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THE DEEPWATER HORIZON OIL SPILL TRUST AND THE GULF COAST CLAIMS FACILITY: THE “SUPERFUND” MYTH AND THE LAW OF UNINTENDED CONSEQUENCES

ALFRED R. LIGHT*

I. INTRODUCTION

Two months after the April 2010 Deepwater Horizon explosion, BP and the Obama White House announced the creation of the \$20 billion Deepwater Horizon Oil Spill Trust (“the Trust”) to pay individuals and businesses suffering losses arising from the disaster.¹ Although BP initially paid certain claimants, Kenneth R. Feinberg, a Washington lawyer who previously administered the 9/11 Compensation Fund, opened the Gulf Coast Claims Facility (“the Facility” or GCCF) in August to “independently” resolve disaster claims against BP.² As publicly advertised, the Facility and the \$20 billion Trust, to which it has

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¹ Jesse Lee, *A New Process and a New Escrow Account for Gulf Coast Claims from BP*, THE WHITE HOUSE BLOG, (June 17, 2010, 2:35 PM EDT), www.whitehouse.gov/blog/2010/06/17/a-new-process-and-a-new-escrow-account-gulf-oil-spill-claims-bp; see also Alfred R. Light, *Designing the Gulf Coast Claims Facility in the Shadow of the Law: A Template from the Superfund §301(e) Report*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11,121 (2010).

² The evolution of this facility and its first months of operations are described in some detail in Light, *supra* note 1, at 11,121-23.

access to pay claims, are designed to address claims by individuals and businesses but do not cover governmental claims for cleanup costs, lost revenues, or natural resource damages.³

The Superfund “myth” is that a trust fund would compensate victims expeditiously and avoid (or at least defer) litigation over the liability of potentially responsible parties.⁴ The myth of the GCCF created last year is the same – those injured by the Deepwater Horizon disaster will be compensated expeditiously without the delays and costs associated with litigation.⁵ This Article explores some of the issues present in the GCCF context that are analogous to those that appeared during the formative years of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA’s unfortunate realities need not be the GCCF’s realities, at least not entirely. CERCLA is a law of unintended consequences, where the quest for quick compensation and remedial response (“shovels first, lawsuits later”⁶) became a ponderous litigation-oriented regime with high transaction costs. This Article identifies potential unintended and undesired consequences for the GCCF by exploring the surrounding myths, with the hope that by doing so, some of those consequences experienced under CERCLA may be avoided.

Part II explores the myth of the Superfund, examining the similarities between CERCLA and the Oil Pollution Act of 1990 (OPA), which is directly implicated in the Deepwater Horizon Disaster. Part III compares and contrasts the Deepwater Horizon Oil Spill Trust Agreement, which establishes the \$20 billion Trust with BP money and authorizes expenditures related to the incident, with the protocols now governing the Gulf Coast Claims Facility administered by Feinberg. Part

³ See GULF COAST CLAIMS FACILITY, www.gulfcoastclaimsfacility.com/proto_4.php (last visited July 5, 2011) (indicating the claims not covered by the facility include government claims, real estate broker/agent claims, and the Gulf Coast Restoration and Protection Foundation (e.g., Rig Worker Assistance Fund)).

⁴ See generally 42 U.S.C.A. § 9601 et seq. (Westlaw 2011). “Superfund” refers to the fund created by Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to address abandoned hazardous waste sites. *Id.* at § 9601(11).

⁵ Early on, Feinberg elaborated his philosophy in a speech to the Economic Club of Washington: “Under this program, you will receive, if you’re eligible, compensation without having to go to court for years, without the uncertainty of going to court, since I’ll be much more generous than any court will be. At the same time, you won’t have to pay lawyers and costs.” See John Pacenti, *Plaintiffs Attorneys Knock BP Fund Administrator*, DAILY BUS. REV. (July 26, 2010), available at www.law.com/jsp/article.jsp?id=1202463865302&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW_20100726&kw=Plaintiffs%20Attorneys%20Knock%20BP%20Fund%20Administrator.

⁶ See DANIEL MAZMANIAN & DAVID MORELL, BEYOND SUPERFAILURE: AMERICA’S TOXIC POLICY FOR THE 1990’S 29 (1992) (quoting Ann Bowman).

IV compares aspects of CERCLA's and OPA's liability regimes, focusing on affirmative and partial defenses, the role of causation (especially proximate cause), the equitable allocation of responsibility among liable parties, and the related issue of the effect of partial settlements. Part V hones in on the ultimate critical issue – the competition among various categories of claimants, including the federal government, states, local governments, private businesses, and individuals, for BP's money. Finally, Part VI shows how the GCCF has evolved while unintended consequences of the Facility's original design have surfaced and continue to exist.

II. THE “MYTH” OF SUPERFUND

“Myth” has two definitions. It can refer to “a belief, opinion, or theory that is not based on fact or reality,” so that “to mythologize” can mean to invent or to make up stories that are false.⁷ In this sense, to mythologize may appear to refer to deception. On the other hand, a “myth” can be “a legend or story, usually one that attempts to account for something in nature.”⁸ Most myths express a religious belief of a people and are of unknown origin. Here, to mythologize can be a genuine attempt to explain. To “mythologize” may be to “construct” a myth or to “relate and explain” the myth from a critical perspective.⁹

CERCLA's “myth” lies somewhere between these two definitions. After the Love Canal disaster in the 1970's, the “lame duck” compromise that created CERCLA deleted the toxic-tort cause of action for private entities in the Senate Bill and focused the “compromise” scheme on cleanup and natural resource damages.¹⁰ The bill created the so-called Section 301(e) Study Group (“Group”) to develop recommendations for Congress regarding a private cause of action.¹¹ That Group ended up recommending against extending Superfund to cover private damage claims or creating a new private federal cause of action for damages. Instead, it recommended a federal administrative compensation scheme for those claims, coupled with state reforms of toxic-tort law.¹² CERCLA's procedure to allow claims against the Superfund largely has been unimplemented with respect to cleanup costs and unavailable with

⁷ 24 WORLD BOOK DICTIONARY 1377 (1990).

⁸ *Id.*

⁹ *Id.*

¹⁰ See ALFRED R. LIGHT, CERCLA LAW & PROCEDURE 12-18 (1991).

¹¹ 42 U.S.C.A. § 9651(e) (Westlaw 2011).

¹² See Alfred R. Light, *A Comparison of the 301(e) Report and Pending Legislative Proposals*, 14 ENVTL. L. REP. NEWS & ANALYSIS 10,133 (1984).

respect to private damage claims.

