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Unconventional Responses to Unique Catastrophes

Kenneth R. Feinberg

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UNCONVENTIONAL RESPONSES TO UNIQUE CATASTROPHES

*Kenneth R. Feinberg**

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I. INTRODUCTION

Mass disasters sometimes require creative remedies. The tort system may not provide the best means of compensation in unusual situations like the Agent Orange chemical exposure litigation,¹ the Virginia Tech shootings,² the attacks of September 11th (“9/11”),³ and the BP oil spill.⁴ Executive compensation after the financial meltdown

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1. Vietnam veterans brought suits against manufacturers that supplied Agent Orange, an herbicide used by the United States military to reduce foliage to locate enemies, alleging it contained toxins causing them to suffer disease. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff’d*, 818 F.2d 145 (2d Cir. 1987) (upholding class action settlement). I served as the special master assisting Judge Jack Weinstein in the litigation and in administering the fund resulting from the class action settlement. See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 144-45 (1986).

2. On April 16, 2007, an on-campus shooting at Virginia Tech took the lives of 32 students and faculty, and injured several others. The Virginia Tech Administration created “The Hokie Spirit Memorial Fund” from unsolicited private donations. For more information, see Kenneth R. Feinberg, *Compensating the Victims of Catastrophe: The Virginia Tech Victims Assistance Program*, 39 VA. L. REV. IN BRIEF 181 (2007); Virginia Tech Victim Assistance Program Final Protocol (Aug. 15, 2007), available at <http://www.virginialawreview.org/inbrief/2007/08/27/protocol.pdf> (last accessed Mar. 26, 2012).

3. See KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005).

4. In what is considered the largest oil spill in history, an offshore drilling rig operated by British Petroleum (BP) exploded off the coast of Louisiana on April 20, 2010. Shannon L. Sole, *BP Compensation Fund: A Buoy for Both Claimants and BP*, 37 J. CORP. L. 245, 247 (2011). I was

may also require new, innovative approaches.⁵ From my work mediating and administering these cases over the last twenty-five years, I have concluded that such alternative compensation systems are—and should be—rare.

II. THE IMPETUS FOR CREATING AN EXCEPTION

Creative alternatives to the tort system are the exception. The adversarial tort system, although not perfect, works pretty well. It is a part of our historical heritage and engrained into the fabric of this country.⁶ It is thus highly unlikely that Congress or state legislatures will set aside two hundred years of history to make massive changes to the judicial system.

However, every once and a while, there is a very visible mass disaster in the United States that galvanizes the public and elected officials, and triggers a different approach to resolving the remedial claims. This has occurred only a handful of times in the last thirty years with disasters such as 9/11 and BP.⁷ When these types of unprecedented disasters have occurred, public officials have occasionally adopted out-of-the-box approaches to compensating the victims. But these alternative remedies require political consensus in order to avoid criticism and ensure the effectiveness of the attempted solution.

appointed to administer the claims fund established by the Obama administration and BP to compensate for losses arising from the spill. For more information, see the claims report at *Gulf Claims Facility Protocol for Interim and Final Claims*, Nov. 20, 2010, available at <http://documents.nytimes.com/documents-determining-oil-spill-payoffs#document/p1> (last accessed Mar. 26, 2012).

5. The Secretary of the Treasury designated me as special master, or “pay czar,” to make compensation determinations involving officials in companies receiving financial help from the taxpayers under the Troubled Asset Relief Program (TARP). Kenneth R. Feinberg, *Symposium on Executive Compensation Keynote Address*, 64 VAND. L. REV. 349, 350 (2011). See also Executive Compensation and Corporate Governance, 12 U.S.C. § 5221 (2010).

6. See Robert S. Thompson, *Decision, Disciplined Inferences, and the Adversary Process*, 13 CARDOZO. L. REV. 725, 726 (1991) (stating how the adversary process is an integral part of the American legal system). See also Kenneth Feinberg, *The September 11th Victim Compensation Fund of 2012: Policy and Precedent*, 56 N.Y.L. SCH. L. REV. 1115, 1117 (2011-2012).

7. A private, not public, response may also occur following such examples of mass tragedy. The best example is Hurricane Katrina. Katrina in 2005 was a powerful storm that destroyed much of New Orleans and the coastal regions of Alabama, Louisiana, and Mississippi. Nearly 2,000 people lost their lives and over 200,000 homes were destroyed. Joseph B. Treaster and Katie Zernike, *Hurricane Katrina Slams into Gulf Coast; Dozens are Dead*, N.Y. TIMES, Aug. 30, 2005, http://www.nytimes.com/2005/08/30/national/30storm.html?_r=1&ref=hurricanekatrina; Justice Greg G. Guidry, *The Louisiana Judiciary: In the Wake of Destruction*, 70 LA. L. REV. 1145, 1145-46, 1152 (2010). Private insurers—not the government—established a private claims program to compensate insureds.

