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THE GULF COAST CLAIMS FACILITY AS QUASI-PUBLIC FUND: TRANSPARENCY AND INDEPENDENCE IN CLAIM ADMINISTRATOR COMPENSATION

Byron G. Stier*

I. INTRODUCTION

In the summer of 2010, months into the catastrophic BP Gulf Oil Spill and weeks into Mr. Kenneth Feinberg's appointment as administrator of the \$20 billion Gulf Coast Claims Facility negotiated by President Obama and BP, Mr. Feinberg stated that his compensation from BP was a confidential matter between him and BP.¹ After increasing calls for disclosure of his pay, Mr. Feinberg did disclose his firm's compensation, but he continued to avoid discussions of his pay with claimants, suggesting they should be concerned with what they received from BP, not what Mr. Feinberg received from BP.² BP was paying Mr. Feinberg's two-partner firm \$850,000 a month for their work on the fund.³ BP and Mr. Feinberg's firm agreed to renegotiate the pay periodically, while Mr. Feinberg continued to determine eligibility decisions for claimants that could affect leftover claim funds returned to BP. Were these approaches proper? How should Mr. Feinberg have proceeded with regard to the determination and disclosure of his claim-administrator compensation?

The answers to these questions turn on the status of Mr. Feinberg and the Gulf Coast Claims Facility he administers. As the multidistrict court in the BP litigation recently held,⁴ the Gulf Coast Claims Facility is a "hybrid" entity: although it is funded by BP and seeks releases from claimants of

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1. See Daniel Fisher, *Feinberg's Pay: Should It Be Disclosed*, FORBES, July 19, 2010, <http://blogs.forbes.com/docket/2010/07/19/feinbergs-bp-pay-should-it-be-disclosed/>; John Schwartz, *For Kenneth Feinberg, More Delicate Diplomacy*, N.Y. TIMES, July 16, 2010, <http://www.nytimes.com/2010/07/17/us/17-feinberg.html>; Byron G. Stier, *Ken Feinberg Compensation for Administering BP Fund—A Problem and a Possible Solution*, MASS TORT LITIG. BLOG, July 18, 2010, http://lawprofessors.typepad.com/mass_tort_litigation/2010/07/ken-feinberg-compensation-for-administering-bp-fund-a-problem-and-possible-solution.html.

2. See Daniel Fisher, *Feinberg to Disclose Salary, Acknowledges "Perception of Conflict"*, FORBES, July 29, 2010, <http://blogs.forbes.com/docket/2010/07/29/feinberg-to-disclose-salary-acknowledges-perception-of-conflict/>.

3. See MEM. FROM MICHAEL B. MUKASEY, PARTNER, DEBEVOISE & PLIMPTON, L.L.P. TO KENNETH FEINBERG, PARTNER, FEINBERG ROZEN, L.L.P., GULF COAST CLAIM FACILITY: FEINBERG ROZEN, L.L.P.'S COMPENSATION 8 (Oct. 8, 2010), http://motherjones.com/files/gulf_coast_claims_facility_feinberg_rozen_llps_compensation_october_8_201011.pdf.

4. Order at 8–9, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Feb. 2, 2011), available at <http://www.laed.uscourts.gov/Oil>

litigation against BP, the Gulf Coast Claims Facility was born in the White House when President Obama called BP there and publicly vowed to the claimants in the Gulf that claims would be “fair[ly]” paid and the fund would be “independent” and “not be controlled by BP.”⁵ Because of that combination of public and private, the Gulf Coast Claims Facility should be viewed as a quasi-public claims fund, a new fund category for which ethical, strategic, and policy implications have not yet been mapped.⁶

The quasi-public fund offers several benefits. Created quickly in response to a still-unfolding crisis and crafted in part by an executive branch that should be committed to public justice, the quasi-public fund allows for relatively swift movement of compensation to claimants. The BP Gulf oil spill posed a systemic threat to the Gulf-area economy—slow-moving trial verdicts may not have prevented a downward economic spiral as coastal businesses closed.⁷ In addition to speed, the quasi-public claims fund offers the possibility of reduced legal fees. Defense counsel fees are surely reduced, because defense counsel generally still bill hourly, notwithstanding periodic criticism of that method,⁸ and the settling of claims within the fund would reduce the need for defense counsel litigation services. But what about plaintiff counsel? If claimants can approach the fund trusting they will receive a fair valuation of their claims, then claimants may also save money by not having to pay a plaintiff lawyer’s fee, which often could amount to one-third or more of the total recovery.⁹