GCCF's "myth" parallels that of CERCLA. Following the Exxon Valdez disaster in the 1980's, the OPA amended the Clean Water Act to expand the trust fund not only to cover cleanup costs and damages to natural resources, but also to pay claims for damages to private parties that were unsuccessful in settling with liable actors.¹³ OPA is different from CERCLA, though, in that it permits recovery from either the responsible party or the fund for damages to real or personal property, subsistence use of natural resources, lost profits and earning capacity, and public services up to a legislative cap of \$75 million (except where an incident was proximately caused by gross negligence or willful misconduct, or by a violation of federal law).¹⁴ Like CERCLA, however, OPA excludes claims for personal injury from its recovery regime.¹⁵

Both regimes are, in part, false promises. Both systems purport to establish a regime in which private claims may be paid by a federal fund. Section 112 of CERCLA authorizes the Hazardous Substances Superfund to pay private claims submitted for natural resource damages and cleanup costs that are consistent with the national contingency plan.¹⁶ The claimant must present a claim to the potentially responsible party sixty days before making a claim against the Superfund.¹⁷ In effect, this provision has never been implemented. Although the Environmental Protection Agency has at various times over the past thirty years stated that the claims procedure might be used in connection with "mixed fund" settlements, this has never been a significant feature of the Superfund.¹⁸ Both the Hazardous Substances Superfund and the Oil Spill Liability Trust Fund have been used almost exclusively to pay for cleanup costs rather than damages.

Even without this dysfunction, payments from OPA's Oil Spill Liability Trust Fund would likely be an unrealistic remedy for those injured by the Deepwater Horizon disaster. Claims submitted to the fund had to be presented to the responsible party at least ninety days before

¹³ 33 U.S.C.A. §§ 2701-2762 (Westlaw 2011).

¹⁴ 33 U.S.C.A. § 2702(b) (Westlaw 2011).

¹⁵ See generally 33 U.S.C.A. § 2703 (Westlaw 2011); 42 U.S.C.A. § 9607 (Westlaw 2011).

¹⁶ 42 U.S.C.A. § 9612 (Westlaw 2011).

¹⁷ 42 U.S.C.A. § 9612(a) (Westlaw 2011).

¹⁸ 42 U.S.C.A. § 9622(b) (Westlaw 2011); Memorandum from J. Winston Porter, Assistant Admin., Office of Solid Waste & Emergency Response, & Thomas L. Adams, Jr., Assistant Admin., Office of Enforcement & Compliance Monitoring, to Regional Administrators, Regions I-X, on Evaluating Mixed Funding Settlements Under CERCLA (Oct. 20, 1987), available at www.epa.gov/compliance/resources/policies/cleanup/superfund/mixfnd-cercla-mem.pdf.

submission to the fund.¹⁹ But Deepwater Horizon immediately disrupted the livelihoods of fishermen, shrimpers, and Gulf-dependent businesses enough that their subsistence could have been grievously harmed within the mandatory ninety-day window for the responsible party's "consideration" of claims. Given the massive scale of the disaster, it was obvious that damages would rapidly exceed the \$75 million cap on liability.²⁰

III. DEEPWATER HORIZON OIL SPILL TRUST VS. GULF COAST CLAIMS FACILITY

A careful reading of the Deepwater Horizon Oil Spill Trust agreement between BP and the trustees reveals a disparity between the scope of the Facility and the Trust. While the agreement plainly excludes the federal government's claims for response costs from payments out of the Trust, it just as plainly *includes* authority for the Trustees to pay amounts settled by BP outside the GCCF, natural resource damages claims (including assessment costs), and state and local government response costs.²¹

Natural resource damages claims, while uncertain, will probably be enormous.²² Since all state and local government claims are eligible for payment from the Trust, some states fear that any restrictions included in the GCCF for payment of individual and business claims might be applied to them as well.²³ The scope of the Trust Agreement also

¹⁹ 33 U.S.C.A. § 2713(c) (Westlaw 2011).

²⁰ See 33 U.S.C.A. § 2704(a)(3) (Westlaw 2011). BP Exploration and Production advised Judge Carl Barbier that when handling the consolidated multidistrict litigation over the Deepwater Horizon spill that it is "waiving" the \$75 million statutory limit on liability under the Oil Pollution Act of 1990 for damage claims from the spill. *BP Waives \$75 Million Limit on Liability for Damage Claims from Gulf Oil Spill*, 25 TOXICS L. REP. (BNA) 1096 (2010). Transocean, however, has said its liability is limited under the Limitation of Liability Act of 1851. *Id.* On November 12, 2010, GAO released a report on the Gulf oil spill that said Congress should change the \$1 billion per-incident cap on spending from the Oil Spill Liability Trust Fund for a single spill. *GAO Calls on Congress to Revise \$1 Billion Cap on Oil Spill Trust Fund*, 218 DAILY ENV'T REP. (BNA) A-10 (Nov. 15, 2010).

²¹ Deepwater Horizon Oil Spill Trust 1 (Aug. 6, 2010) (on file with author).

²² See e.g., *Gulf Damages Assessment in Early Stages: Officials Say Full Accounting Years Away*, 142 DAILY REP. FOR EXECES. (BNA) A-36 (July 28, 2010) (reporting natural resources trustee testimony before Senate subcommittee on July 27); see generally Michael P. Coglianese, *The Importance of Determining Chronic Natural Resource Damages from the Deepwater Horizon Disaster*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11,100 (2010).

²³ See Letter from Robert A. Butterworth, Jim Smith, Eugene E. Sterns, and Daniel J. Gerber, Florida Deepwater Horizon Legal Group, to Hon. Charlie Crist and Attorney General McCollum 8 (July 19, 2010), quoted in Alfred R. Light, *Protocols for the Gulf Coast Claims Facility: An Etiquette of Equivocation*, 25 TOXICS L. REP. (BNA) 985, 988-89 (Sept. 23, 2010).

explains equivocation in early draft protocols for the Facility about whether the GCCF is the only way to present a claim to BP for payment before proceeding with legal remedies under the OPA.²⁴ The Trust Agreement clearly authorizes payments from the Trust where BP has settled claims outside the GCCF that “relate to the Oil Spill.”²⁵ The revised protocol released on November 22, 2010, provides, “Under OPA a claimant must file a claim with BP or the GCCF for OPA damages prior to seeking payment from the National Pollution Fund Center or commencing an action in court.”²⁶ Therefore, a claimant does not have to use the GCCF for presentation of claims to BP.²⁷ The GCCF is simply an alternative dispute resolution mechanism that is totally voluntary, and “participation in the GCCF shall not affect any right that the Claimant would have had absent such participation until final resolution of the claim is achieved.”²⁸ Despite this clarification in the protocol, GCCF takes the position in its FAQs that all claims after August 23, 2010, “must be filed with the GCCF,” rather than with BP.²⁹

Of course, the GCCF’s \$20 billion Trust is neither a cap nor a floor on BP’s liabilities.³⁰ If BP is successful in showing that the company is not at fault (or has lesser fault than Halliburton, Anadarko, or Transocean), the Trust, or BP by way of subrogation, might be able to recover some of the \$20 billion that funds the GCCF from those parties in indemnification or contribution litigation. As of late December 2010, GCCF had denied more claims than it had paid. In fact, it paid only about \$2.5 billion of the \$20 billion authorized for the Fund.³¹ In addition to

²⁴ See Light, *supra* note 23, at 988.

²⁵ The Trust refers to these as “Other Resolved Claims.” Deepwater Horizon Oil Spill Trust, *supra* note 21.

²⁶ *Gulf Coast Claims Facility Protocol for Interim and Final Claims*, GULF COAST CLAIMS FACILITY (Feb. 8, 2011), www.gulfcoastclaimsfacility.com/proto_4.

