustained by the rules' strict bonding mechanisms. Alas, the GCCF fails at the starting gate. This argument is made in the final section where we also argue that a structure giving independence to Mr. Feinberg and tying him to fiduciary obligations and potential restitution claims would be a step forward. The failures of the BP arrangement should serve as a lesson to those seeking to build better structures for the compensation of the widespread injury-producing occurrences that will inevitably dot our futures.<sup>14</sup> Here is the

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13. This is not to say that BP is unaffected by Feinberg's settlement and compensation actions. It has criticized Feinberg for being too generous. See Catherine Clifford, *BP: Feinberg's Gulf Oil Spill Payments Are Too Generous*, CNN MONEY, (Feb. 17, 2011), [http://money.cnn.com/2011/02/17/smallbusiness/bp\\_payments\\_generous/index.htm](http://money.cnn.com/2011/02/17/smallbusiness/bp_payments_generous/index.htm) (last visited Oct. 5, 2011) (stating that BP was ill-advised to give public voice to its misgivings because the GCCF independence is paramount) (on file with the Washington and Lee Law Review).

14. The top 10 spills are as follows:

1989 Exxon Valdez*	11.3 Million Gallons
2010 Deepwater Horizon	206.2
1979 IXTOC 1	147.8
1983 Nowruz 4	82.1
1971 Wodeco 3	18.5
1978 Escravos	13.9
1980 Funiwa No. 5	8.6
1977 Phillips Ekofisk	8.5
1969 Union Oil Platform	4.2
1980 Ron Tappmeyer	4.2
1970 Chevron Main Pass	2.7

\*The Valdez spill resulted from a tanker accident. Source: Paul Scherrer Institute.

Responses to mass disasters vary on the basis of whether they are "man-made" or natural. Limits of markets will dictate that government intervene to support insurance markets and provide succor for victims. See Stephen D. Sugarman, *Roles for Government in Compensating Disaster Victims*, in DANIEL A. FARBER & MICHAEL G. FAURE, *DISASTER LAW*

thesis of the article. In designing a compensation scheme to compete against tort compensation, it is vital to recognize that claimants' trust and confidence in the scheme must be garnered through mechanisms that will include strong claims for restitution by claimants. The Restatement (Third) of Restitution & Unjust Enrichment gives courts clear rules to sustain these restitution claims.

## *II. Compensation and Mass Torts: Alternatives*

No one living in the United States could have easily avoided the daily barrage of news coverage of the oil spill that resulted from the blowout of the Macondo well. The Deepwater Horizon exploded on April 20, 2010, and while the fire was being fought on the platform, Transocean and BP began assessing and attempting to stop the oil flowing from the ruptured well. The well topped a reservoir of some 110 million barrels of oil, more than 13,000 feet below the sea floor. The depth of the Gulf at this point is about 5,000 feet. Oil streamed from the ruptured wellhead for the next eighty-seven days. The final staunching of the flow came as a giant relief, but the lack of planning for a deepwater cataclysm and the insouciance of governmental oversight and regulation remained apparent. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling presents an important case study that one hopes will provide lessons for industry and government. As a staff paper points out, the energy and resources of BP, government, and scientists brought to the task over those eighty-seven days were remarkable.<sup>15</sup> Technologies were developed on the fly, and government galvanized to monitor and advise. Despite all these efforts, tremendous destruction was wrought—workers died from the explosion, livelihoods were diminished, the ocean was polluted, wildlife was killed, and commerce was disjointed.

Oil spills are not new to the American people, and the capacity for environmental destruction is written large in the Exxon Valdez oil spill. That disaster occurred on March 24, 1989, when the Exxon Valdez oil tanker ran aground on Bligh Reef in Prince William Sound, Alaska.<sup>16</sup> Over

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507–40 (2010) (examining how victim compensation from the government can be a useful tool instead of tort action).

15. See CHIEF COUNSEL'S REPORT, NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING (Feb. 17, 2011), <http://www.oilspillcommission.gov/chief-counsels-report> (last visited Oct. 5, 2011) (describing the numerous attempts by BP to stop the flow) (on file with the Washington and Lee Law Review).

16. See William Yardley, *Recovery Still Incomplete After Valdez Spill*, N.Y. TIMES

the next few days, the tanker discharged some 11 million gallons of oil into the Sound, in the process "staining 1,500 miles of coastline, killing hundreds of thousands of seabirds, otters, seals and whales, and devastating local communities."<sup>17</sup> The effects of the oil spill linger even today, more than two decades later, with young people unable to pursue careers in fishing, leaving a "jaded" group of residents, along with other ongoing effects: The "mountain views are still stunning but the herring fishery is gone, the king and Dungeness crabs, too. Prawns are coming back, but just barely."<sup>18</sup> Although residents ultimately received payments from Exxon, many of the payments have proven to be too low to allow individuals to rebuild their lives.<sup>19</sup>

As with the BP Oil Spill, the Exxon Valdez incident caused major losses to persons who rely on the natural environment. Although the effects have been broadly felt by those in the vicinity, the economic losses range far beyond, drawing into consideration the limits of legal and public policy. Even for gross negligence, as was evident in *Exxon Shipping Co. v. Baker*,<sup>20</sup>

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(May 5, 2010), [http://www.nytimes.com/2010/05/06/us/06alaska.html?\\_r=1&ref=exxon\\_valdezoilspill1989](http://www.nytimes.com/2010/05/06/us/06alaska.html?_r=1&ref=exxon_valdezoilspill1989) (last visited Oct. 5, 2011) ("As the oil spill spreads ominously in the Gulf of Mexico, its impact uncertain, communities here beside Prince William Sound are still confronting the consequences of March 24, 1989, the day of the wreck of the Exxon Valdez.") (on file with the Washington and Lee Law Review).

17. *Id.*

18. *Id.* However, some have questioned whether the loss of herring fishing was due to the spill or to other causes. *Id.* ("The loss of the herring industry over the years since the spill has cost the region about \$400 million . . . although some blame cyclical patterns or other factors for the change, not the spill.")

19. *See id.* The article recites the example of one fisherman:

In December, Exxon sent the last of a nearly \$500,000 payment to John Platt, but Mr. Platt said he never saw it. Straight to the state and the bank it went, to clear the liens on his boats and his fishing permits, to dig out of the debt he accumulated, some through his own admitted missteps, in the two decades since the wreck of the Valdez.

The payments were initially supposed to be much higher, before Exxon successfully fought, all the way to the Supreme Court, to have them reduced.

"The money was supposed to bring closure," Mr. Platt said. "Deep down inside I was really banking on it, but it didn't happen."

*Id.*

20. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 509–15 (2008) (finding that Exxon's actions were "worse than negligent but less than malicious" and that the maximum award of punitive damages allowed was equal to the jury's award of \$507.5 million in compensatory damages).



we must draw a line, as does the U.S. Supreme Court in awarding punitive damages that are now constrained by a judicially imposed ratio.<sup>21</sup>

As huge efforts were being made to cap the BP oil well, the drama of multiple claims for loss by those affected by the spill was at full throttle. It soon became apparent that the issue of how to provide compensation for the victims of the oil spill would be every bit as difficult as the technological obstacles encountered in capping the well. As engineers struggled to stem the flow of oil, BP and the government faced a daunting picture in trying to assess liability and provide compensation. As the nation witnessed with the Exxon Valdez incident, and the compensation fund established following the 9/11 Terrorist attacks on the World Trade Center towers,<sup>22</sup> the tort system has provided a poor mechanism for resolving claims and meting out compensation to victims.<sup>23</sup> The establishment of a fund through insurance mechanisms may in addition be an effective deterrence to social ills that cause harm to citizens.<sup>24</sup>

Following the Exxon Valdez incident, Congress enacted the Federal Oil Pollution Act of 1990 (OPA)<sup>25</sup> that extended liability by imposing strict liability on responsible parties for certain economic losses in navigable waters and along shorelines. The legislation involved a consolidation of previous piecemeal legislation, and established the Oil Spill Liability Trust Fund that was authorized to pay out to a maximum of \$1 billion per incident. The fund was financed by taxes on crude oil bought by U.S. refineries and on petroleum products imported, consumed, and stored in the United States.

The OPA establishes a cap of \$75 million per responsible party per incident. Under Section 2704(c)(1), the cap does not apply "if the incident was proximately caused by:

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21. See *id.* at 513 ("[A] 1:1 ratio . . . is a fair upper limit in such maritime cases.").

22. See Mireya Navarro, *There's Room on His Plate, 9/11 Mediator Says*, N.Y. TIMES (June 17, 2010), <http://green.blogs.nytimes.com/2010/06/17/theres-room-on-his-plate-mediator-insists/?scp=33&sq=9%2F11+trust+fund&st=nyt> (last visited Oct. 5, 2011) (detailing the many problems faced during the settlement of lawsuits between New York City and ground zero rescue and cleanup workers) (on file with the Washington and Lee Law Review).