But can claimants trust a quasi-public fund? Claimants may be confused about whether a quasi-public claims fund is like a private fund, where an offered award is equivalent to a settlement offer and an attorney is

Spill/Orders/222011OrderonRecDoc912.pdf (finding that “the GCC and Mr. Feinberg are not completely ‘neutral’ or independent from BP”); see also John Schwartz, *Fund Official Not Neutral, Judge Rules*, N.Y. TIMES, Feb. 2, 2011, <http://www.nytimes.com/2011/02/03/us/03feinberg.html>.

5. The White House, Remarks by the President to the Nation on the BP Oil Spill, June 15, 2010, <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill> (last visited July 9, 2011).

6. See 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 11041, 11045 (2010) (referring to the BP fund as an “innovation” and “a legal animal that had never before existed, neither corporate nor governmental”).

7. One wonders if this would be the case if there were a fully functioning market for litigation claims. In such a market, litigants might sell some or all of their claims immediately. Although such outright sale of tort claims is currently generally prohibited, a controversial market for borrowing in advance of, and dependent on, a judgment is emerging. See Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES, Jan. 17, 2011, <http://www.nytimes.com/2011/01/17/business/17lawsuit.html> (discussing nascent lawsuit loan market); Byron G. Stier, *Lawsuit Loans*, MASS TORT LITIG. BLOG, Jan. 23, 2011, http://lawprofessors.typepad.com/mass_tort_litigation/2011/01/lawsuit-loans.html (raising concerns about regulatory capping of interest rates and encouraging a market-oriented approach).

8. See, e.g., Daniel W. Whitney, *In Defense of Hourly Billing*, CORP. COUNSEL, Sept. 18, 2009, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202433874848> (arguing that “[w]hen experienced counsel are engaged for reasonable rates and results are judged not by a single case but rather by the overall performance of the firm, the hourly model works”).

9. See MODEL RULES OF PROF’L CONDUCT R. 1.5(c) (permitting use of contingent fees); Editorial, *Contingency Fees and Compassion*, BOSTON GLOBE, Mar. 2, 1990 (stating that contingency fees have been considered “the ‘poor man’s key to the courthouse’ ” and that the fee percentage is “usually one-third of the award”).

needed to evaluate whether to take that offer, or like a public fund, where claimants might have maximum confidence that full and fair compensation is being made. Seeking answers to that question, claimants understandably turn to scrutinizing the structure of a fund to see if it is one they can trust. Who is paying the claim administrator? How much? How is the claim administrator incentivized?

If the quasi-public fund is to be successful in persuading claimants to opt-in and saving attorneys' fees, the fund needs to assure claimants of its independence from influence from the tortfeasor funding it. The fund may do so by pursuing two goals: first, transparency with regard to its compensation structure; and second, utilization of a pay structure that would preserve independence by not permitting any possible monetary reward to the claim administrator for reducing awards to claimants and returning funds to the tortfeasor. With regard to pay structure, one method to avoid claim-administrator bias would employ a fixed fee not subject to renegotiation. But if the amount of claim-administrator work is unvarying or unpredictable, a single fixed fee may not be feasible, and there, an independent oversight panel, whose judgment the defendant trusts, might be used to determine claim-administrator compensation. Such an approach would draw support and guidance from the experience of class settlements, where defendants often agree to settle with plaintiffs and pay whatever plaintiff-counsel fees the judge determines are reasonable.¹⁰ An oversight panel might be composed of retired judges who themselves might serve pro bono, as Mr. Feinberg laudably did in the 9/11 Victims Compensation Fund,¹¹ or the panel itself might be compensated by the tortfeasor with a single fixed fee or a monthly fixed fee not subject to renegotiation, which might be possible in light of the likely more predictable task of merely determining claim-administrator compensation.