²⁷ The November 22 protocol thus confirms the conclusion stated in my article this past September. Light, *supra* note 23, at 988 (“In my opinion, the Emergency Advance Protocol equivocates about whether a claimant must present his final claim to GCCF before suing BP. Its clarification can be read to permit a claimant to present his or her claim to BP and settle the claim outside the GCCF (and, if BP refuses to settle, sue).”).

²⁸ *Gulf Coast Claims Facility Protocol for Interim and Final Claims*, *supra* note 26, ¶ I.A.

²⁹ *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, www.gulfcoastclaimsfacility.com/faq (last visited July 13, 2011) (“As of August 23, 2010, all claims must be filed with the GCCF. The GCCF has replaced the BP claims process. Individuals and Businesses should no longer present claims to BP.”).

³⁰ See, e.g., Jean Helwege, *The Gulf Oil Spill: Social Versus Legal Obligations Facing BP*, 7 THE SCITECH LAWYER 6 (Winter 2011).

³¹ BP, CLAIMS AND GOVERNMENT PAYMENTS GULF OF MEXICO OIL SPILL PUBLIC REPORT—12/22/2010, available at www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Public_Report_12.22.10.pdf.

this amount, the GCCF had allocated \$41.5 million to state real estate organizations for their payments to real estate brokers and agents—groups that GCCF declined to pay directly because it refused to acknowledge the validity of this type of claim on an individual basis.³² BP had paid another \$1.6 billion to governments, mainly for cleanup costs.³³ At the end of 2010, GCCF administrator Kenneth Feinberg speculated that \$10 billion would be enough to compensate claims filed with the Trust.³⁴ BP's stock rose toward the end of 2010 when it became apparent that Trust expenditures were lower than anticipated.³⁵

Ultimately, BP will likely pay out much more than \$20 billion in connection with the spill. One calculation by the Wall Street Journal indicates that stock market participants expect the incident to cost BP shareholders more than \$50 billion.³⁶ In 2010, BP began to sell some large assets as part of its efforts to raise up to \$30 billion to help pay for the spill.³⁷ However, it could also be part of a strategy to “reduce BP's empire” in ultimate anticipation of a bankruptcy filing in several years under which it would reorganize, similar to asbestos manufacturers.³⁸ In January 2011, BP made Russian oil giant OAO Rosneft its largest stockholder in a \$16 billion share swap.³⁹ Rosneft is state-owned. Under the deal, the two firms will form a joint operating company—two-thirds owned by Rosneft and a third by BP—to explore for oil in the Arctic Circle.⁴⁰ Making another sovereign, particularly Russia, its largest

³² *Id.*; see also Ian Urbina, *BP Settlements Likely to Shield Top Defendants*, N.Y. TIMES, Aug. 20, 2010, available at www.nytimes.com/2010/08/20/us/20spill.html?_r=1&ref=ianurbina; Light, *supra* note 1, at 11,126.

³³ BP, *supra* note 31.

³⁴ James Herron, *A Good Week for BP, but It Still Faces Long Road to Recovery*, THE SOURCE, WALL ST. J. (Jan. 7, 2011, 11:04 AM GMT), blogs.wsj.com/source/2011/01/07/a-good-week-for-bp-but-it-still-faces-long-road-to-recovery/?KEYWORDS=oil+pollution++liability+limit; James Herron, *BP Shares Rise as Spill Cost Seen Lower*, WALL ST. J., Jan. 5, 2011, available at online.wsj.com/article/SB10001424052748704723104576061332735278932.html.

³⁵ Andrea Tryphonides & Colin Ng, *BP Resurgence Helps Push FTSE Up 1.9%*, WALL ST. J., Jan. 4, 2011, available at online.wsj.com/article/SB10001424052748704723104576062300209162130.html (“BP jumped 5.9% following reports that compensation payouts for the Gulf oil spill may be much lower than expected. Continued speculation that it is a takeover target also aided BP.”).

³⁶ Helwege, *supra* note 30, at 6.

³⁷ Guy Chazan, *BP to Sell Canadian Natural-Gas Operation*, WALL ST. J., Dec. 16, 2010, available at online.wsj.com/article/SB10001424052748704098304576021722396486948.html?KEYWORDS=bp+sell+asset.

³⁸ See Helwege, *supra* note 30, at 7.

³⁹ Guy Chazan, *BP, Rosneft Deal Draws Criticism*, WALL ST. J., Jan. 17, 2011, available at online.wsj.com/article/SB10001424052748704511404576085932247348132.html?KEYWORDS=b+p+stock.

⁴⁰ *Id.*

shareholder certainly complicates any U.S. court's management of a potential BP bankruptcy. Such arrangements also raise the prospect of another "channel for avoiding listing all the assets of BP in a Chapter 11 case – to file at the holding company level and leave the subsidiaries out of the equation."⁴¹ Just as Philip Morris and RJR Nabisco shed their food businesses as they faced unfavorable tobacco-litigation outcomes, BP might further complicate and possibly limit its liability through corporate reorganization.⁴²

IV. AFFIRMATIVE DEFENSES

The parallels between CERCLA and OPA in the context of Deepwater Horizon go far beyond the core myth of a Superfund alternative to litigation. The role of proof that a "standard of care" has been violated is another parallel between the two regimes. CERCLA actually incorporates the strict liability of the Clean Water Act's earlier "oil and hazardous substance liability" regime through incorporation by reference of 33 U.S.C. § 1321.⁴³ OPA uses the same incorporation by reference.⁴⁴ At the time of CERCLA's enactment in 1980, several courts had construed the standard under this cross-referenced provision of the Clean Water Act to be a strict-liability standard.⁴⁵ The Department of Justice (DOJ) noted this in its "legislative history" letter to Representative James J. Florio (D.N.J.), floor leader for CERCLA in the House.⁴⁶

As all good torts students know, making CERCLA and OPA "strict liability" regimes does not necessarily eliminate the issue of a defendant's due care from a court's consideration. CERCLA contains an affirmative defense for defendants who prove that a release is solely caused by an act or omission of an unrelated third party and that its own

⁴¹ Helwege, *supra* note 30, at 7.

⁴² *Id.*; see also Guy Chazan, *Rosneft Tie-Up Shows BP's Ability to Deal After Spill*, WALL ST. J., Jan. 18, 2011, available at online.wsj.com/article/SB10001424052748704029704576088153707130740.html?mod=WSJ_Energy_leftHeadlines ("Stan Polevets . . . said under the shareholder agreement between BP and AAR, TNK-BP should hold the shares in Rosneft, not BP.").

⁴³ 42 U.S.C.A. § 9601(32) (Westlaw 2011) (incorporating "the standard of liability which obtains under section 1321 of Title 33").

⁴⁴ 33 U.S.C.A. § 2701(17) (Westlaw 2011) (incorporating "the standard of liability which obtains under section 1321 of this title").

⁴⁵ See *e.g.*, *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979); *Burgess v. M/V Tamano*, 564 F.2d 964 (1st Cir. 1977).