The legal and financial genesis for these alternative remedies has come from both public and private sources. With 9/11, Congress initiated the option by passing a law, signed by President George W. Bush, giving victims a statutory alternative to the tort system.⁸ The BP oil spill required only a handshake between the chief executive officer of BP and President Barack Obama.⁹ With this handshake, BP agreed as a private contracting party to an escrow agreement with the Department of Justice to provide \$20 billion to compensate for the harm from the oil spill in the Gulf of Mexico.¹⁰ BP did not worry about contributions from its oil rig partners, TransOcean, Halliburton, and Anadarko. It simply reacted to a problem of immense proportion.

III. DESIGNING AND ADMINISTERING A SYSTEM

Once the political consensus justifies an alternative compensation system, the question arises as to how this system is to be administered. With 9/11, Congress passed a law authorizing the Attorney General of the United States to appoint a person, not a committee, to design, implement, and administer the remedy.¹¹ No additional confirmation of the appointment was required,¹² and appeals to the courts of the decisions were prohibited by statute.¹³ There were many unanswered questions: how much would it cost, how much value should be given to a life, how many people were physically injured, and what were the causal connections between the terrorist attack and the victims? The answers were unclear, but Congress needed to act fast. With only a day of debate, Congress passed the statutory alternative system.¹⁴ It

8. Air Transportation Safety and System Stabilization Act, tit. IV, Pub. L. No. 107-42, 115 Stat. 230, 237 (Sept. 22, 2001) (codified as amended at 49 U.S.C. § 40101 (2002)).

9. Neil King Jr., *Feinberg Ramps Up \$20 Billion Compensation Fund*, WALL ST. J., June 10, 2010, at A6 (noting that the fund “has a number of oddities. It was created as a voluntary compact between the U.S. government and BP, but without any act of Congress, executive order or other legal anchor.”)

10. See David F. Partlett & Russell L. Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 62 WASH. & LEE L. REV. 1341, 1349 (2011); Jackie Calmes, *For Gulf Victims, Mediator With Deep Pockets and Broad Power*, N.Y. TIMES, June 22, 2010, <http://www.nytimes.com/2010/06/23/us/23feinberg.html?pagewanted=all>.

11. Air Transportation Safety and System Stabilization Act § 404(a)(1), (2). See also Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, http://www.usdoj.gov/final_report.pdf.

12. Robert M. Ackerman, *The September 11 Victim Compensation Fund: An Effective Administrative Response to a National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 175 (2005).

13. Air Transportation Safety and System Stabilization Act § 405(b)(3) (“Such a determination [of the Special Master] shall be final and not subject to judicial review”).

14. *Id.*; see WHAT IS LIFE WORTH?, *supra* note 3, at 20.

provided no funding for the program, instead relying on money from petty cash in the U.S. Treasury to pay the claims.

In BP, there was not even a congressional imprimatur. A simple agreement between the President and BP resulted in a \$20 billion fund, the Gulf Coast Claims Facility (“GCCF”), with an understanding that it would be designed and administered by one independent person. There was concern about whether giving one person this type of authority was good government or wise precedent, but the disaster called for some type of immediate response.

Once established, there were additional concerns with the GCCF about establishing eligibility and causation criteria for individual claims. Despite an expert report by Harvard professor John Goldberg explaining the importance of proximate cause in assessing the extent of BP’s legal liability for economic damages,¹⁵ claimants focused only on but-for causation. And it was a huge problem attempting to define eligibility and decide who is permitted, in a rather unique elite system, to bypass the courts and receive a check.¹⁶

In 9/11, eligibility determinations were somewhat easier. Proof of death was readily available. There were New York City Police Department Certificates of Death, airline manifests, and Pentagon military records. However, it was not so easy to establish criteria for physical injury claims. What constitutes, under the statute, physical injury in the “immediate” vicinity of the World Trade Center and the Pentagon?¹⁷ The criteria for eligibility are difficult to define when there is the potential of millions of people claiming injury due to the terrorists’ attacks. For example, should a person who fell off a ladder in his kitchen and broke his leg when he heard the news of the attacks be eligible for compensation? (The answer was “no.”)

In BP, eligibility determinations were complicated by the volume of claims. In the first eighteen months of the program, there were over one million claims from fifty states and thirty-eight foreign countries. Alternative compensation programs make it easy for people to file claims, and tend to attract more claimants than might be seen in court.

15. See John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Oil Spill* (Nov. 22, 2010), <http://dash.harvard.edu/handle/1/4595438>, reprinted in 30 MISS. C. L. REV. 335 (2011) (appendix).