23. See Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 289–93 (2003) (describing the stigmatization of blameless victims that inhibits the compensation process).

24. See Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism—and Crime*, 102 MICH. L. REV. 268, 269 (2003) ("Future political actors may evaluate private responses to the risk of terrorism in deciding on the character or degree of a governmental response.").

25. 33 U.S.C. §§ 2701–2761 (2010).

- (A) gross negligence or willful misconduct of, or
- (B) the violation of an applicable Federal safety, consultation, or operating regulation, by the responsible party . . . ."<sup>26</sup>

Absent the legislation, those aggrieved by the BP oil spill would have had some avenues of redress. They could have brought an action under the OPA or under the maritime law applicable to the claim. However, this avenue of redress was deemed insufficient by potential claimants and the various governmental entities. Under a barrage of adverse publicity, BP officials and President Obama met and executed an agreement on January 16, 2010, to create a compensation fund for the victims of the spill. BP pledged a minimum of \$20 billion to the fund over forty months, with security provided. BP's establishment of the funds, with claims to be processed through the GCCF and Mr. Kenneth Feinberg as the administrator, staunches, as did the capping of the well, the fierce criticism to which BP was being subjected. But, like the well capping, the trust fund left a myriad of issues to be resolved. Under the fund, Feinberg was not being asked to make compensation payments based on the expected liability of BP and others who may have responsibility for the oil spill, but rather on the basis of criteria that he established.<sup>27</sup> As a result, claimants continue to have statutory and common law claims against BP or other parties. However, if a claimant accepts a final payment from the GCCF fund, the claimant must waive other rights of action.<sup>28</sup>

Although Mr. Feinberg has maintained that his decisions on whether to pay claims under the GCCF does not depend on enforceable rights in law, the background is important in ascertaining the scope of liability and influencing the criteria for payment that he will make. At Mr. Feinberg's request, Professor John Goldberg of Harvard has provided a closely reasoned and compelling analysis of liability that might accrue based on the OPA and the common law.<sup>29</sup>

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26. *Id.* § 2704(c)(1).

27. *See* DEEPWATER HORIZON OIL SPILL TRUST, (Aug. 6, 2010), [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/incident\\_response/STAGING/local\\_assets/downloads\\_pdfs/Trust\\_Agreement\\_Executed\\_Copy.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Trust_Agreement_Executed_Copy.pdf) (describing the structure of the trust fund created by Feinberg).

28. *See* PROTOCOL FOR FINAL CLAIMS, GULF COAST CLAIMS FACILITY, (Feb. 8, 2011), [http://www.gulfcoastclaimsfacility.com/proto\\_4](http://www.gulfcoastclaimsfacility.com/proto_4) (last visited Oct. 5, 2011) ("Claimants who accept a Final Payment must sign a Release. . . . The Release will waive any rights the Claimant may have against BP and any other potentially liable parties . . . .") (on file with the Washington and Lee Law Review).

29. John Goldberg, Memorandum to Kenneth R. Feinberg with Report on Liability for Economic Loss in Connection with the Deepwater Horizon Oil Spill (Nov. 22, 2010),

It is not our intention to review exhaustively Professor Goldberg's analysis, but a brief review is in order. In short, Goldberg concludes that BP's common law liability depends upon a showing of personal or property loss caused by the spill. If such loss is shown, economic loss consequent to that loss will be recoverable. In addition, the OPA allows for recovery of economic losses that flow from the destruction of resources that the claimant could have exploited to his economic benefit. This confirms the approach of some courts that allow recovery of losses that flow from destruction of fish stocks to which the fisherman had a right or privilege to exploit.<sup>30</sup> While the fisherman may hold no property interest in the fish stocks, they do hold something approaching a property interest, and they (as a class) are easily distinguishable from the vast class of persons who will suffer economic loss because of the event.<sup>31</sup>

#### A. *The Structure of the Fund*

In creating the BP trust fund, the challenge for both BP and the government was to provide claimants with confidence that all legitimate claims would be covered. Only a generous gesture and subsequent confidence-building moves would be sufficient. BP started by accepting designation as "the responsible party" under the Oil Pollution Act. Once it did, BP was obliged to establish a claims process for legitimate claims. This it did through the GCCF, to which all existing claims were transmitted. The documents establish a \$20 billion fund that is held beyond the control of BP in an irrevocable trust with patently independent and experienced trustees having been named. The appointment of a seasoned and trusted

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<http://dash.harvard.edu/handle/1/4595438> (on file with the Washington and Lee Law Review).

30. *See* Union Oil Co. v. Oppen, 501 F.2d 558, 568–70 (9th Cir. 1974) (finding that fishermen could recover from an oil company for an oil spill in California because the company had a duty to commercial fishermen to conduct their offshore drilling and production in a reasonably prudent manner and that the spill disrupted the fishermen's economic and personal affairs).

31. *See* Louisiana, *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1032 (5th Cir. 1985) (finding that various plaintiffs, including shipping interests, boat operators, seafood enterprises, tackle and bait shops, and recreational fishermen, who sustained no physical damage to property as result of chemical spill in Mississippi River, could not recover against those entities allegedly responsible for the spill). The issue of the classes of claimants who may have viable claims under maritime law applicable to the spill that occurred on the continental shelf was ruled on by Judge Barbier recently, see *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179, 2011 WL 3805746 (E.D. La. Aug. 26, 2011).

administrator was made, in an effort to inspire confidence by payment of early emergency claims, and he was required to be accessible and active in informing claimants and offering transparency in performance. All the foregoing steps were designed to inculcate trust and encourage claimants to forgo the tort system for claims as a final resolution.

The design of the BP trust fund, however, suffers from several fatal flaws. The trust, which is subject to Delaware law, establishes the payment scheme. Through the administrator, the trust requires that funds be distributed to claimants, and it refers to the trust's beneficiaries as the "holders of resolved Damage Claims." The usual disclosures required of trustees to beneficiaries are excluded in Article IX, Section B, which provides, in particular, for non-disclosure of the amount of distribution to, or identify of, any other beneficiary.<sup>32</sup> Under the GCCF trust document, the Trustees are required to distribute funds according to the direction of the Claim Administrator—Mr. Feinberg—or according to the direction of BP itself. The trustees monitor the activities of the Corporate Trustee, Citibank, but do not exercise any oversight over the Administrator. The individual trustees, the Corporate Trustee, and the "Lead Paying Agent" (also Citibank), are held harmless and are exonerated from liability on account of "any honest error of judgment" or for harm caused without "willful misconduct or negligence," under Art. VI, Section E.4.<sup>33</sup> Trustees likewise are given exoneration for non-negligent or willfully wrongful acts. The Administrator, however, is not so indemnified under the Trust Agreement—rather, BP indemnifies Mr. Feinberg for his actions "relating to or arising from the operation of the GCCF" in his personal contract with BP.<sup>34</sup>

### *B. Compensation Distribution and Criteria*

The GCCF distinguishes between two types of payments that private claimants may seek: Emergency Advance Payments (that were available only through November 23, 2010), and Final Payments (available through

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32. See DEEPWATER HORIZON OIL SPILL TRUST, *supra* note 27, art. IX, § B ("The Trustees shall have no obligation to provide the Beneficiaries with any report (annual or otherwise), accounting or any other information with respect to the Trust's administration, distributions of the Trust Fund or any other aspect of the Trust . . .").

33. See *id.*

34. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on Apr. 20, 2010, MDL No. 2179, 2011 WL 323866, at \*6 (E.D. La. Feb. 2, 2011).

August 23, 2013). The Protocol for Emergency Advance Payments, promulgated August 23, 2010, was the initial statement of claim eligibility. In February 2011, the GCCF posted a Protocol for Final Claims, and a proposed final payment evaluation methodology. In the latter, the GCCF provides:

All individuals and businesses that incurred losses due to the Oil Spill are entitled to and are encouraged to file a Final or Interim Claim with the GCCF. Neither physical proximity to the Oil Spill nor a particular type of work or business engaged in by the claimant is a prerequisite to eligibility for payment of a claim. But adequate documentation of damage attributable to the Oil Spill is required. Physical proximity to the Oil Spill, and the nature of the business or work engaged in by the claimant, are important factors when it comes to the proof needed to document a claim that the damage was caused by the Oil Spill. The ability of the claimant to link the alleged damage to the Oil Spill—as opposed to other factors such as a general downturn in the Gulf region economy or other financial uncertainty unrelated to the Oil Spill—is required.<sup>35</sup>

The legitimacy of claims is guided by conformity to the OPA and applicable federal maritime law. Claims require documentation or other evidence for each type of damage claimed. Physical proximity to the spill is not dispositive of proximate causation; Mr. Feinberg reiterated this point in the face of political pressure from potential Floridian claimants.<sup>36</sup> Under both the Emergency Protocol and the Final Payment protocol, the Administrator has stipulated the types of losses for which a claim may be submitted. Included are damages for removal and cleanup costs, real and personal property loss, lost profits and lost earning capacity, subsistence use of natural resources, physical injury and death, and the costs of existing damages.<sup>37</sup> Collateral compensation, including "[a]ny other earnings or

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35. *Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology*, GULF COAST CLAIMS FACILITY at 2 (Feb. 18, 2011) [hereinafter *Final Rules*], available at [http://www.gulfcoastclaimsfacility.com/FINAL\\_RULES.pdf](http://www.gulfcoastclaimsfacility.com/FINAL_RULES.pdf).