⁴⁶ 126 CONG. REC. H11, 788 (daily ed. Dec. 3, 1980), reprinted in 1, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) 780 (1983).

conduct was not negligent.⁴⁷ OPA does the same.⁴⁸ Both statutes reverse the burden of proof on the standard of care. However, both defenses are also ephemeral because the third party causing the response costs or damages cannot have a contractual relationship with the defendant.⁴⁹ The “contractual relationship” eliminating the defense does not have to relate to the operation leading to the release, but can instead simply be “land contracts, deeds, easements, leases, or other instruments transferring title or possession” of the property.⁵⁰ Where there is a “contractual relationship,” separate proof that the defendant “exercised due care with respect to the oil . . . in light of all relevant facts and circumstances” is insufficient to establish the defense.⁵¹

More importantly, even in the usual circumstance where no affirmative defense is available to a defendant, negligence considerations are relevant to limitations of a defendant’s liability where there is more than one responsible party and liability may be apportioned. In the CERCLA context, the United States Supreme Court recently clarified, in *Burlington Northern & Santa Fe Railway Co. v. United States*, that under applicable Restatement principles, a defendant’s liability can be limited if the defendant shows a reasonable basis for apportionment of an indivisible harm.⁵² However, the *Burlington Northern* principle avoiding so-called “joint and several” liability is limited to situations where two defendants “acting independently” cause a release.⁵³ Put another way, the principle applies only when the damages caused by one liable party are “divisible” from the damages caused by another liable party. Limitation of liability is a determination of causation. “Damages can be divided by causation when any person or group of persons to whom the fact finder assigns a percentage of responsibility (or any tortuous act of such a person) was a legal cause of less than the entire damages.”⁵⁴ Thus, with CERCLA, the government learned (albeit over twenty-eight years after CERCLA’s enactment) that causation determinations may not be

⁴⁷ 42 U.S.C.A. § 9607(b)(3) (Westlaw 2011).

⁴⁸ 33 U.S.C.A. § 2703(a)(3) (Westlaw 2011).

⁴⁹ *Id.*; 42 U.S.C.A. § 9607(b)(3).

⁵⁰ 33 U.S.C.A. § 2703(d) (Westlaw 2011) (OPA); *cf.* 42 U.S.C.A. § 9601(35) (Westlaw 2011) (CERCLA).

⁵¹ *See* 33 U.S.C. § 2703(a)(3)(A) (Westlaw 2011) (OPA); *cf.* 42 U.S.C.A. § 9607(b)(3) (Westlaw 2011) (CERCLA).

⁵² *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1881 (2009); *see also* Alfred R. Light, *Restatement of Joint and Several Liability Under CERCLA After Burlington Northern*, 39 ENVTL. L. REP. NEWS & ANALYSIS 11,058 (2009).

⁵³ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 (2000); RESTATEMENT (SECOND) OF TORTS §§ 433A, 879, 881 (1965).

⁵⁴ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. a (2000).

entirely avoided even though “CERCLA . . . does not require causation as a prerequisite to liability.”⁵⁵ In addition, another line of CERCLA decisions establishes that “release . . . which causes the incurrence of response costs” in the statute’s liability provision means that “[p]roof of a causal link between a defendant’s release and the plaintiff’s response . . . forms one of the ‘basic elements’ of a plaintiff’s prima facie case under CERCLA.”⁵⁶

In some respects, *Burlington’s* “joint and several” jurisprudence has no direct relevance to Deepwater Horizon since the contributions of the various known defendants to the chain of events causing the spill are not independent of one another. More traditional justifications for the imposition of joint and several liability associated with persons acting in concert apply.⁵⁷ For example, in some circumstances the employer of an independent contractor may be liable for acts of the contractor.⁵⁸ More generally, the decisions are relevant in their emphasis on the necessary role of causation (or “nexus”) as a feature of the liability determination. At some point, “adding to the penalties of the statute by making the defendant liable for an unrelated harm could result in over deterrence.”⁵⁹ As Professor Marshall Shapo has noted, “What is important, in the end, is that courts keep in mind not only the ‘purpose’ of a particular statute, but the purposes of the law of torts.”⁶⁰

Interestingly, both CERCLA and OPA contain presumptive monetary caps on damages recovery, as opposed to cleanup costs. Under CERCLA § 107(c), the trustee may not recover in excess of \$50 million unless a showing is made that the release resulted from willful misconduct or willful negligence, or from a violation of federal safety or operating standards.⁶¹ While OPA raises the cap to \$75 million for OPA spills and implicitly expands the cap’s coverage by expanding the definition of recoverable damages, its wording is the same as

⁵⁵ *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 937 (9th Cir. 2008), *rev’d on other grounds*, 129 S. Ct. 1870 (2009).

⁵⁶ *Dedham Water Co. v. Cumberland Farms, Inc.*, 689 F. Supp. 1223, 1224 (D. Mass. 1988), *rev’d on other grounds*, 889 F.2d 1146 (1st Cir. 1989); *see* 42 U.S.C.A. § 9607(a)(4) (Westlaw 2011); *see also* ALFRED R. LIGHT, *CERCLA LAW AND PROCEDURE* § 4.2.7, at 80-82 (1991).

⁵⁷ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 15 (2000) (“When persons are liable because they acted in concert, all persons are jointly and severally liable for the share of comparative responsibility assigned to each person engaged in concerted activity.”); *see also* RESTATEMENT (SECOND) OF TORTS § 876 (1979).

⁵⁸ *See* RESTATEMENT (SECOND) OF TORTS §§ 416-429 (1965).

⁵⁹ William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 131 (1983).

⁶⁰ MARSHALL S. SHAPO, *BASIC PRINCIPLES OF TORT LAW* ¶ 56.05 (1998).

⁶¹ 42 U.S.C.A. § 9607(c) (Westlaw 2011).

CERCLA's.⁶² If a defendant sought to enforce such caps, it is unclear what effect that assertion would ultimately have, given the broad savings provisions for state-law causes of action. CERCLA's savings clause reads, "Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."⁶³ OPA's is similarly broad: "Nothing in this Act . . . shall . . . affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law."⁶⁴ OPA's savings clause plainly preserves state laws that establish liability rules and financial requirements relating to oil spills.⁶⁵ Therefore, any plaintiff, other than possibly the federal government, may assert a cause of action for recovery outside the strictures of CERCLA or OPA.

In January 2011, the Presidential Commission investigating the BP spill concluded it was an avoidable disaster that resulted from management failures by BP and its contractors.⁶⁶ Strangely, investors interpreted this Report as *reducing* the likelihood that BP would be found guilty of gross negligence.⁶⁷ By pointing to systemic failures in the system of oil exploration and regulation, BP was also seen as having a better chance of "clawing back" some of the costs from its contract partners, Anadarko and MOEX Offshore 2007.⁶⁸ Professor David Uhlmann, former chief of the DOJ's Environmental Crimes Section, nonetheless concluded that there may be a basis for criminal liability under existing Clean Water Act case law, even though BP's conduct was not gross negligence.⁶⁹

A. CAUSATION

Like CERCLA, OPA requires that the plaintiff incurring cleanup

⁶² 33 U.S.C.A. § 2704(a) (Westlaw 2011).

⁶³ 42 U.S.C.A. § 9652(d) (Westlaw 2011).

⁶⁴ 33 U.S.C.A. § 2718(a)(2) (Westlaw 2011).

⁶⁵ *United States v. Locke*, 529 U.S. 89, 106 (2000); *see also Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973).

⁶⁶ Stephen Power & Ben Casselman, *White House Probe Blames BP, Industry in Gulf Blast*, WALL ST. J., Jan. 6, 2011, *available at* online.wsj.com/article/SB10001424052748704405704576064122843672118.html.