16. Eligible individuals under the 9/11 compensation act included a person who was present at the World Trade Center, the Pentagon, or the Shanksville, Pennsylvania crash site at the time or in the immediate aftermath of the terrorist-related aircraft crashes and who “suffered physical harm or death as a result of such an air crash or debris removal.” Air Transportation Safety and System Stabilization Act §§ 402(14)(a), 405(c)(2)(A)(ii).

17. *Id.*

But they raise more questions of eligibility related to cases of “indirect” injury. For example, should a restaurant in Boston that advertises “the best shrimp scampi in town” receive compensation because it can no longer get shrimp from the Gulf and lost twelve percent of its clientele? (The answer again was “no.”) Issues of lack of proof also impact eligibility determinations. This was a serious problem, particularly in the Gulf of Mexico where you have an underground economy. A fisherman losing money because he can no longer fish in the Gulf offers only proof of his license, which fails to establish economic harm from the spill.

Another issue of administration is determining the methodology to be used to calculate damages.¹⁸ One possibility is to adopt a torts-like system and make damages the sum of economic loss and non-economic loss.¹⁹ This is a time-honored methodology—if it is feasible. However, offering a traditional tort calculation for damages when setting up a program such as BP or 9/11 means each individual receives a different amount of money, posing serious political problems. The wife of a fireman killed at the World Trade Center did not understand why she was awarded a million dollars less than the widow of the banker working for Enron in the World Trade Center. Waiters in the same restaurant who earn the same wages may not understand why they received unequal compensation, even if the difference is a result of reporting different amounts on their income taxes. These issues of comparative equity are prevalent in many alternative compensation systems. While there may be a tort gloss to these alternative remedies, the concerns over equity show the extent to which these remedies lie outside of the traditional system.

Other external problems threaten to undercut purely private compensation systems like BP’s. The 1,200,000 private claims that arose out of the BP oil spill were unlike anything ever before seen.²⁰ The sheer magnitude of the claims overwhelmed the system and changed the dynamic of the program. Merely adding more resources is not enough. When you have over a million claims you are not able to afford

18. One other issue of measuring damages is factoring in collateral offsets—those benefits received by victims from collateral sources such as insurance.

19. See Harry Zavos, *Monetary Damages for Nonmonetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Noneconomic Damages*, 43 LOY. LA. L. REV. 193 (2009); Ralph Anzivino, *The Economic Loss Doctrine: Distinguishing Economic Loss from Noneconomic Loss*, 91 MARQ. L. REV. 1081 (2008).

20. OVERALL PROGRAM STATISTICS, GULF COAST CLAIMS FACILITY (Mar. 23, 2012), http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf (last visited Mar. 25, 2012).

everyone a hearing and the system becomes mostly ministerial. In contrast, for the 9/11 attacks, everyone had the option of a hearing. Individuals reacted differently to the tragedy. Half of the people were not interested in a hearing; the remaining half wanted a hearing and an opportunity to vent about life's unfairness. The other half just wanted to receive their check without a hearing and try and move on. But the hearings were instrumental in promoting the success and credibility of the 9/11 program—a supporting factor not present with BP.²¹

IV. ALTERNATIVE REMEDIES SYSTEMS AS PRECEDENT

It is important to keep in mind that these alternative programs are aberrations, not precedent. They are exceedingly rare and not very often considered. In a torts or remedies course, it is better advised to have a real discussion about the future, if any, of class actions than to focus on the 9/11 and BP oil spill funds.

And these types of alternative remedies systems *should* remain exceedingly rare. This is not just based on my belief that the torts system works pretty well. Even if the tort system worked terribly, there is still a political philosophy dilemma with these programs: Why should just these people get the benefit of these programs? Bad things happen to good people every day in this country. There was no special government program similar to 9/11 or BP set up for Hurricane Katrina; the Joplin, Missouri and Tuscaloosa, Alabama tornadoes; the Oklahoma City terrorist attacks; or the first World Trade Center terrorist attack in 1993.²² In American society, we need to use care when setting up very special lucrative programs for some people but not for others. These special programs do not sit well with Congress or the American people and, frankly, it is not a very good idea. This problem was seen in the “pay czar” executive compensation program. The government called for the Treasury to fix the problem of exorbitant executive pay in the

21. FEINBERG, *supra* note 3; see also Robert L. Rabin, *September 11 Through the Prism of Victim Compensation*, 106 COLUM. L. REV. 464, 477-79 (2006).