By viewing the origins, benefits, and concerns of the quasi-public fund, we can answer the opening questions for the Gulf Coast Claims Facility and Mr. Feinberg. In pursuit of transparency, Mr. Feinberg should not have initially refrained from disclosing his compensation. To the contrary, he should have affirmatively sought out opportunities to explain his own compensation structure to minimize claimant confusion. In addition, rather than adopt a fee subject to renegotiation, which might raise concerns of his catering to the defendant, Mr. Feinberg and BP should have sought to create an independent oversight panel, whose judgment BP would trust, to have discretion to pay Feinberg an appropriate sum for his services. Indeed, the current trustees of the Gulf Coast Claims Facility consist of a former federal judge and the current Dean of Washington University Law

10. See FED. R. CIV. P. 23(h) (stating that “[i]n a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement”).

11. See David Hechler, *Conquering the Challenge*, 27 NAT’L L.J. 20, 20 (2004) (discussing that Lawyer of the Year Kenneth Feinberg performed as 9/11 fund administrator for thirty-three months, entirely pro bono).

School¹²—perhaps they could undertake this independent oversight role for Mr. Feinberg's pay?

These pay-structure issues initially may have seemed tangential to the Gulf Coast Claims Facility, but in fact, legitimacy and claimant confidence in the Gulf Coast Claims Facility are essential to its success, as was highlighted by a recent federal multidistrict litigation order questioning the fund.¹³ In that order, Judge Barbier scrutinized the relationship of the Gulf Coast Claims Facility and Mr. Feinberg with BP and found that the Facility was not “independent.”¹⁴ Accordingly, the court regulated fund communications with claimants, who were also putative class members in actions pending before the court.¹⁵ This Article provides a broader context for the court's concerns, and in the wake of the opinion, offers suggestions that may help bolster claimants' confidence in the GCCF, as well as future quasi-public claims funds.

Although I differ with the fund's compensation structure and its lack of transparency on compensation issues, I do not claim that the BP claims administrators have done anything unethical as lawyers. In reviewing the GCCF as a consultant, prominent ethicist and law professor Stephen Gillers also makes no claim of any unethical activity.¹⁶ My perspective comes not from legal ethics, but from mass tort litigation: how can we best utilize and enhance the functioning of this interesting new vehicle, the quasi-public claims fund? That is what Gulf Coast Claims Facility administrator Ken Feinberg has been trying to do in good faith, and my suggestions seek to help in that common task.

12. See Deepwater Horizon Oil Spill Trust Agreement, dated Aug. 6, 2010, at 1, available at http://media.nola.com/2010_gulf_oil_spill/other/Trust%20Agreement.pdf (stating that fund trustees will be the Honorable John S. Martin, Jr., and Dean Kent Syverud).

13. Order, *supra* note 4, at 9; see also Ali Helgoth, *Nelson: BP Claims Process “Unacceptable”*, PANAMA CITY NEWS HERALD, Feb. 14, 2011, <http://www.newsherald.com/articles/claims-90930-nelson-panama.html> (stating U.S. Senator Bill Nelson's call for more transparency and White House investigation into GCCF following the MDL opinion calling into question GCCF's neutrality).

14. Order, *supra* note 4, at 9 (finding “that the GCCF and Mr. Feinberg are not completely ‘neutral’ or independent from BP”).

15. *Id.*

16. LETTER FROM STEPHEN GILLERS, THE CRYSTAL EASTMAN PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, TO KENNETH R. FEINBERG, ADMINISTRATOR, GULF COAST CLAIMS FACILITY (Dec. 28, 2010), http://www.gulfcoastclaimsfacility.com/Gillers_Feinberg_Doc_2010.pdf [hereinafter GILLERS LETTER]; see also Harry R. Weber, *Gulf Spill Fund Czar Paying for Ethics Advice*, ASSOC. PRESS, Dec. 30, 2010, <http://www.washingtontimes.com/news/2010/dec/30/gulf-spill-fund-czar-paying-ethics-advice/> (noting Professor Gillers' compensation of \$950 an hour). *But see* Decl. of Geoffrey C. Hazard, Jr., *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (Jan. 15, 2011) (stating that certain statements by Mr. Feinberg and the GCCF have been “inaccurate and misleading,” such as being “entirely independent” of BP). Model Rule of Professional Conduct 2.4 explicitly authorizes third-party neutral work, though Model Rule 2.4 does not provide any guidance about pay arrangements. MODEL RULES OF PROF'L CONDUCT R. 2.4. *But see* GILLERS LETTER, *supra*, note 16, at 5–6 (arguing the Model Rule 2.4 does not apply to Mr. Feinberg and GCCF, because they are administering a compensation scheme and making offers to one claimant at a time); Andrew M. Perlman, *The Ethics of Administering the BP Compensation Fund*, LEGAL ETHICS FORUM, July 19, 2010, <http://www.legalethicsforum.com/blog/2010/07/the-ethics-of-administering-the-bp-compensation-fund.html> (stating that Model Rule 2.4 would not apply and instead suggesting possibly the Standards of Conduct for Mediators or Code of Ethics for Arbitrators).