⁶⁷ Guy Chazan, *BP Gets Lift from Oil-Spill Report*, WALL ST. J., Jan. 7, 2011, *available at* online.wsj.com/article/SB10001424052748704415104576065602870469870.html.

⁶⁸ *Id.*

⁶⁹ *Id.*; *see also* David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413 (2011).

costs in connection with a spill establish that the costs “result from such incident.”⁷⁰ While specific costs sought may be disputed, the CERCLA experience suggests that courts may be quite deferential to plaintiffs who have incurred such costs with the expectation of reimbursement.⁷¹ CERCLA’s limitation of private recovery for response costs distinguishes CERCLA from OPA, which provides for various forms of private damages recovery.⁷² However, both statutes permit governmental trustees to recover natural resource damages.⁷³ Litigation under CERCLA’s natural resource damages provision may be an indicator of how “causation” determinations under OPA should be resolved.

In interpreting CERCLA liability in the natural resource damages context, some courts have made reference to common-law causation standards. For example, in *Ohio v. U.S. Department of the Interior*,⁷⁴ the court concluded the Department of the Interior’s (DOI) position that the traditional common-law standard of causation should be applied was a permissible reading of the statute.⁷⁵ Consequently, trustees must be able to meet traditional causation standards when showing that a particular spill or release caused or was at least a “contributing factor” to a particular injury.⁷⁶ The DOI’s Natural Resource Damage Assessment regulations require that trustees determine the baseline condition of the injured resource and then compare that baseline with the injured status of the resource to quantify injury.⁷⁷ “Baseline” is defined as “the condition or conditions that would have existed at the assessment area had the discharge of oil or release of the hazardous substance under investigation

⁷⁰ 33 U.S.C.A. § 2702(a) (Westlaw 2011).

⁷¹ *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1249-1250 (9th Cir. 2005) (costs include indirect costs calculated with a “full cost” methodology).

⁷² *See e.g.*, *Syms v. Olin Corp.*, 408 F.3d 95, 103 (2d Cir. 2005) (affirming disallowance of costs of physical site maintenance, damage caused during asbestos removal, activities of counsel, medical monitoring, survey of contaminated ditch); *Vine St., LLC v. Keeling*, 460 F. Supp. 2d 728, 758 (E.D. Tex. 2006) (economic damages not corresponding to work closely related to cleanup activities, such as lost rent, diminution of property value, attorney’s fees related to litigation and experts’ fees, were not CERCLA response costs recoverable on property owner’s contribution claim); *cf.* 33 U.S.C.A. § 2702 (b)(2)(B)-(C),(E) (Westlaw 2011) (recoverable damages by private parties).

⁷³ 33 U.S.C.A. § 2702(a)(2)(A) (Westlaw 2011) (OPA); 42 U.S.C.A. § 9607(a)(4)(C) (Westlaw 2011).

⁷⁴ *Ohio v. U.S. Dep’t of the Interior*, 880 F.2d 432, 470 (D.C. Cir. 1989).

⁷⁵ *Id.*

⁷⁶ *See, e.g.*, *Coeur D’Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1124 (D. Idaho 2003) (requiring use of “contributing factor” causation test in natural resource damages action by native American tribe and United States against mining companies).

⁷⁷ *See generally* 43 C.F.R. pt. 11 (Westlaw 2011).

not occurred.”⁷⁸ While a trustee has the burden of determining the baseline, defendants are supposed to ensure that the trustee is apprised of all appropriate conditions or factors impacting the resource other than the spill.⁷⁹

Closely related to causation in natural resource damages cases is the requirement that the plaintiff carefully articulate the injury. For example, in *New Mexico v. General Electric Company*,⁸⁰ the court was not satisfied that the plaintiffs validated their assumptions that water affected by contamination could be used absent the contamination and that any loss of use would be permanent.⁸¹ Proving an injury to a natural resource is not the same as proving what amount of damages should be recoverable. Under CERCLA, any recovery obtained by a trustee of natural resources must be used “to restore, replace, or acquire the equivalent” of the injured natural resource.⁸²

Since the GCCF protocols are directed exclusively to claims by private individuals and businesses and do not encompass governmental claims for natural resource damages, the causation requirement discussed above is not addressed directly in the GCCF protocol. The GCCF, however, has stuck to the original position in its drafts that it will only “pay for harm or damage that is proximately caused by the Spill.”⁸³ Use of “proximately caused” has been controversial. Based on the language of OPA, some have argued that the statute’s causation requirement is more relaxed than the traditional common-law principle. For example, several attorneys general claim that OPA does not require proximate cause and have urged Feinberg to clarify that it applies only to personal injury claims not compensable under OPA.⁸⁴ In the final protocol, Feinberg simply concludes, “The GCCF’s causation determinations of OPA claims will be guided by OPA and federal law interpreting OPA.”⁸⁵ Earlier discussions of the BP claims process were more specific about the nexus requirements GCCF would apply. For example, the drafters referenced criteria such as proximity to the coast, dependence of the plaintiff on the natural resources harmed by the spill, and a hierarchy of

⁷⁸ 43 C.F.R. § 11.14(e) (Westlaw 2011).

⁷⁹ See 43 C.F.R. § 11.15 (Westlaw 2011).

⁸⁰ *N.M. v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1212 (D.N.M. 2004).

⁸¹ *Id.*

⁸² 42 U.S.C.A. § 9607(f)(1) (Westlaw 2011).

⁸³ *Gulf Coast Claims Facility Protocol for Interim and Final Claims*, *supra* note 26, ¶ II.G.

⁸⁴ Letter from Douglas M. Gansler, Joseph R. “Beau” Biden III, & Roy Cooper to Kenneth R. Feinberg 2 (July 22, 2010) (on file with author).

⁸⁵ *Gulf Coast Claims Facility Protocol for Interim and Final Claims*, *supra* note 26, ¶ II.G.

industries most clearly affected.⁸⁶ Until courts clarify OPA's nexus requirements, the protocol simply avoids resolving the matter by rule, essentially deciding the question during case-by-case determinations that are not disclosed to nonparties.⁸⁷

These determinations have been critical to the wholesale denial of claims. The publicly stated reason for the large number of denials has been the lack of documentation for submitted claims. This explanation may cover a multitude of sins, but most of them are likely related to the proximate-cause requirement. The Deepwater Horizon Disaster took place in an unfortunate economic context for a region that was still recovering from the devastation of Hurricane Katrina. Census figures for Louisiana illustrate the relative loss of population arising out of that disaster. Thus, businesses along the Gulf had difficulty justifying "lost earnings or profits that were caused by the injury, destruction, or loss of specific property or natural resource *as a result of the Spill*."⁸⁸ The adjusters in Columbus, Ohio, associated with Feinberg's firm might easily have looked askance at "comparable time periods" prior to Katrina. And of course, claimants are also required to report "income received from alternative employment or business during the period when the loss occurred" and "savings to overhead and other normal expenses not incurred as a result of the Spill."⁸⁹

Claims for loss of real or personal property require documentation as proof that the claimant's property was "physically damaged or destroyed as a result of the Spill."⁹⁰ Even individuals trying to demonstrate "lost earnings" need to show that their losses are a result of the spill. For example, a fisherman claiming lost income might have to show that his "fishing grounds have been closed as a result of the spill,"⁹¹ or a hotel or rental property owner might have to show that she has "decreased profits because beaches, swimming, or fishing areas have

⁸⁶ Video: Claims Overview—Darryl Willis—7 July 2010, BP, bp.concerts.com/gom/claimsoverviewdarrellwillis070710.htm.