22. On February 26, 1993, a bomb exploded in the public parking garage located beneath the concourse between the two World Trade Center buildings. Six people were killed and many others injured. See Judith Miller & Don Van Natta Jr., *Traces of Terror: The Intelligence Reports; In Years of Plots and Clues, Scope of Al Qaeda Eluded U.S.*, N.Y. TIMES, June 9, 2002, <http://www.nytimes.com/2002/06/09/us/traces-terror-intelligence-reports-years-plots-clues-scope-qaeda-eluded-us.html?scp=2&sq=1993%20world%20trade%20center%20al%20qaeda&st=cse>; *In re World Trade Center Bombing Litig.*, 776 N.Y.S.2d 713 (2004).

aftermath of the financial meltdown, but it did so only for seven companies, and only for 175 people.²³

On the other hand, what makes these programs so attractive is the legal trend away from class action aggregative resolution and the need to fill the gap with some other form of resolution.²⁴ As courts decide cases like *Walmart Stores, Inc. v. Dukes* limiting class actions²⁵ and reject class action settlements like Judge Weinstein's in the Agent Orange cases,²⁶ the more likely there will be a push for something creative to fill that void. The question is whether this gap can be satisfied by alternative public and private compensation systems? If you want to think creatively about how to deal more effectively with mass tragedies, it is better to think within the traditional system of class actions, consolidations, and multi-district litigation.

BP is a good example of why these programs are mere aberrations in the judicial system. Another BP type agreement is unlikely. Experts cannot recall the last time that a company advanced \$20 billion four weeks after a disaster. Rather than offering billions to set up a program after a disaster, companies are more inclined to litigate. This is true even though there are cases like the Exxon Valdez oil spill that have resulted in 22 years of litigation and billions of dollars in damages and environmental clean-up costs.²⁷ Despite this extreme possibility, it is

23. See Feinberg, *supra* note 5, at 350. See also Executive Compensation and Corporate Governance, 12 U.S.C.A. § 5221 (2010).

24. See Kenneth R. Feinberg, *How Can ADR Alleviate Long-Standing Social Problems?*, 34 *FORDHAM URB. L.J.* 785, 789 (2007); Myriam E. Gilles & Gary B. Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 *U. CHI. L. REV.* ____ (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928071.

25. *Walmart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) (invalidating certification of class of all female employees in Title VII sex discrimination class action for failure to satisfy the commonality requirement from lack of sufficient evidence of a common policy of gender discrimination in promotions and hiring). See, e.g., *Jamie S. v. Milwaukee Public Schs.*, 668 F.3d 481, 486 (7th Cir. 2012) (stating that similar to in *Walmart*, these claims are "highly individualized and vastly diverse," making the class not suitable for a class action); *Bennett v. Nucor Corp.*, 656 F.3d 802, 814-16 (8th Cir. 2011) (holding that the commonality requirement articulated in *Walmart* was not met here because there was variation in the policies among departments and objective, not subjective, promotion criteria). See also Judith Resnick, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 *HARV. L. REV.* 78 (2011); Erin Chemerinsky, *New Limits on Class Actions*, 47 *TRIAL* 56 (2011).

26. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (successfully challenging the class action settlement in the Agent Orange case because of the failure to provide future claimants with adequate legal representation), *aff'd in relevant part*, 539 U.S. 111 (2003).

27. On March 24, 1989, the Exxon Valdez oil tanker ran aground on Bligh Reef in Prince William Sound, Alaska. In the days following, the tanker discharged 11 million gallons of oil. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), *remanded to Exxon Valdez v. Exxon Mobile*, 568 F.3d 1077 (9th Cir. 2009); Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of*

doubtful that any companies are going to deviate from the usual litigation approach and pay upfront like BP.

BP, though, is pleased with its decision to pursue an alternative compensation program. In just 18 months, the program secured over 200,000 fully executed releases against BP and any other defendants.²⁸ BP will worry later about seeking contribution from any jointly responsible parties. BP, however, may regret agreeing upfront to a liquidated amount of \$20 billion. The minute BP announced the program, claims were filed from dentists, chiropractors, veterinarians—every conceivable claim. Most of these were rejected as part of the total number of around 600,000 claims denied. But the very existence of a large sum of money invited claims from all fronts.

V. CONCLUSION

In summary, sometimes mass disasters lead to creative alternatives rather than conventional tort solutions. However, these alternatives raise several issues. There are procedural issues, such as finding legal justification for the implementation of the program and determining the appropriate way to administer the program. Substantively, creating these programs requires answering several difficult questions pertaining to eligibility and the methodology of calculating payments. Further, there are also external issues to consider, such as political consensus and the volume of claims.

Fortunately, these 9/11 and BP solutions are aberrations. Because of the issues involved, they should remain that way.

Civil Liability, 86 WASH. L. REV. 1, 2-4 (2011); Partlett & Weaver, *supra* note 10, at 1348; Ilisja Moreland, *From the Exxon Valdez to the Deep Water Horizon: Will BP's Dollar Reach Where the Oil Didn't?*, 14 SUSTAINABLE DEV. L.J.117 (2011).

28. OVERALL PROGRAM STATISTICS, *supra* note 20.