36. See Jill Snyder & JoAnne Norton, *Feinberg Says Proximity Won't Be Weighed in BP Claims*, BLOOMBERG (Oct. 4, 2010), <http://www.bloomberg.com/news/2010-10-04/feinberg-says-proximity-won-t-affect-bp-claim-being-processed.html> (last visited Oct. 5, 2011) ("Kenneth Feinberg, who is responsible for compensating victims of [BP's] Gulf of Mexico oil spill, said geographic proximity won't affect the processing of an individual or business claim.") (on file with the Washington and Lee Law Review).

37. Such is in conformance with the mandates of the OPA, which explicitly contemplates damages recoverable from responsible parties by private claimants:

(B) *Real or personal property.* Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be

profits [the claimant] received from another job or another source of earnings or profits during the period for which [the claimant is] claiming lost earnings or profits," is deducted from Final Payments.

The Protocol references an essential matter in play in our analysis. The "determinations of claims under the OPA will be guided by the OPA. Determinations of physical injury or death claims will be guided . . . by other federal law or pertinent state laws."<sup>38</sup> The protocol contemplates payments that tightly follow the contours of liability and the OPA and State common law and statutes. It is supposed that payments will be made along the interpretation of the law rendered by John Goldberg.

As noted, the GCCF posted for public comment a proposal for the final evaluation protocol on February 2, 2011.<sup>39</sup> This document further explains evidentiary requirements and lays out specific payment policies. The most notable aspect of the proposal was its Final Payment calculus, which provided as follows:

Each claimant's Final Payment offer will be the larger of: (1) Two times each eligible Claimant's 2010 Actual Documented Losses (except for claimants with 2010 losses in excess of \$500,000); four times each eligible oyster harvester's 2010 Actual Documented Losses, or (2) The total actual documented losses through the date of the filing of the Final Claim.<sup>40</sup>

The proposal's appendices contain sample payment calculations (Exhibits A, B), and detailed support for the GCCF's determination that the Gulf will largely recover by 2012 (Exhibits C, D, E). Such a proposition underlies Feinberg's payment multiplier.

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recoverable by a claimant who owns or leases that property.

(C) *Subsistence use.* Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources. . . .

(E) *Profits and earning capacity.* Damages 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 resources, which shall be recoverable by any claimant.

33 U.S.C. § 2702.

38. See PROTOCOL FOR FINAL CLAIMS, *supra* note 28.

39. See *Final Rules*, *supra* note 35, at 1 ("In an effort to promote full disclosure and transparency, the GCCF's Announcement requested public comment during the period February 2 through February 16, 2011, from all claimants and other interested parties.").

40. *Id.* at 6.

Of general interest may be the public comments themselves, which the GCCF posts daily on its website.<sup>41</sup> If nothing else, the responses give one a sense of the variety of potentially disappointed claimants (including, for example, the full-time student who inquires as to the calculation of compensation for loss of chance in a diminished job market).

The Protocol assumes that some false or fraudulent claims will be submitted. The Protocol attempts to deal with this problem, in part, by requiring claimants to declare that the information submitted in support of their claims is "true and accurate," and seeks to make it clear to them that false or fraudulent statements might be subject to criminal and civil penalties. The latter penalties are not spelt out.

There is no apparent scheme for parceling out the \$20 billion corpus equitably between claimants; the trust document provides merely that the Facility must make payments in the order Feinberg authorizes them. Though Feinberg would presumably account for limited fund scarcity in exercising his discretion, it seems likely that he will authorize claims—and thus that claims will be paid out—on the basis of first-in-time filing (or rather, of first-in-time perfection under the applicable protocol). BP itself has rejected suggestions that GCCF's \$20 billion will serve as a liability cap, though it is unclear whether excess claims would produce further BP contributions to the Facility, or be available only through actions against BP. Most recently, Feinberg has suggested that he expects to satisfy all claims for about \$10 billion, expending half the corpus.<sup>42</sup> Much of this turns on predictions that the ecosystem will return to health quite quickly in the bacteria laden waters of the Gulf.<sup>43</sup>

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41. See E-MAIL COMMENTS CONCERNING DRAFT METHODOLOGY AND ELIGIBILITY CRITERIA, [http://www.gulfcoastclaimsfacility.com/methodology\\_email.php](http://www.gulfcoastclaimsfacility.com/methodology_email.php) (last visited Oct. 5, 2011) (publishing thousands of daily comments) (on file with the Washington and Lee Law Review).

42. See Brian Swint, *BP Reinstates Dividend After Profit Increase, Plans to Sell Two Refineries*, BLOOMBERG (Feb. 1, 2011), <http://www.bloomberg.com/news/2011-02-01/bp-reinstates-quarterly-dividend-after-fourth-quarter-profit-increases-30-.html> (last visited Oct. 5, 2011) ("Kenneth Feinberg, who is administering the fund, said in a Dec. 31 Bloomberg Television interview that \$10 billion may be 'more than enough to pay all the claims.'") (on file with the Washington and Lee Law Review).

43. See Claudia Dreifus, *Revisiting the Deepwater Horizon Oil Spill*, N.Y. TIMES, Mar. 21, 2011, at D3 (describing the devastating ecological effects of the spill on the seafloor and how bacteria in the water eat oil).

### C. Terms of Release

A claim for Emergency Advance Payment does not require waiver or release of any right; a reimbursed claimant may still pursue an action against BP or file a claim against the federal Oil Spill Liability Trust Fund. To receive a Final Payment, however, a claimant must sign a release—thus, acceptance becomes a critical decision point for claimants.

The Release will waive any rights the Claimant may have against BP and any other potentially liable parties to assert additional claims, to file an individual legal action, to participate in other legal actions associated with the Spill, or to submit any claim for payment by the National Pollution Funds Center. However, except where the Claimant accepts a Final Payment for physical injury or death, the Release will not waive the Claimant's rights with regard to a physical injury or death claim. If the Claimant elects to accept a Final Payment for a claim for physical injury or death, the Claimant will return to the GCCF a Release specifically waiving the Claimant's rights with regard to the Claimant's physical injury or death claim.<sup>44</sup>

Under the Protocol, the Claimant has a right to appeal the determination of a Final Payment. The appeal is reviewed by a panel appointed by the Claims Administrator who is required to select "one distinguished member of the legal profession . . . who will identify distinguished members of the legal community . . . to serve as impartial GCCF Appeals Judges."<sup>45</sup> A panel of three approved GCCF judges are appointed once an "appeal is certified."<sup>46</sup> The decision is binding on BP, but a claimant may pursue other remedies at law. It is of note, however, that a claimant who accepts an insufficient Final Payment from the GCCF may still present his claim to the federal Oil Spill Liability Trust Fund.<sup>47</sup>

### D. Compensation in a Sea of Tort

Although the 9/11 Compensation Fund was fraught with human tragedy, and thus required deft and sensitive administration, the road was

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44. See PROTOCOL FOR FINAL CLAIMS, *supra* note 28.