⁸⁷ Kenneth Feinberg said on October 27 that he will not use a geographic test to bar claimants and is seeking "the very best independent science" on the future of the Gulf of Mexico as the program moves to its second phase of offering final payments to claimants. *Feinberg Says Distance from Spill Will Not Automatically Bar Compensation Fund Claims*, 207 DAILY ENV'T REP. (BNA) A-9 (Oct. 28, 2010).

⁸⁸ GULF COAST CLAIMS FACILITY, PROTOCOL FOR EMERGENCY ADVANCE PAYMENTS 3 (Aug. 23, 2010), available at www.tpcg.org/emgevents/pdf/AUGUST%2023%202010%20PROTOCOL%20_2.pdf (emphasis added).

⁸⁹ *Id.*

⁹⁰ *Id.* at 2.

⁹¹ *Id.* at 3.

been affected by the oil from the Spill.”⁹² Even those limiting their claims to removal and cleanup costs are expected to show “information or documentation explaining how the actions taken were necessary to prevent, minimize, or mitigate oil pollution from the Spill” and “that the actions taken were approved by the Federal On-Scene Coordinator or were consistent with the National Contingency Plan.”⁹³

In various public forums, Feinberg has complained that claimants have been unwilling or unable to provide tax returns documenting their pre-Spill income. He has promised to accept alternative documentation such as affidavits from employers or other trustworthy associates (e.g., a parish priest) to vouch for a claimant’s pre-Spill work history. A careful reading of the Deepwater Horizon Oil Spill Trust agreement counsels careful consideration of these documentation methods. Under the agreement, the GCCF Paying Agent (initially Garden City Group, Inc.) prepares and processes IRS Forms 1099-MISC and 1042-S in respect to distributions from the Trust.⁹⁴ These forms report to the IRS amounts subject to federal income tax. So, any shrimp-boat worker who overlooked his or her obligation to pay federal income taxes prior to the Spill will likely be contacted about such omissions when filing a 2011 return in connection with payments received from the Trust in 2010.

B. ALLOCATION OF EQUITABLE RESPONSIBILITY AMONG LIABLE PARTIES

CERCLA’s lessons for the GCCF are not limited to matters of causation and documentation. The Deepwater Horizon disaster, like most CERCLA releases, involves more than one defendant (i.e., BP Exploration and Production, Inc.) who has chosen to settle claims. Even the Deepwater Horizon Oil Spill Trust Agreement, which is broader than the GCCF, does not purport to be a settlement mechanism for claims by agencies of the federal government. Approximately 300 cases filed against BP, Transocean, and Halliburton have been consolidated as part of a multidistrict litigation in the Eastern District of Louisiana for purposes of pretrial discovery.⁹⁵ Inevitably, the Deepwater Horizon disaster will result in a need to resolve the same procedural and substantive issues that have been addressed in multi-party CERCLA

⁹² *Id.*

⁹³ *Id.* at 2.

⁹⁴ Deepwater Horizon Oil Spill Trust, *supra* note 21, at 6.

⁹⁵ *In re: Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico*, on April 20, 2010, MDL 2179, 2010 WL 3166434 (Aug. 10, 2010).

cases over the past decades.

The most obvious of these issues is the so-called “contribution protection” issue. Feinberg and GCCF have been severely criticized for requiring that a Final Payment from the Trust be considered a complete resolution of the claim, except for personal injury claims. A Final Payment is a “complete and final resolution of all claims for past, current, or future losses that a Claimant has or may have with regard to the Deepwater Horizon incident and oil spill against BP and all other potentially liable parties.”⁹⁶ Why does the GCCF require that a settling claimant release not only BP but also Transocean, Halliburton, and all other potentially liable parties? The problem is that a claimant’s separate litigation against other potentially liable parties might well involve BP and GCCF. Once sued, Transocean and Halliburton will likely implead BP and GCCF into the litigation through third-party practice by way of claims for indemnification and contribution.⁹⁷ This was a serious problem under the original version of CERCLA because the liability provisions of the statute did not address the issue. In the infamous *Seymour* settlement, the United States had to agree in advance to reduce its judgment against a nonsettlor to the extent necessary to eliminate any contribution claims the nonsettlor might have against the settling defendant.⁹⁸

However, in the Superfund Amendments and Reauthorization Act of 1986, Congress added CERCLA section 113(f), which provides, “A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution for matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable parties unless its terms so provide, but it reduces the potential liability of others by the amount of the settlement.”⁹⁹ OPA, like the original version of CERCLA, does not address the contribution protection issue. As a result, the only way for BP to extinguish litigation with a claimant is to have the claimant release not only BP but also other potentially liable parties for matters addressed in the settlement.

The “contribution protection” provision in the Superfund Amendments and Reauthorization Act of 1986 (SARA) was part of

⁹⁶ *Gulf Coast Claims Facility Protocol for Interim and Final Claims*, *supra* note 26, ¶ IV.B.

⁹⁷ FED. R. CIV. P. 14(a).

⁹⁸ *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1347-48 (S.D. Ind. 1982).

⁹⁹ 42 U.S.C.A. § 9613(f)(2) (Westlaw 2011). Note that the precise terms of this provision, drafted by the government in a self-centered way, do not address claims by private parties for response costs under CERCLA § 107(a)(4)(B). *See id.*

DOJ's CERCLA litigation strategy. That strategy was to assert joint and several liability in any CERCLA case as a means to avoid becoming involved in the complex matter of allocating equitable responsibility among all potentially liable persons. To the extent that the United States is able to convince a court that a party is jointly and severally liable, it can recover all costs and damages from that party without regard to how they are ultimately allocated in contribution actions. The "contribution protection" provision protects not only the settling party, but also the government as plaintiff from involvement in comparative fault matters central to these contribution actions. Interestingly, DOJ adopts the same litigation strategy with respect to the Deepwater Horizon disaster. In its complaint filed on December 15, 2010, the United States asserts the joint and several liability of each defendant in the action: BP Exploration and Production, Inc., Anadarko Exploration and Production LLC, Moex Offshore 2007 LLC, Triton Asset Leasing GMBH, Transocean Holdings LLC, Transocean Offshore Deepwater Drilling, Inc., and QBE Underwriting Ltd., Lloyd's Syndicate 1036.¹⁰⁰

Under the normal operation of the Federal Rules of Civil Procedure, the strategy of the United States to avoid entanglement with allocation among jointly and severally liable defendants would be unsuccessful, because no final judgment is entered in a case until all claims in the action, including contribution actions, are resolved.¹⁰¹ The United States has to wait for their resolution. Nonetheless, SARA also added, at the government's behest, an unusual provision that expressly allows a court to bifurcate claims and to enter a declaratory judgment applicable in a subsequent action for future costs.¹⁰²

The absence of these types of provisions in OPA is likely to present the same kinds of difficulties that existed under the original version of CERCLA. Defendants such as BP, which are unlikely to have plausible defenses to liability or cannot apply the joint-and-several principle, will seek an allocation of responsibility among liable parties before entry of judgment in the government's suit.¹⁰³ The government will vociferously argue the contrary so that it may collect billions from BP without implicating itself in the liability and allocation disputes involving other defendants it has sued or third-party defendants identified by BP and

¹⁰⁰ United States v. BP Exploration & Prod., Inc., filed Dec. 15, 2010, available at docs.justia.com/cases/federal/district-courts/louisiana/laedce/2:2010cv04536/144523/1/.