Part II of this Article details the origins and structure of the Gulf Coast Claims Facility, focusing on its combination of public and private aspects. Next, part III discusses the policy benefits and concerns attending the quasi-public claims fund, and situates the quasi-public fund between the poles of the public fund and the private fund. Part IV provides a plan to minimize such concerns, advising the pursuit of transparency and independence in claim-administrator compensation. In addition, part IV also proposes the use of an independent oversight panel to determine claim-administrator pay in situations where an unpredictable and varying amount of work precludes determination of a single, fixed fee or a monthly fixed fee not subject to renegotiation. Finally, part V concludes by endorsing the proper use of quasi-public claims funds in situations where a tortfeasor admits responsibility and a fast-developing crisis warrants the attention of high-level executive officials.

II. THE GULF COAST CLAIMS FACILITY

On April 20, 2010, the Deepwater Horizon oil rig in the Gulf of Mexico exploded, killing eleven rig workers and injuring many others.¹⁷ Subsequently, nearly five million barrels of oil poured into the Gulf of Mexico.¹⁸ After a temporary cap in July 2010, the oil well was permanently capped in September 2010.¹⁹ The oil spill had widespread effects on the economy of the Gulf region. Commercial fishermen, including shrimpers and crabbers, were unable to fish, resulting in cascading losses to seafood processors and restaurants.²⁰ In addition, the absence of tourists in the coastal areas during the summer caused additional losses to hotels and restaurants.²¹

Soon after the oil spill, the U.S. Coast Guard designated BP a “responsible party” under the Oil Pollution Act of 1990, rendering BP strictly liable for losses from the oil spill.²² Under OPA, before suing in court, a claimant must submit a claim to the responsible party, and if the claim is denied or not settled within ninety days, then the claimant may sue in court or make a claim against the back-up industry-wide Oil Spill Liability Trust Fund.²³ OPA-recognized claims include removal costs,²⁴ natural resource damages,²⁵ personal property damages and attendant economic loss,²⁶ loss of

17. See Denise M. Pilié, *Satisfying Deepwater Horizon Oil Spill Claims: Will Ken Feinberg's Process Work?*, 58 LA. B. J. 176, 177 (2010).

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.* (“An entire culture and way of life are in danger of going extinct, increasing anxiety and depression among coastal residents.”).

22. 33 U.S.C. §§ 2701–2762 (2011); LETTER FROM THE U.S. COAST GUARD TO BP EXPLORATION & PRODUCTION, INC. (Apr. 28, 2010), <http://www.ag.louisiana.gov/Shared/ViewDoc.aspx?Type=3&Doc=259> (Exhibit B).

23. *See* 33 U.S.C. § 2713(c) (2011) (Claims Procedure); 26 U.S.C. § 9509 (2011) (Oil Spill Liability Trust Fund).

24. *See* 33 U.S.C. § 2702(a) (2011).

25. *Id.* § 2702(b)(2) (available for the United States, individual states, Native American tribes, and foreign trustees).

26. *Id.*

profits resulting from destruction of real or personal property or natural resources,²⁷ and lost taxes and fees.²⁸ Under OPA, claimants may seek interim payments for damages, without foreclosing their ability to seek additional payments for future damages.²⁹ OPA caps liability at \$75 million for responsible parties, unless there is gross negligence, willful misconduct, or a violation of applicable federal safety, construction, or operating regulation.³⁰ OPA permits state legislatures to promulgate laws for oil-spill liability in excess of OPA limits.³¹ Florida, Louisiana, and Texas also have “mini-OPA” statutes that may also provide grounds for recovery.³² Certain state statutes may bestow on private landowners various riparian rights and common-law claims for damage adjacent to the shoreline³³ or damage to oyster beds leased from the state.³⁴ In addition, claimants might seek recovery under state common-law tort claims, such as negligence,³⁵ nuisance,³⁶ trespass,³⁷ or strict liability,³⁸ which might authorize punitive damages;³⁹ such claims would need to overcome the pure economic loss rule denying tort recovery solely for loss of profits, but courts may make an exception for commercial fishermen.⁴⁰

In June 2010, BP created an initial claims process for loss of income for those affected by the spill⁴¹ and eventually formally waived the \$75

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* § 2704(a)(1), (c)(1).