45. *Id.*

46. *Id.*

47. See 33 U.S.C. § 2713 (2010) ("If a claim is presented [first to the responsible party] . . . and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund."). Congress may appropriate up to \$1 billion for the Fund.



clear of the conflicting tensions surrounding the BP Oil Spill. Nothing reveals this more strongly than a recent ruling on February 2, 2011 by Judge Barbier in the U.S. District Court of the Eastern District of Louisiana who has been charged with administering the class action.<sup>48</sup> The decision declares that BP is not only the OPA "responsible party," but is also a "primary defendant in the MDL and consolidated putative class actions."<sup>49</sup> Under Rule 23, the Court has inherent authority and responsibility to supervise or control communications with class members, particularly when unrepresented by their own counsel to ensure that putative class members do not receive inaccurate or misleading communications.<sup>50</sup> At issue was the claim by Mr. Feinberg that he enjoyed independence from BP and was not its agent in his actions in administering the GCCF.<sup>51</sup> The Court noted that BP's statutory obligations under the OPA were non-delegable and thus could not be delegated either to Mr. Feinberg or to the GCCF.<sup>52</sup> In addition, the court found indicia of BP's control over Mr. Feinberg and the GCCF, all of which tended to undermine their independence: BP's responsibility for paying Mr. Feinberg's salary; BP's right to exercise control under the employment contract; BP's indemnification of Mr. Feinberg; BP's authority to terminate Mr. Feinberg for cause; Mr. Feinberg's covenant to comply with the corporate conduct code; and BP's right to make a quarterly reevaluation of Mr. Feinberg's fees.<sup>53</sup> The judge described Mr. Feinberg and the GCCF as performing a hybrid function, which he opined has led to confusion and misunderstanding by claimants.<sup>54</sup>

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48. *See In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on Apr. 20, 2010*, MDL No. 2179, 2011 WL 323866, at \*6, \*8 (E.D. La. Feb. 2, 2011) (finding that Feinberg and the GCCF are not totally independent of BP and that they should inform claimants of that connection with BP).

49. *Id.* at \*6.

50. *See id.* (describing how the court has the authority to control communications to potential class members prior to the certification of them as a class).

51. *See id.* at \*3 ("BP insists that Mr. Feinberg is solely responsible for administering the GCCF, that he developed the protocols and Release, and that he does not report to BP.").

52. *See id.* at \*5 ("To fulfill its statutory obligations, BP has created the GCCF, which is administered by Mr. Feinberg and his law firm, Feinberg Rozen, LLP. The fact that BP in this instance has chosen to delegate this responsibility cannot relieve BP of its statutory obligations.").

53. *See id.* at \*5-6 (stating the court's reasons for why Feinberg and the GCCF are not independent of BP).

54. *See id.* at \*7 ("Because the Court finds 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 . . .").

Using that reasoning, the court ordered that BP "through its agents" Mr. Feinberg and the GCCF:

- (1) Refrain from contacting directly any claimant that they know or reasonably should know is represented by counsel, whether or not said claimant has filed a lawsuit or formal claim;
- (2) 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 as the "responsible party" under the OPA;
- (3) Begin any communication with a putative class member with the statement that the individual has a right to consult with an attorney of his/her own choosing prior to accepting any settlement or signing a release of legal rights; and
- (4) Refrain from giving or purporting to give legal advice to unrepresented claimants . . . .<sup>55</sup>

Judge Barbier found that, because claimants who agreed to a final payment must sign a release of all claims against all defendants, BP benefited by discharging its liability.<sup>56</sup> The speeches and information provided by Mr. Feinberg extolling the advantages of the GCCF process were therefore misleading.

Perhaps more damaging to the GCCF's process, however, was a report on January 31, 2011 headed "91,000 Gulf Oil Spill Claims, Just 1 Final Payment."<sup>57</sup> The records showed, it was asserted, that the one final payment was for \$10 million and that it was a payment for which BP had lobbied.<sup>58</sup> Moreover, the claim was not reviewed for merit by Mr. Feinberg or the GCCF.<sup>59</sup> The report says: "BP struck an outside deal with the

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55. *Id.* at \*8. Feinberg had been telling potential claimants to eschew hiring lawyers in favor of submitting GCCF claims. *Id.* at \*7.

56. *See id.* at \*7 ("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.").

57. Brian Skoloff, *91,000 Gulf Oil Spill Claims, Just 1 Final Payment*, ASSOCIATED PRESS (Jan. 31, 2011), <http://www.cnsnews.com/news/article/91000-gulf-oil-spill-claims-just-1-final> (last visited Oct. 5, 2011) (on file with the Washington and Lee Law Review).

58. *See id.* ("BP won't identify the business, citing confidentiality, but acknowledges it lobbied for the settlement.").

59. *See id.* ("Feinberg said Monday the facility never reviewed that claim for merit.").

[claimant] and told the fund to make the payment."<sup>60</sup> The story cites a litany of complaints about the "lack of transparency and independence from BP."<sup>61</sup> However, the image in the minds of claimants is that the GCCF is a slush fund by which BP pays claims subject to its whim and self-interest.<sup>62</sup>

Indeed, the distribution of the trust's corpus does not fall solely within the bailiwick of Mr. Feinberg: According to the Trust Agreement, the beneficiaries include all "holders of resolved Damage Claims."<sup>63</sup> Included in the definition of "Damage Claims," however, are "amounts owed by [BP] pursuant to . . . settlement agreements that are resolved outside of the GCCF process . . ."<sup>64</sup> With respect to such claims, the GCCF is not empowered to assess "the consistency of the claim with . . . [the] settlement agreement."<sup>65</sup> BP need merely submit a notice of claim payment to the GCCF's bank, thereby circumventing Feinberg entirely.

All of this springs from the basic flaw in the trust document: It does not ensure Mr. Feinberg's independence. This flaw is surprising given that the fund was structured as an irrevocable trust fund and therefore seemed to be an appropriate payment vehicle. However, several factors militated against a clear-eyed argument for independence:

- (1) The OPA arrangement, around which the structure needed to be built;
- (2) The haste with which the deal was constructed;
- (3) The huge interest of aggressive plaintiffs' lawyers in attracting claimants into their class action;
- (4) An unexamined reliance on Mr. Feinberg's reassurances, and a neglect of the critical role of the institutional arrangements. [Perhaps this stemmed from the glow of Mr. Feinberg's great success in handling the 9/11 Fund.]; and
- (5) An assumption that the very quantum of the fund would exert gravitational pull on claimants to opt for the GCCF and the compensation scheme.

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60. *Id.*

61. *Id.*

62. *See generally* Comments Regarding the Announcement of Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology, <http://www.gulfcoastclaimsfacility.com/methodology> (last visited Oct. 5, 2011) (on file with the Washington and Lee Law Review).

63. DEEPWATER HORIZON OIL SPILL TRUST, *supra* note 27, Recital § 4.

64. *Id.* Recital § 3.

65. *Id.* art. II, § D, para. 3.

### III. Shortcomings of the Compensation Scheme

If one has labored for long enough in the torts vineyard, one recalls that compensation issues were once paramount.<sup>66</sup> The great tort scholars of the day, e.g., Fleming James and John Fleming, fine doctrinal scholars that they were, eschewed the role of tort law as delivering effective compensation for the haven of compensation schemes that would deliver more cents on the dollar to the victims of accidents.<sup>67</sup> These were days before economic analysis and deterrence theory loomed large. The most radical scheme was adopted by the New Zealand government in the late 1960s when tort liability for personal injury was abolished and a government compensation scheme replaced it.<sup>68</sup> At that time, Australia and the U.K. were close to adopting similar schemes.<sup>69</sup> Of course, Workers' Compensation, with roots in Bismarck's Germany, was the grandparent of these schemes.<sup>70</sup>

The times have changed, and strong governmental intervention is certainly unpopular except, under the moniker of tort reform, to the extent it limits the ability of plaintiffs to bring action in certain types of litigation.<sup>71</sup> At the same time, the costs of litigation, modern commentators have

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66. See generally David F. Partlett, *Of Law Reform Lions and the Limits of Tort Reform*, 27 SYD. L. REV. 417 (2005).

67. But modern scholars remain concerned about the inherent inefficiencies in delivering compensation in large complex suits. See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 320 (2011) ("Of the roughly \$7 billion Merck will have to spend on the Vioxx litigation, approximately \$3.5 billion will have been on attorneys' fees, including roughly \$2 billion for defense litigation fees.").

68. See GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA* 69–104 (1979) (describing the debate over the Accident Compensation Bill, which set up a government compensation framework to reimburse victims of personal injury). For a later discussion, see Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 YALE L. & POL'Y REV. 1 (2008) and Stephen Todd, *Treatment Injury in New Zealand*, 86 CHI.-KENT L. REV. 1169 (2011) (describing the evolution and limits of the scheme).

69. See Palmer, *supra* note 68, at 131–42 (detailing how the Australian government contacted the New Zealand government regarding its compensation scheme and how the Australian government modeled its system after New Zealand's scheme).

70. See Richard A. Epstein, *The Historical Origins of and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 775–90 (1982) (detailing the history of Workers' Compensation and its effect on other compensation schemes).