¹⁰¹ See FED. R. CIV. P. 54(b).

¹⁰² See 42 U.S.C.A. § 9613(g)(2) (Westlaw 2011).

¹⁰³ Halliburton may have plausible defenses to joint and several liability but not to nominal liability based on their due care. See *Halliburton Disputes Commission Report Questioning Stability of BP Well Cementing*, 209 DAILY ENV'T REP. (BNA) A-9 (Nov. 1, 2010).

others. A court wishing to expedite the resolution of all Deepwater Horizon claims, as opposed to simply expediting the government's recovery, may delay entry of judgment to force all the parties to resolve allocation and other common issues. Efficiency from the government's point of view is not necessarily the same as efficiency from the court's perspective.

V. COMPETITION OF FEDERAL, STATE AND PRIVATE CLAIMS

Ultimately, an even larger complexity of the Deepwater Horizon litigation reminiscent of CERCLA litigation is the competition for BP's funds among the federal government, states, and other claimants. The federal government's December 2010 claim is not only for cleanup costs and damages, but also for civil penalties. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling recommended that eighty percent of any penalties assessed for the spill go to ecosystem restoration.¹⁰⁴ Commission staff also recommended that the government and responsible parties consider restoration of consumer confidence—notably, in Gulf seafood and tourism—as an appropriate place to allocate funding when calculating fines and settlements.¹⁰⁵ These penalties recognize that indirect economic losses are not covered by the compensation requirements of the Oil Pollution Act of 1990.¹⁰⁶ At the same time, commissioners expressed much concern about recommendations in light of what companies can afford.¹⁰⁷

The Commission's recommendations are reminiscent of earlier environmental disasters where comprehensive judicial settlements included various environmental projects. For example, the Allied Kepone settlement led to the creation of the Virginia Environmental Endowment.¹⁰⁸ In 2010, BP moved aggressively outside the context of

¹⁰⁴ *Oil Spill Panel Moves Plan to Use 80 Percent of Penalties for Gulf Restoration*, 232 DAILY ENV'T REP.A-10 (Dec. 6, 2010); see generally Carrie Presnall, Laura López-Hoffman, & Marc L. Miller, *Can the Deepwater Horizon Trust Take Account of Ecosystem Services and Fund Restoration of the Gulf?*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11,129 (2010), available at www.eli.org/pdf/NA_40-11/40.11129.pdf.

¹⁰⁵ *Oil Spill Panel Moves Plan to Use 80 Percent of Penalties for Gulf Restoration*, 232 DAILY ENV'T REP.A-10 (Dec. 6, 2010).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; see also *Oil Spill Restoration Chief Says Penalties Should Support Gulf Coast Cleanup Projects*, 25 TOXICS L. REP. (BNA) 1008 (2010) (stating that Navy Secretary Ray Mabus released Sept. 28 report asking Congress to amend Clean Water Act to divert "significant funds" from the Oil Spill Liability Trust Fund to Gulf of Mexico restoration projects).

¹⁰⁸ See Martin Harrell, *Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty*, 6 VILL. ENVTL. L.J. 243, 290 n.55 (1995);

the GCCF to voluntarily fund oil-spill-related efforts. Beginning in May 2010, BP paid the State of Florida millions of dollars to promote tourism in the Gulf area and throughout the state.¹⁰⁹ BP also paid private claims such as those by Virginia's oyster industry for loss of one source of its supply.¹¹⁰ As to any penalty settlement, an agreement between the government and responsible parties is not necessarily dispositive. The Center for Biological Diversity has filed a citizen suit against BP and the government, seeking penalties of \$4,300 per barrel of oil spilled, which is upwards of \$20 billion, under the Clean Water Act.¹¹¹

The potential wild card in the Deepwater Horizon litigation arises out of the government's criminal investigation into the disaster. As of January 2011, the DOJ has not filed criminal charges in connection with the disaster, but doing so will vastly complicate resolution of the numerous civil claims.¹¹² As environmental lawyers know, DOJ separates its criminal and civil enforcement litigators, and the presence of an ongoing criminal case makes civil discovery more difficult since witnesses face the risk of incarceration based on their testimony. Often, civil settlement negotiations are delayed until a criminal investigation is concluded. Similarly, DOJ also separates its environmental enforcement and environmental defense functions. It is likely that DOJ's environmental defense group will not be able to avoid its ultimate involvement in the BP litigation. After Hurricane Andrew, a federal judge permitted a plaintiff's suit against the Army Corps of Engineers to proceed on the theory that the failure of its flood-control projects created monetary damages for which the United States was liable, the "discretionary function" exception to the Federal Torts Claims Act to the

James W. Radig, *Corporate Contributions to Charity as a Condition of Probation Under the Federal Probation Act*, 9 J. CORP. L. 241, 247 (1984).

¹⁰⁹ On May 20, BP agreed in a Memorandum of Understanding with Florida officials to pay \$25 million for Florida's emergency marketing campaign to preserve the state's tourism industry and an extra \$10 million for marketing support in impact counties. Agreement between Douglas J. Suttler, CEO of BP Exploration & Prod., Inc., and David Holstead, Florida Division of Emergency Management (May 20, 2010).

¹¹⁰ Pamela A. D'Angelo, *Northern Neck Oyster Houses Share Pain of BP Oil Spill*, RICHMOND TIMES-DISPATCH, July 26, 2010.

¹¹¹ *In re: Deepwater Horizon*, No. 10-2454 (E.D. La., filed Aug. 4, 2010); *see also* Center for Biological Diversity v. BP America, Inc., No. 10-1768 (E.D. La., filed June 18, 2010).

¹¹² A criminal prosecution is widely expected. *See e.g.*, Uhlmann, *supra* note 69, at 1417; John Schwartz, *With Criminal Charges, Costs to BP Could Soar*, N.Y. TIMES, June 16, 2010, available at www.nytimes.com/2010/06/17/us/17liability.html?ref=johnschwartz; Marisa Taylor, *Criminal Charges Likely from Gulf Oil Spill, Legal Experts Say*, MCCLATCHY NEWSPAPERS (May 12, 2010), www.mcclatchydc.com/2010/05/12/94061/federal-laws-point-to-criminal.html; *Justice Department Probes Spill; Charges Expected*, NPR MORNING EDITION (June 9, 2010), www.npr.org/templates/story/story.php?storyId=127586497.

contrary notwithstanding.¹¹³ It remains to be seen whether the failure of governmental oversight alleged in the Deepwater Horizon disaster will produce similar theories of government liability.¹¹⁴