31. *Id.* § 2718(a), (c); *United States v. Locke*, 529 U.S. 89, 105 (2000); *Bouchard Transp. Co. v. Updegraff*, 147 F.3d 1344, 1352 (11th Cir. 1998).

32. FLA. STAT. § 376.123 (2010); Oil Spill Prevention and Response Act, LA. REV. STAT. ANN. §§ 30:2451–2496 (2010); Oil Spill Prevention and Response Act, TEX. NAT. RES. CODE ANN. § 40.159 (Vernon 2009); *see also* Stanley A. Millan, *Escaping the “Black Hole” in the Gulf*, 24 TUL. ENVTL. L.J. 41, 66 (2010) (discussing state mini-OPAs).

33. *See* ALA. CODE § 9-12-22 (2010); Stephen Gidiere, Mike Freeman & Mary Samuels, *The Coming Wave of Gulf Coast Oil Spill Litigation*, 71 ALA. LAW. 374, 378 (Sept. 2010).

34. *See* LA. REV. STAT. ANN. § 56:423 (2010); FLA. STAT. § 379.232 (2010); TEX. PARKS & WILD. CODE ANN. § 1.011 (Vernon 2009); Gidiere et al., *supra* note 33, at 378.

35. *See* Gidiere et al., *supra* note 33, at 378.

36. *See* ALA. CODE § 6-5-123 (2010); Gidiere et al., *supra* note 33, at 378.

37. *See* ALA. CODE §§ 6-5-210 (2010) (real property), 6-5-262 (2010) (personal property); Gidiere et al., *supra* note 33, at 378.

38. *See* Gidiere et al., *supra* note 33, at 378 (raising strict liability on the grounds of BP’s allegedly abnormally dangerous or ultrahazardous activities).

39. *See* 33 U.S.C. § 2718(a) (2011) (“Nothing in this Act or the Act of March 3, 1851 [Limitation of Liability Act] shall . . . affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any persons under . . . State law, including common law.”); Gidiere et al., *supra* note 33, at 376–78; *cf.* *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (considering punitive damages under federal maritime law in the Exxon Valdez spill, which pre-dated OPA).

40. *See, e.g.*, *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974) (limiting economic loss recovery from the oil spill to commercial fishermen only); Robert J. Rhee, *A Production Theory of Pure Economic Loss*, 104 Nw. U. L. REV. 49, 53, 56–57 (2010); Marshall S. Shapo, *The Legal Recourse in a Sea of Oil*, 57 RISK MGMT. MAG. (Dec. 2010), available at <http://rmmagazine.com/MGTemplate.cfm?Section=MagArchive&NavMenuID=304&template=/Magazine/DisplayMagazines.cfm&Archive=1&IssueID=351&AID=4218&Volume=57&ShowArticle=1> (noting that the economic-loss rule in tort law is “pockmarked with exceptions”).

41. *See* Pilié, *supra* note 17, at 177.

million cap on liability potentially applicable under OPA.⁴² This preliminary claims program dispensed hundreds of millions of dollars to claimants through the end of the summer of 2010.⁴³ Yet tens of thousands of claimants awaited payment, either because of documentation problems or administrative slowness.⁴⁴

In response to the crisis, President Obama called BP into the White House and the President and his staff negotiated the creation of a \$20 billion fund.⁴⁵ The President then used his first nationwide Oval Office address to discuss the BP spill and also to announce the BP fund.⁴⁶ In particular, the President stated that “[i]n order to ensure that all legitimate claims are paid out in a fair and timely manner, the account must and will be administered by an independent third party.”⁴⁷ In addition, the President promised that the fund would “not be controlled by BP.”⁴⁸ A White House Fact Sheet released with Mr. Feinberg’s appointment promised “[a] new, independent claims process will be created with the mandate to be fairer, faster, and more transparent in paying damage claims by individuals and businesses.”⁴⁹ Similarly, after meeting with BP executives, the President stated in a press conference that the fund would be “administered by an impartial, independent third party,” and that claims would be “administered as quickly, as fairly, and as transparently as possible.”⁵⁰

The same day the President announced the fund, the White House and BP chose Kenneth Feinberg as claim administrator, who is perhaps the most well known claims administrator in the United States.⁵¹ In 1984, Mr.