71. See TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 1–21 (2005) (detailing how the medical societies got tort reform passed to make it harder for plaintiffs to file medical malpractice suits); Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 393–96 (2005) (describing the effect insurance underwriting has had on medical malpractice reform).

argued, may be justified by non-monetary benefits resulting from the individualization of claims at common law.<sup>72</sup>

All of this should be conceded, but none of it undermines an argument that in certain types of claims the tying of compensation to a tort claim is baleful.<sup>73</sup> This had led to the non-fault scheme set up under the National Childhood Vaccine Injury Act of 1986.<sup>74</sup> At the time, legislators were concerned that the pursuit of tort remedies would crimp the goal of research, development, and distribution of drugs to the detriment of public health.<sup>75</sup> Though Congress was confident in the energy industry's ability to persevere in the face of liability, the fund established under the OPA was purposed to similar ends, i.e., to deliver compensation by an industry through an established fund and to provide it at a price that would not unduly dampen the business of oil.<sup>76</sup> It is testament to the dimension of the BP spill and its political impact that BP was quick to insist that it would not avail itself of the limits of liability.<sup>77</sup>

With GCCF, no claimant is obliged to make a claim through the fund. On the contrary, all are free, and no doubt will be told even more explicitly now to proceed through class action or otherwise. Although Judge Barbier was concerned about making sure that certain warnings were transmitted to claimants, his order says nothing about providing claimants with

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72. See SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 72–92 (1993) (describing the lawyer/client relationships for medical malpractice suits); Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences With the 9/11 Victim Compensation Fund*, 42 *LAW & SOC'Y REV.* 645 (2008) (examining the differences between a cash payment from the victim compensation fund and the pursuit of litigation for victims of 9/11).

73. In an area well away from property and personal loss, one sees the same concern with liability for defamation chilling speech. See Daniel Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 *HARV. L. REV.* 554 (1991).

74. National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10–300aa-33 (2006).

75. In product liability cases relating to drugs, the courts have been concerned about trammeling discovery and distribution of generally beneficial drugs. See *Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549 (Cal. 1991). For recent academic commentary arguing for the restrictive influence of tort liability, see George L. Priest, *The Effects of Modern Tort Law on Innovation and Economic Growth*, in *RULES FOR GROWTH: PROMOTING INNOVATION ON GROWTH THROUGH LEGAL REFORM*, THE KAUFFMAN TASK FORCE ON LAW, INNOVATION AND GROWTH 273–76 (2011).

76. See S. REP. NO. 101-94 (1989).

77. Perhaps it shows that some of the statutory schemes setting caps are not *in extremis* viable. This would have an impact on the insurability of enterprises involved in these hazardous industries. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1521–26 (1987) (describing the changes in commercial casualty insurance markets during 1986).

information about the hazards of proceeding outside the GCCF. To rely upon the claimants' counsel, avid to recruit for the class, even though they are ethically restrained to disclose risks and pitfalls of the litigation, is naïve. Just as Mr. Feinberg or the GCCF may have a bias in favor of giving an unbalanced appraisal of the advantages of the trust fund, plaintiffs' lawyers have a similar bias in favor of their own interests. The Court, in exercise of its powers, by parity of reasoning ought to provide a means by which claimants can rationally assess all of the necessary considerations and interests. Class actions notoriously empower plaintiffs' lawyers to the endangerment of their clients. The process compounds the vulnerability of claimants that tort law was designed to secure.<sup>78</sup>

In encouraging BP to establish the trust fund, the Federal Government dipped its hand in the water to quell the uproar in public opinion. It seems appropriate that, having entered the fray, it should now help ensure that claimants receive unbiased advice. For example, the government could enlist a panel of experts to provide an analysis of the advantages and disadvantages of taking particular courses of action. Such advice would be entirely impartial and would bear a mark of legitimacy. As a rough gauge, our sense is that claimants with modest losses and marginal claims would be best served by the GCCF process. Those with large dollar claims that fall within clear liability boundaries may prosper more in litigation, particularly if super-compensatory damages could be garnered. But much depends on claimants' utility curves and the time value of money. The *Exxon Valdez* litigation lasted for many years, and then the U.S. Supreme Court restricted the scope of punitive damage awards.<sup>79</sup>

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78. The problem of conflicting interests between attorneys and class action clients is much debated. See AM. LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). The inherent problems have led to alternative schemes. See RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 1–50 (2007) (detailing the huge class action personal injury lawsuits against major companies and how those settlements transformed the tort system).

79. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 (2008) (finding that the maximum award of punitive damages allowed under maritime law was equal to jury's award of \$507.5 million in compensatory damages); see also Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 44–46 (2009) (discussing the residual unpredictability of punitive awards in the wake of the *Exxon* decision). Judge Barbier has determined that the OPA does not pre-empt punitive damages. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, MDL No. 2179, 2011 WL 3805746, at \*14–15 (E.D. La. Aug. 26, 2011).

*IV. A Model: Fiduciary Obligations*

With the creation of the GCCF as an escrow account for BP's liabilities, the opportunity was lost to establish a fund that could have more efficiently dealt with the bulk of the claims. The missing ingredient was trust—that has been revealed by Judge Barbier's findings regarding Mr. Feinberg's role and obligations, and the publicity around the paying out of claims to date. Indeed, there is significant evidence that a number of claimants are refusing to accept final claims (which would require them to issue a liability release) and opting instead to take only the interim payment.

The trust structure could have been used to great effect. Essentially, BP as settlor should have given up control of the fund to the Trustees who could have employed Mr. Feinberg as their agent for the payment of claims. The fund should have been segregated from BP's efforts to settle other claims. The claimants, once their claims have been paid out, would have been owed fiduciary duties by Mr. Feinberg as an agent of the trustees. If there were to be an indemnity for Mr. Feinberg, it should not come from BP funds, but from trust funds. And the indemnity should not cover fraudulent actions but only actions taken in good faith exercise of his discretion.

Claimants are attracted to courts of law because, among other things, of the individual attention given to them.<sup>80</sup> However, it is apparent that under the MDL class action the claims will perforce of their numbers and complexity will be bureaucratized. Therefore, the comparison for claimants is between two rather impersonal choices, both with a basis to argue legitimately for independence in decision making. The Courts have it by tradition; the GCCF—properly constituted—would have gained legitimacy through patent mechanisms designed to inspire confidence and trust. Victims of the spill would then have before them a meaningful choice about

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80. See SLOAN ET AL., *supra* note 72, at 72–92 (stating that claimants seek courts for medical malpractice suits to get personal, thorough review of their case). The necessary bureaucratization of claims is admitted by Judge Barbier in *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, MDL No. 2179, 2011 WL 3805746 (E.D. La. Aug. 26, 2011). Judge Barbier stated:

A judge handling an MDL often must employ special procedures and case management tools in order to have the MDL operate in an orderly and efficient manner. In this massive and complex MDL, the Court is faced with a significant practical problem. It would be impractical, time-consuming, and disruptive to the orderly conduct of this MDL . . . if the Court or the parties were required to sort through in excess of 100,000 individual [relevant claims] to determine which ones should be dismissed at the current time.

*Id.* at \*16.

how to proceed. At the same time, the defendants, BP and others, would have had a better prospect of emerging within a reasonable time from the shadow of impending claims.<sup>81</sup>

*V. Designing a Compensation Scheme: Restitutionary Rights  
and Obligations*

In this final section of the Article, we suggest a better design for a compensation fund. Some of the principles could be adopted for the GCCF arrangement. Of course, the ultimate challenge for the designers of the fund and for Mr. Feinberg is how to attract claimants to the GCCF process rather than encouraging them to take their chances outside the fund through representation in court by plaintiffs' lawyers. In an economic sense, claimants should be encouraged to consider seriously whether individual claimants are better off working with Mr. Feinberg or the plaintiffs' lawyers. In other words, claimants should be encouraged to think about which system offers claimants lower agency costs, better services, and better compensation. The utility curve of different classes of claimants will vary and this makes it challenging to define an efficient system.

In the common law system, small claims tend to be overcompensated because defendants (usually insurance companies) have a strong incentive to purge small "nuisance" claims from their books. For these claims to be processed and settled expeditiously by the GCCF would appear to be advantageous to all. This justifies Mr. Feinberg's latest option to claimants that reads as follows:

There is a separate option for those claimants who want to file a Final Claim and who previously received an Emergency Advance Payment. Such claimants may apply for a Quick Payment Final Claim. This is an expedited procedure, which offers a fixed amount of \$5,000 for individuals and \$25,000 for businesses to finally resolve their Final Claims. Under the Quick Payment Final Claim process, you do not have to document your final claim. Do not elect the Quick Payment Final Claim process unless you are willing to accept the fixed payment of \$5,000 for individuals and \$25,000 for businesses and to sign a full release of liability. If you sign a release of liability, you will not be able

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81. The Court's assault on the GCCF may have perverse consequences. It is likely that Mr. Feinberg will now want to show his independent plumage whenever possible to counteract perceptions of being in BP's pocket. This is likely to result in settlements that may in size and generosity disgruntle BP, whose grumbling may undermine the public's perception of the GCCF's independence. The MDL Court has determined that the limitation and liability trials shall commence in February, 2012.



to seek further compensation from the GCCF, the Coast Guard, or in court.<sup>82</sup>

The task in designing an effective system is to give prospective claimants the assurance that their claims will be fairly dealt with by impartial actors and agents. Claimants know that, if they bring their claims in court, they will have the considerable social capital of honest, capable institutions to which they can petition for "justice." But courts are ponderous, and in a large class action claim like in the case of the BP oil spill, the claims will be numerous and varied. The class action mechanism will streamline claims at the cost of uniformity. In this way, the process tracks the GCCF. Furthermore, the courts, to the extent they become managers of the class action litigation, erode the patina of aloofness from the fray that gives assurance to claimants and defendants alike.