Therefore, it is in the interest of the government to negotiate a plea agreement with BP “prior to indictment or shortly thereafter.”¹¹⁵ Even if criminal liability is available under existing law, establishing liability by proving ordinary negligence, in light of the likely non-intentional nature of BP’s misconduct, may spur Congress to “consider limiting criminal liability for ordinary negligence to cases of endangerment . . . or cases that involve substantial harm to the environment (like the Gulf oil spill), and should otherwise require at least criminal negligence or recklessness for criminal prosecution.”¹¹⁶ Even then, the “concern is that the egregiousness of the harm will divert attention from the culpability of the underlying conduct.”¹¹⁷

VI. CONCLUSION: THE LAW OF UNINTENDED CONSEQUENCES

The Gulf Coast Claims Facility has evolved since its creation in June 2010. Feinberg originally invoked the Superfund myth – a regime for quick compensation of claimants damaged by the oil spill without the need for the expense or assistance of lawyers. However, he received a firestorm of criticism when it became apparent that the Facility wished to resolve and liquidate claims, rather than pay them on an open-ended basis, and required documentation of damages and their connection to the oil spill as a prerequisite to final settlement. This led to a retooling of the Facility in late 2010 to permit, as an alternative to final liquidation, a continuation of interim claims for persons who had convinced the Facility to the extent of obtaining prior interim payments.¹¹⁸ This quick-pay option is narrow – interim payments after 2010 were quarterly retroactive payments based on losses from the prior quarter, not for

¹¹³ *Robinson v. United States (In re Katrina Canal Breaches Consol. Litig.)*, 471 F. Supp. 2d 684 (E.D. La. 2007); see *In re Katrina Canal Breaches Consol. Litig.*, 533 F. Supp. 2d 615, 628-29, 637-39 (E.D. La. 2008).

¹¹⁴ See Oliver A. Houck, *Worst Case and the Deepwater Horizon Blowout: There Ought to Be a Law*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11,033, 11,037 (2010) (alleging “willful blindness”); see also Zygmunt J.B. Plater, *Learning from Disasters: Twenty-One Years After the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska?*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11,041 (2010).

¹¹⁵ Uhlmann, *supra* note 69, at 1418.

¹¹⁶ *Id.* at 1458.

¹¹⁷ *Id.* at 1460.

¹¹⁸ *BP Spill Compensation Fund Moves into Next Phase, Offering Two Options*, 226 DAILY ENV’T REP. (BNA) A-7 (Nov. 26, 2010).

losses in the upcoming month as with the prior emergency payments system. Feinberg saw the need for this option in light of the large number of claimants that lacked adequate documentation of their claims to justify final settlements.¹¹⁹

The paucity of claims paid by the end of 2010 also gave Feinberg the flexibility to offer, as he did in December 2010, to pay attorney's fees for any claimants who wanted legal representation in connection with their claims.¹²⁰ Exactly how this fee-shifting will work and how much it might cost the Trust remained unclear at the end of 2010.¹²¹ With discovery in the Multidistrict Litigation scheduled to commence in January 2011, the focus of attention may be on claims outside the scope of the GCCF, like the government's response costs, natural resource damages, and penalty claims, rather than those of private individuals and businesses that could have filed claims against the GCCF in 2010.¹²² Even where the BP Deepwater Horizon Oil Spill Trust may serve as the source of payment for very large claims, such as those of states and local governments for natural resources damages, the GCCF has disclaimed jurisdiction.¹²³ On the other hand, Judge Barbier, who is handling the Multidistrict Litigation, has asserted jurisdiction over some of these claims, refusing to permit their adjudication elsewhere.¹²⁴ Ironically, the less Feinberg pays for interim claims, final settlements, and administrative costs, the more BP will have available from the \$20 billion Trust for governmental claims outside the scope of the GCCF. If a large balance remains in the Trust, it could be a substitute for the much smaller Oil Pollution Liability Trust Fund. In this sense, at least, maybe Superfund is less of a myth than it might otherwise appear.

Nonetheless, the law of unintended consequences appears in many places related to the Deepwater Horizon Disaster. Especially in the early

¹¹⁹ Video: Feinberg Says Quick-Pay Option for BP Claims "Very Fair," BLOOMBERG (Dec. 14, 2010), www.bloomberg.com/video/65253264/.

¹²⁰ *Id.* ("BP will pay the costs of the pro bono program so that any claimant can have a lawyer.").

¹²¹ *Id.*

¹²² See Judge Says Written, Deposition Discovery in Multidistrict Litigation to Begin in January, 225 DAILY ENV'T REP. (BNA) A-9 (Nov. 24, 2010).

¹²³ See Lee, *supra* note 1; see also Light, *supra* note 1.

¹²⁴ *Louisiana Suit Against BP to Remain Part of Multidistrict Litigation*, 25 TOXICS L. REP. (BNA) 1064 (Oct. 14, 2010). As of January 2011, however, the states continue to argue before Judge Barbier that he should separate their cases from those brought on behalf of individuals and businesses. Amanda Bronstad, *States Seek Distance from Other BP Plaintiffs*, NAT'L L. J., Jan. 17, 2011, available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202478067056&src=EMC-Email&et=editorial&bu=National%20Law%20Journal&pt=NLJ.com-%20Daily%20Headlines&cn=20110117NLJ&kw=States%20seek%20distance%20from%20other%20BP%20plaintiffs.

months after the blowout and largely for public relations purposes, BP and the GCCF compensated victims that were only remotely associated with spill. But the GCCF ultimately may not compensate many with larger claims, and those claimants might decide to take a ticket in the lawsuit lottery rather than rely on GCCF for a comprehensive settlement. GCCF's continuation of interim payments during the winter of 2010 suggests the law of unintended consequences of the original Trust design still persists.

From a broader perspective, the nation's renewed emphasis on government enforcement might "simply lead to more government workers without a concomitant increase in safety as captive regulators play golf and dine out with their industry counterparts."¹²⁵ According to the *Wall Street Journal*, stock investors perceive the identification of systemic problems in oil exploration as lessening the extent of specific responsibility for BP.¹²⁶ The interaction of corporate law, international law, and environmental regulation surely complicates the situation. As the government pushes its case for criminal sanctions, that action may delay justice for those who choose to pursue civil actions for damages, because to the extent "we make the firm pay for every dime of damages, our efforts may trigger a bankruptcy that results in lower compensation to victims."¹²⁷ Even without such direct conflicts, the inevitable limitation of resources available to address this matter ultimately exposes the competition for those resources among (1) individuals and businesses allegedly damaged in an economic sense, (2) those in the oil industry trying to produce the products upon which our economy relies, (3) government scientists seeking ecosystem restoration, and (4) prosecutors seeking retribution through criminal actions to "express societal outrage about the spill in ways that civil penalties cannot."¹²⁸

Just as dispersants have hidden much of the real spill below the surface, the ultimate role of the GCCF in compensating victims may be known only after we see how the complex components of that system (government and private lawsuits, comprehensive settlements, restoration of the Gulf oil, fishing, and tourism industries) play out and interact. In other words, we are still seeing more of the myth than the reality of the GCCF.

¹²⁵ Helwege, *supra* note 30, at 7.

¹²⁶ See Chazan, *supra* note 67.

¹²⁷ Helwege, *supra* note 30, at 7; see also *supra* notes 112-117.

¹²⁸ Uhlmann, *supra* note 69, at 1461.