42. *BP Confirms Waiver of \$75 Million Cap for Oil Spill*, 269 ENV. COUNS. 6 (Jan. 2011); Statement of BP Exploration & Prod. Inc. Re Applicability of Limit of Liability Under Oil Pollution Act of 1990, *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Oct. 18, 2010). Another potential defendant, Transocean Ltd., which owned the oil rig that exploded in BP spill, has sought to limit its liability to the \$27.6 million value of the oil rig, relying on the Limitation of Liability Act of 1851, 46 U.S.C. App. §§ 181–196. Quinn Bowman, *Oil Spill Liability A Complicated Legal Web*, PBS NEWSHOUR, June 7, 2010, http://www.pbs.org/newshour/updates/politics/jan-june10/oillaw_06-04.html. But the U.S. Department of Justice has successfully challenged Transocean’s limitation of liability with regard to OPA claims and various other federal statutes. See Gidiere et al., *supra* note 33, at 378. Other putative defendants may include, inter alia, Halliburton, whose cementing operations were involved in capping the well, and Cameron International, which provided the blow-out preventers that did not prevent the spill. See *id.*

43. See Gidiere et al., *supra* note 33, at 378; Press Release, July 28, 2010, BP, “Total Claims Payments Top \$256 Million,” <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064024> (last visited July 9, 2011).

44. See Pilić, *supra* note 17, at 177.

45. See Press Release, June 16, 2010, The White House, FACT SHEET: Claims and Escrow, “Independent Claims Facility,” <http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow> (last visited July 9, 2011).

46. Remarks by the President to the Nation on the BP Oil Spill, *supra* note 5.

47. *Id.* (emphasis added).

48. *Id.*

49. See FACT SHEET: Claims and Escrow, *supra* note 45.

50. See Press Release, June 16, 2010, The White House, Statement by the President After Meeting with BP Executive, <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives> (last visited July 9, 2011).

51. See Statement of President After Meeting with BP Executives, *supra* note 50 (“We’ve mutually agreed that Ken Feinberg will run the independent claims process we’re putting in place.”); MUKASEY MEM., *supra* note 3, at 5; see generally Terry Carter, *The Master of Disasters: Is It Just Him*,

Feinberg served as a mediator in the \$180 million *Agent Orange* class settlement that provided compensation to veterans claiming health injuries stemming from the Agent Orange defoliants sprayed during the Vietnam conflict.⁵² In addition, Mr. Feinberg served as a trustee of the Dalkon Shield Claimants Trust.⁵³ Mr. Feinberg also served as the claim administrator for the 9/11 Victim Compensation Fund created by Congress after the terrorist attacks on the World Trade Center in New York in 2001.⁵⁴ In 2007, Mr. Feinberg administered the fund assembled to compensate victims of the university shooting at Virginia Tech, in which thirty-two persons died.⁵⁵ More recently, President Obama appointed Mr. Feinberg to oversee executive salaries for entities receiving funds from the Trouble Asset Relief Program following the 2008 financial crisis.⁵⁶

The entity created to disburse the \$20 billion BP fund was named the Gulf Coast Claims Facility.⁵⁷ Under the formal trust agreement, executed in August 2010, BP agreed to create the \$20 billion fund by providing \$5 billion to the Trust by the end of 2010 and \$1.25 billion per quarter to the Trust between 2011 and 2013.⁵⁸ The formal trust agreement named two individual trustees, Kent Syverud, Dean of Washington University School of Law, and former federal judge John S. Martin, Jr.,⁵⁹ and stated that each individual trustee was to be compensated at \$100,000 per year.⁶⁰ In addition, the trust agreement named Mr. Kenneth Feinberg as GCCF Claims Administrator.⁶¹ The GCCF sought to pay not only claims related to OPA, but also state-tort claims for physical injury and death.⁶² At the expiration of the trust, all unused GCCF funds are to be returned to BP.⁶³

or *Is Kenneth Feinberg Changing the Course of Mass Tort Resolution?*, 97 A.B.A. J. 32 (2011) (discussing Mr. Feinberg's career in mass tort claims resolution).