To succeed, the GCCF and Mr. Feinberg will have to show to prospective claimants that they are highly trustworthy. They cannot be seen as tools of BP. Trustworthiness is usually guaranteed through liability rules that at their strictest provide that the agent is a fiduciary. Such well-known rules include a prohibition against allowing a fiduciary's duty to the founder of the trust to conflict with his duties to the beneficiaries.<sup>83</sup> The remedy is powerful, providing for disgorgement of any profits garnered even though the beneficiary should suffer no harm. Thus, if Feinberg is conceived of as a fiduciary agent of the prospective claimants, the duty will instill confidence of selfless deciding. (He is entitled to his fee, of course, and this is explicitly disclosed on the trust document at the core of the GCCF. The fee however should not come from BP but rather be payable by the Fund at the behest of the Trustees.)

A major issue for claimants is to have confidence that they will be dealt with fairly and equitably. As presently constituted, especially in relation to the confidentiality of settlements, the fund does not inspire trust. Full disclosure of settlements might discourage and delay the settlement process because claimants might delay hoping for better information on which to press their claims. An ignorance of the identity of claimants will tend to encourage a rush to settle. An independent government auditor may provide the necessary assurance of fair dealing. Government auditing is a

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82. Gulf Coast Claims Facility, Summary of Options for Submission of Final and Interim Payment Claims, [http://www.gulfcoastclaimsfacility.com/summary\\_options.pdf](http://www.gulfcoastclaimsfacility.com/summary_options.pdf) (last visited Oct. 5, 2011) (on file with the Washington and Lee Law Review).

83. For an excellent exposition of this law, see PAUL FINN, FIDUCIARY OBLIGATIONS (1977).

well recognized mechanism for providing direct monitoring arrangements, and this can be accomplished by audits and preestablished performance standard, as well as by "indirect" monitoring mechanisms that create incentives for due performance.<sup>84</sup> The theory was first forcefully articulated by Jensen and Meckling.<sup>85</sup> We have discussed fiduciary obligations but agency costs may also be reduced by pre-commitments to performance, capital contributions that would be forfeited in the case of breach, covenants not to compete, self-imposed ethical standards, and termination clauses.

Tort liability such as bad-faith breach of contract, inducement to breach of contract, and extended tort-like damages for breach of contract<sup>86</sup> are all ways in which relationships of agency may be sustained.<sup>87</sup>

Let us provide an example springing from the tort of inducement to breach of contract.<sup>88</sup> For the London Opera season of 1852, two impresarios, Lumley and Gye, old rivals, vied for supremacy. After much pursuit, Lumley persuaded Wagner, a cantatrice to the King of Prussia and niece of Richard, to sing at his theatre, Her Majesty's Drury Lane in London, during the 1852 opera season. Gye, knowing of the contract, offered Ms. Wagner a better deal at Covent Garden. Note that the contract for personal services entered into by Johanna Wagner could not be specifically enforced for a variety of reasons.<sup>89</sup> However, she could be prevented from supplying her services under the contract with Gye because the contract contained a negative clause that prevented her from singing for

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84. See ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 352 (2007) (detailing the effects government auditing has on monitoring schemes).

85. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305–10 (1976) (describing their definition of the firm and its effect on agency costs).

86. The range of relationships precipitating tort liability for bad faith breach has been debated. Compare *Freeman & Mills, Inc. v. Belcher Oil Co.*, 990 P. 2d 669 (Cal. 1995) (holding that insurance remains the only firm category), with *Farley v. Skinner* [2002] 2 A.C. 732 (H.L.) (giving noneconomic damages for breach of contract for an English travel agency contract). American courts have been slower to countenance non-economic damages in pure breach of contract.

87. See generally Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978). See in this Symposium the analysis of David Campbell, drawing on the relational contract theory. David Campbell, *A Relational Critique of the Third Restatement of Restitution* § 39, 68 WASH & LEE L. REV. 1063 (2011).

88. The facts of the example are taken from *Lumley v. Gye*. See David Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TULANE L. REV. 771, 777–83 (1992) (stating the facts and holding of *Lumley v. Gye*).

89. See *id.* at 777 (describing Wagner's singing contract with Lumley's theater).

anyone else.<sup>90</sup> But more important, the tort of inducement to breach of contract allowed Lumley tort damages for the loss of her services. In the face of the tort, artists in the position of Ms. Wagner will be inveigled away only at a considerable premium. A person wanting to destroy the contract will be sure to take account of his potential liability in tort and will in negotiations pay for immunity from suit. The original relationship will accordingly be protected. The tort also tends to discourage free-riding by persons like rival impresarios. To discover and contract with a fine artist for her talents is a delicate, expensive, and risky venture, as it was for Lumley. If artists can be inveigled away by rivals, the investments in discovery and promotion will be lost. Therefore, the tort encourages investment by overcoming the free-rider problem.<sup>91</sup> The same line of reasoning supports the new Restatement of Restitution provision that provides a remedy for disgorgement for breach of contract.<sup>92</sup> For parties vulnerable to exploitation, the remedy with its teeth gives an assurance against advantage taking as opportunistic behavior in a world of bounded rationality<sup>93</sup> that would otherwise infect relational contracts where one party invests faith in due carriage of the contractual undertakings.

The significant agency cost problem with the GCCF and the MDL is that claimants will have different and perhaps vying interests, as economists say "heterogeneous preferences." Accordingly, the barriers to their collective action will cause them to delegate more discretion to the agent, and it will be more difficult to ensure that the agent does the "right" thing.<sup>94</sup>

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90. See *id.* ("The court, in *Lumley v. Wagner*, granted the injunction on the basis of a negative covenant that had been inserted into the contract during negotiations in Paris.")

91. See *id.* at 820–21 (describing the premium extracted from Sony Corporation when it sought to contract with Peters & Guber, who had a contract with Warner Brothers to produce movies.) Under threat of a tort action, Sony agreed to give over substantial assets to procure the services of Peters & Guber, then renowned for their Batman movie success, after Peters had been Barbra Streisand's hairdresser—it was a poor investment. *Id.*

92. See, e.g., Caprice L. Roberts, *A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945, 978–85 (2008).

93. See OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 47–49 (1985) (describing the remedies for breach of contract that protect helpless parties); Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227, 227–30 (2004) (detailing how the doctrine of impracticability improves the efficiency and productivity of long-term contractual agreements).

94. See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE*, 39–44 (1996) (describing the difficulties class action claimants have in delegating power to agents and supervising the agent's actions); Hideki Kanda, *Debt Holders and Equity Holders*, 21 J. LEG. STUD. 431, 440–41, 444–45 (1992) (examining the fiduciary duties agents have to the claimants and how the beneficiary of the fiduciary principle in corporate law should be residual claimants).

The principals, the claimants, will be unable to directly monitor the agents' behavior, and a bond by way of liability for opportunistic or negligent behavior would benefit principle and agent alike. In the face of coordination costs, regulatory strategies are often invoked. A court or regulatory body has the role of determining compliance. This explains the Federal Courts' function in the class action context in the corporate setting.<sup>95</sup> Armour, Hansmann, and Kraakman suggest the following heuristic:

Strategies for Protecting Principals<sup>96</sup>

	Regulatory Strategies		Governance Strategies		
	<i>Agent Constraints</i>	<i>Affiliation Terms</i>	<i>Appointment Rights</i>	<i>Decision Rights</i>	<i>Agent Incentives</i>
<i>Ex Ante</i>	RULES	ENTRY	SELECTION	INITIATION	TRUSTEESHIP
<i>Ex Post</i>	STANDARDS	EXIT	REMOVAL	VETO	REWARD

Although the heuristic is designed to explain and help the reader understand the geometry of corporate governance and regulation,<sup>97</sup> its structure helps to clarify the relative strengths and weaknesses of the GCCF and class action alternatives. If one takes "agent incentives," the Ex Post reward structure of the BP trust fund (with payment by BP and control by BP over the fate of Mr. Feinberg) is corrosive, but so too is the incentive structure rewarding plaintiffs' lawyers.<sup>98</sup> On the *ex ante* axis it would seem that Mr. Feinberg's firm structure is ideal. His firm has come to specialize in this work and he expends much effort in shoring up its reputation for reliability and faithful dealing; his firm's future depends upon a faithful and competent performance. His future stock in the business of running compensation schemes is enhanced by building on his performance in the past, burnishing his reputation, as well as by his ability to offer legitimate

95. See Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1477-83 (describing the ethics issues faced by class action litigators and how those issues should be addressed by Rule 23 of the Federal Rules of Civil Procedure and Rule 1.7 of the Model Rules of Professional Conduct).

96. John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems, Legal Strategies and Enforcement*, (Oxford Legal Studies, Research Paper No. 21, 2009), <http://ssrn.com/abstract=1436555> (last visited Oct. 5, 2011) (on file with the Washington and Lee Law Review).

97. See *id.* (providing a functional analysis of corporate law in the United States, Europe, and Japan).

98. For a recent trenchant exposition see Erichson & Zipursky, *supra* note 67.

and convincing services in the future.<sup>99</sup> The trusteeship element for attorneys in the class action is supplied by their ethical constraints, court oversight, and reputational jeopardy. This has been seen by commentators as a rather naïve and weak reed. Given the money at stake, and the disparity of power, Congress has moved to strengthen oversight by courts of class action plaintiffs.<sup>100</sup>

Market mechanisms have also been suggested.<sup>101</sup> Rival groups of plaintiffs' lawyers could promise a better performance or a reduced cost. Informational asymmetries plague this approach, however. It may be seen that this equation of the compensation fund is a way of introducing a competitive monitor so that the monopoly rents of the attorneys can be bid down to the benefit of claimants. It is this competition that has inspired at this early date an assault on the GCCF. Another variant is the judicial creation of a temporary administrative agency to monitor more closely, even take an active role, in the settlement of complex class actions.<sup>102</sup>

Modes of enforcement can be critical, and they include public enforcement, private enforcement, and gatekeeper control. Thus, the GCCF could be subject to regulatory agency enforcement of standards, to legal or non-legal private norms, or to actors like auditors retained to check on agents' behavior. In the case of the GCCF, to date at least, media scrutiny flowing from the moment of the event has acted to reduce agency costs.

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99. Feinberg's voluntary services in the 9/11 Fund serves this function.

100. Cf. Moore, *supra* note 95; see also Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard* (NYU Ctr. for Law & Bus., Research Paper No. 03-16, 2003), [http://papers.ssrn.com/abstract\\_id=446942](http://papers.ssrn.com/abstract_id=446942) (last visited Oct. 5, 2011) (suggesting a test whereby discordant interests may be consolidated) (on file with the Washington and Lee Law Review).

101. See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669–75 (1986) (explaining the incentives and organizational problems facing professional plaintiff's attorneys who specialize in class and derivative litigation); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 370–90 (2000) (arguing for the increase of power to class members' voice and exit in class litigation instead of forcing a rigorous definition of class cohesion).

102. See John Goldberg, *Misconduct, Misfortune and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2034–50 (1997) (comparing Judge Jack Weinstein's low damage amounts to tort law and distributive justice); Martha Minow, *The Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2010–25 (1997) (describing Judge Jack Weinstein's activist efforts to include all potentially affected parties in class litigation, calling it the 'temporary administrative agency'); Richard Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 899–930 (1996) (arguing that the rise of massive tort settlements mimics the development of public administrative agencies).

The concern is that this scrutiny may fade over time and is subject to distortion. The public is fickle as new events crowd out the old.

A full discussion of agency cost concerns would be lengthy. It is plain that where large class actions are permitted, the possibility that plaintiff's lawyers may take advantage of the system by reaching settlements that suit their self-interest rather than the interests of their clients is apparent.<sup>103</sup> Given the advantages of class actions, the task is to ameliorate the agency costs. The operation of one mechanism can be seen at work in the BP Spill in the order of the Federal Court for the GCCF to clarify its status. The Court is given the task of monitoring the process to ensure fairness. Other methods can also control costs, including mechanisms designed to create economic incentives by way of auctions for representative services to diffuse monopoly rents and to help ensure that plaintiffs are not disadvantaged by lawyers feathering their own nests.<sup>104</sup>

The concerns of claimants will be difficult to define *ex ante* as they are like long-term contracts where conditions may change. With the obstacles of monitoring for such requirements or standards as "fair-dealing" between claimants, a regulatory solution may make sense. For example, Congress could establish a legislative framework for voluntary compensation schemes by appointing a public auditor, or private auditors publicly appointed and licensed, who are charged with the task of assuring the parties of due compliance. Such a legislative structure would encourage the establishment of compensation schemes.

What of liability rules that will enforce compliance? These would be established *ex ante* to allow *ex post* aggrieved parties to enforce the standards. If the claims administrator owes fiduciary obligations, the duty of loyalty will place claimants' interests above those of the settlor, BP. Moreover, the claims administrator will be prohibited from arbitrarily promoting the interests of some claimants over those of others.

Clear priority rules will encourage claimants to "invest." But the presently fuzzy indicators of the way in which claims will be resolved and paid and the confidentiality cloak on settlements, will cause claimant to shy away. It is here that accountability for allocative decisions will be aided by resort to restitution rights.

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103. See Erickson & Zipursky *supra* note 67, at 266–92 (examining the problems of the Vioxx settlement).

104. Cf. Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 115–40 (2004) (offering a transformation to class action governance by adding stronger disclosure requirements and giving decision-makers more independence).

As suggested earlier, one agency cost mechanism would be for the GCCF to be structured to ensure that Mr. Feinberg would owe clear duties as a fiduciary to those persons who have agreed to a final payment. Fiduciary duties are well defined and will guard against any nondisclosed interest that would clash with his duty to the claimant. Such an arrangement would differ markedly from the present structure of the GCCF, whereby Mr. Feinberg is neither a trustee of the fund nor an agent of the claimants, and, in any event, is personally indemnified by BP by an instrument external to the Trust Agreement. Owing fiduciary duties, Mr. Feinberg would be required to deal fairly and equitably with the claimants, subject to the various strictures of either the law of agency<sup>105</sup> (were the Administrator considered the claimants' agent in their dealings with the fund), or the law of trusts<sup>106</sup> (were the Administrator repurposed as a trustee of the fund). He could not distribute funds except on a rational and reasonable basis pursuant to the duty of loyalty, a requirement that drives toward a clearer articulation of the basis by which payments are to be made. The law of restitution would create a basis for the fiduciary-Administrator's liability to claimants for the benefit of any breach.<sup>107</sup>

In addition to such rights against the Administrator, claimants would have restitution claims where they could claim an equitable right to a payment in priority to other claimants. The Restatement of the Law (Third) of Restitution & Unjust Enrichment Section 48 considers the existence of equitable priorities between independent obligees, where both parties have an independent right to payment from a third-party obligor.<sup>108</sup> Take the example of the Claimants who have received Final Payment and have forfeited their rights to sue at Common Law. Here, the priorities of Claimant *A* and Claimant *B* could be judged inter se, as where Claimant *A*'s underlying entitlement to payment is paramount to that of Claimant *B*'s. Where there is no statute or recognized rule concerning priority of

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105. See RESTATEMENT (THIRD) OF AGENCY §§ 8.01–8.06 (concerning the agent's role as fiduciary, his duty of loyalty, and his duty of performance).

106. See RESTATEMENT (THIRD) OF TRUSTS §§ 76–84 (concerning the specific duties of trusteeship such as duty of prudence, loyalty, and impartiality). The duty imposed by Section 78, for instance—a duty to communicate all material facts to the beneficiaries—would have obviated the Louisiana order requiring more complete disclosure on the part of the GCCF.

107. See *infra* note 110 and accompanying text (discussing Section 43).

108. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 48 cmt. d ("Each of them, rather, has an independent right to a payment that has been received by the defendant from a third-party obligor; yet if the equities of the parties are judged inter se, the right of the claimant is superior to the right of the defendant.").

payments from the GCCF, "the priority of one entitlement over another can only be determined by comparing the individualized equities of the particular claimants."<sup>109</sup> The question then becomes how to rank the competing interests of the claimants: Is the stronger claim to the trust's corpus founded upon the directness of proximate causation? The date of a claimant's application to the trust? The date of the application's perfection with respect to Mr. Feinberg's evidentiary requirements? The size of the claim? The type of damages claimed?

As the structure of the fund now stands, no priorities are established to give rise to equities between GCCF claimants. However, if priorities were established, Claimant *A*—taking funds as a final settlement out of the order stipulation—would be liable to a restitution claim by Claimant *B* who had priority. Say, for example, that the Trustee imposes the requirement for *A*, but does not use it to limit *B*'s recovery. Let us hasten to add that if the Administrator has funds to make all Claimants whole in a final distribution of funds according to the priorities that claims under Section 48, *A*'s claim will be pursued against the trustee rather than through restitution. But such largess will be rare.

If either a restitution or trust matter, the next issue is whether the funds so marshaled have found their way to the hands of the claimants who have less priority or no claim at all. If they have, then the Restatement might allow recovery against either the claims administrator, as fiduciary, or the claimant him/herself. In particular, Section 43 provides as follows:

A person who obtains a benefit:

- (a) in breach of a fiduciary duty,
- (b) in breach of an equivalent duty imposed by a relation of trust and confidence, or
- (c) in consequence of another's breach of such a duty, is liable in restitution to the person to whom the duty is owed.<sup>110</sup>

There are two possible scenarios in which restitutionary claims might arise. The first is the situation in which a claimant has filed a false or fraudulent claim, and the Administrator pays the claim without realizing the fraud. This situation could arise in an array of contexts. For example, suppose that a shrimper claims a dramatic loss in revenue attributable to the

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109. *See id.* cmt. h.

110. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 43. *See also* Campbell, *supra* note 87; Caprice Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH & LEE L. REV. 1027 (2011).



BP Oil Spill. In particular, the shrimper claims that he was not allowed to fish for a considerable period of time, and therefore was unable to support himself or to make a living. In support of his claim, the shrimper submits records to the Trustee showing revenue for the years before the oil spill, as well as records showing the dramatic decline in revenue. As a result, the Administrator compensates the shrimper for the lost income. However, unbeknownst to the Trustee, the shrimper's drop in revenue had nothing to do with the environmental contamination, but rather was due to the fact that his boat had gone beyond its useful life and could no longer be used. In other words, with or without the oil spill, the shrimper would have seen a dramatic drop in revenue because he had no boat and therefore could not engage in shrimping.

Of course, the shrimp example provides only one example of fraud. A fraudulent claim could also be submitted by an oceanfront hotelier that submitted documentation of revenue for the years before the oil spill, and the year after, and claimed that a dramatic drop in revenue was directly attributable to the oil spill (e.g., either the beach in front of the hotel was spoiled by tar, or the public perceived that the beach was spoiled by the tar and went elsewhere). In fact, the hotel was under renovation at the time of the BP oil spill, and had taken a large number of its rooms out of inventory. As a result, the revenue decline was attributable to the renovations rather than to the oil spill. Or suppose that an individual who lives near the Gulf claims that she fishes the Gulf to provide food for her family, and asks for compensation for loss of the subsistence that she and her family had drawn from the Gulf. Because there are no records of this subsistence, the Administrator accepts the individual's affidavit regarding her subsistence practices. In fact, the individual does not do subsistence fishing, and decided to submit a claim only after learning about the fact that some of his neighbors had succeeded in obtaining money from the BP Oil Trust by making subsistence allegations.

Now suppose that a legitimate claimant fairly documents his claims and accepts a Final Payment with a waiver, but comes to regard his payment as insufficient given the payments made to others who submitted fraudulent claims. He submits a request for reconsideration to the Trustee, but the fund is now exhausted. Accordingly, he debates whether to pursue a claim against the fraudulent claimants. How does the legitimate claimant find out about the fraudulent claims? Suppose that the *New York Times* conducts an investigation of the BP Oil Trust and publishes a lengthy expose detailing fraud by individuals like the shrimper, the hotelier, and the private individual who recovered for

subsistence. Some of the payments made to the fraudulent claimants were quite large. The hotelier (who had 200 rooms) might have received compensation in the millions. Other claims (the individual who sought compensation for the loss of subsistence) might have a claim that is much smaller. Nevertheless, based on the *New York Times* article, the claimant has reason to believe that lots of fraudulent subsistence claims were submitted, and that the total payout for these claims was quite large.

Section 43 would seem to permit the disappointed claimant to recover against both the Administrator (for breach of fiduciary duty) and against those who made the fraudulent claims. If the Administrator was not diligent in ensuring that claims were not fraudulently submitted, there may well be a breach of his quasi-fiduciary obligations. The Administrator would be required to disgorge his benefit in the entire transaction as a strong deterrent; indeed, Section 43 seems to suggest that such recovery might be appropriate.

Another scenario in which recovery might be allowed is if the Administrator errs in evaluating the relative claims, in determining whether causation really exists, and in assessing priorities between claimants. Let us assume that the Administrator, in a well-drawn scheme where priorities in payment of economic losses are patent, decides to provide recovery for mere economic loss. In that situation, it might be quite clear that one applicant's claim on the BP Trust is quite strong and deserves to be paid. For example, there was a period of time when fishing vessels were not allowed to fish in the Gulf for fear that their catch would be contaminated. Suppose, for example, that fishing boats are unemployed because the oil spill contaminated the waters and potentially contaminated their catch. As a result, a number of individuals and companies were thrown out of work. Their claims to compensation might be quite strong under traditional recovery principles.

The claims of a hotelier in Florida, who alleges that the oil spill discouraged potential customers from staying at his resort, may be considerably more speculative, and less justifiable. Indeed, there may be other possible explanations for a decline in the Florida hotelier's occupancy rate, including a significant decline in economic activity. So, if the Administrator fails to sufficiently distinguish between claimants, and the trust fund is unable to pay all deserving claims, more deserving claimants may claim that the Trustee breached his fiduciary obligations by failing to be sufficiently careful in the payment of claims.

Of course, the amount of the recovery against either the Administrator or against other claimants will depend upon circumstances. The Restatement

distinguishes between claimants based on their blameworthiness. Section 43, Comment h provides:

Disgorgement liability by the rule of § 43 is not restricted to conscious wrongdoers. In contrast to the property-based rules of §§ 40–42, the prophylactic aims of fiduciary duty require a fiduciary to disgorge profits (including consequential gains) even if the breach of duty is inadvertent. . . . The same liability is imposed on a third party who acquires a benefit with notice of the fiduciary's breach of duty. . . . By contrast, an innocent third party who obtains property as a result of another's breach of trust is liable to make restitution of what has been received but not for consequential gains.<sup>111</sup>

Based on this language, those who submitted fraudulent claims to the Trustee could be required to disgorge because they accepted monies "with notice of the fiduciary's breach of duty."<sup>112</sup> Even those who were unaware of the wrong (e.g., those who recover because the Trustee failed to sufficiently distinguish between claimants) might be required to disgorge, but they would only be responsible for "what has been received but not for consequential gains."<sup>113</sup>

Of course, even if recovery is allowed, courts may face difficult issues in determining the amount that a particular claimant should receive, and there may not be clear answers about how the court should dole out any monies that are recovered. If the overall trust fund proves inadequate to satisfy all legitimate claims, a given legitimate claimant may be simply one of many similarly situated legitimate individuals, and it is unclear that the plaintiff in a restitution action should receive full recovery while others (who did not) receive no extra funds. The BP Oil Trust is a \$20 billion trust fund, and we are told that the funds are more than adequate. But this will not always be the case with all compensation schemes. Suppose that, of those directly affected by a disaster, there are total legitimate claims of \$25 billion. Is it really fair to allow the plaintiff (as one member of the class) to receive full recovery while others (also members of the same class) receive only a partial recovery?

It may be said that any dissatisfied claimant can simply go to her rights at common law. This is passing strange, however, should the fund advertise itself as a superior compensation vehicle. And it follows from our

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111. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 43 cmt. h. See generally Alan Berg, *Accessory Liability for Procuring or Assisting a Breach of Trust*, 111 LAW Q. REV. 545 (1995).

112. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 43 cmt. h.

113. *Id.*

argument that the fund must be viewed by a significant class of claimants as superior if it is to succeed in its underlying objective.

### *VI. Conclusion*

Although restitution rules are most often seen as a private law mechanism for achieving corrective or commutative justice,<sup>114</sup> we have shown that they play an indispensable role in the design of an effective compensation scheme. Along with reassurances of reputation and other social and market norms, liability rules, as outlined, with restitutionary remedies, make up the substance of a well-designed scheme. It is this instrumental role that we highlight here, and that role is not akin to restitution's private role and function elsewhere.<sup>115</sup>

We hope that the missteps in the BP Oil and GCCF scheme—especially the problem of failing to clarify the trustee's relative obligations and responsibilities—will encourage those who set up future compensation schemes to opt for templates that are more responsive to agency costs. The Restatement provisions, because of their careful articulation of trust and restitutionary rules, provide salutary guidance in a field that has seemed far from the usual concerns of fiduciary duties, mistake, and fraud. Their prophylactic role should not be forgotten.

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114. See JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT, THE PRINCIPLE AGAINST UNJUSTIFIED ENRICHMENT* 419–44 (2006) (describing how restitution and unjust enrichment principles are used to make the person whole again).

115. Indeed, as Professor Andrew Kull reminded us in his remarks recalling Professor Weinrib's observation, "restitution is the private parts of private law."