52. See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* passim (1987); Pilié, *supra* note 17, at 177.

53. See Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 *LAW & CONTEMP. PROBS.* 79 (1990); Georgene Vairo, *Why Me? The Role of Private Trustees in Complex Claims Resolution*, 57 *STAN. L. REV.* 1391, 1392 (2005).

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

55. See Kenneth R. Feinberg, *Compensating the Victims of Catastrophe: The Virginia Tech Victims Assistance Program*, 93 *VA. L. REV. IN BRIEF* 181 (2007); Laura Parker, *A Conversation with BP's Pay Czar, Kenneth Feinberg*, AOL NEWS, Jan. 10, 2011, <http://www.aolnews.com/2011/01/10/a-conversation-with-bps-pay-czar-kenneth-feinberg/>.

56. See Parker, *supra* note 55.

57. See *id.*

58. Deepwater Horizon Oil Spill Trust Agreement, *supra* note 12, at 2.

59. *Id.* at 1. The corporate trustee was Citigroup Trust-Delaware, N.A. *Id.*

60. *Id.* at Schedule B-2-1.

61. *Id.* at 1.

62. See Pilié, *supra* note 17, at 177; Deepwater Horizon Oil Spill Trust Agreement, *supra* note 12, at 1. Under the GCCF protocol, BP may appeal awards over \$500,000 made by Mr. Feinberg. Gulf Coast Claims Facility Protocol for Interim and Final Claims, ¶ 6(B)(1), Feb. 8, 2011, http://www.gulfcoastclaimsfacility.com/proto_4. BP may appeal awards of less than \$500,000 if Mr. Feinberg approves. *Id.* ¶ 6(B)(2).

63. Deepwater Horizon Oil Spill Trust Agreement, *supra* note 12, at 9.

With regard to claims for loss of income from distant businesses, Mr. Feinberg initially disfavored payment, but subsequently stated “that a geographic test to determine eligibility regarding economic harm due to the oil spill is unwarranted.”⁶⁴ Mr. Feinberg’s decisions with regard to which industries may seek compensation have drawn criticism, including from the federal Department of Justice⁶⁵ and state attorneys general.⁶⁶ The GCCF distributed emergency checks for six months of lost profits, with claims filed by the end of November 2010.⁶⁷ Subsequently, until April 2013, Mr. Feinberg is to assess and offer a final claim payment, acceptance of which would require claimants to waive all additional claims, though claimants may also instead continue to apply for interim quarterly payments.⁶⁸ In December 2010, Mr. Feinberg introduced a quick-pay option under which those already approved for an emergency payment could obtain an additional “quick pay” option of \$5,000 for an individual or \$25,000 for a business, provided that any future claims against BP or other responsible parties were waived.⁶⁹ The GCCF does not offer payments for alleged punitive damages.⁷⁰ The GCCF protocol provides that for final claims, a claimant may appeal a monetary award in excess of \$250,000 and BP may appeal an award in excess of \$500,000, with appeals heard by a three-judge

64. See Feinberg Announces Clarification Regarding Geographic Proximity, Oct. 4, 2010, <http://www.gulfcoastclaimsfacility.com/press7.php>; see also Editorial, *Feinberg Finally Gets It*, PENSACOLA NEWS JOURNAL, Oct. 6, 2010 (discussing Mr. Feinberg’s move away from a purely geographic test for claims eligibility).

65. See, e.g., David Hammer, *Kenneth Feinberg’s Use of Industry Categories in Scoring Claims Is Criticized*, TIMES-PICAYUNE, Feb. 4, 2011, http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/02/justice_department_scolds_fein.html.

66. See, e.g., *Gulf Spill Fund Czar Paying for Ethics Advice*, *supra* note 16 (noting a November 24, 2010 letter from Louisiana Attorney General James Caldwell questioning the independence of the GCCF and Mr. Feinberg); Anita Lee, *Hood Wants Someone Looking over Feinberg’s Shoulder*, SUN HERALD, Jan. 25, 2011 (relating Mississippi Attorney General Jim Hood’s request that the MDL court appoint a person to oversee Mr. Feinberg, and noting Attorney General Hood’s concerns about legal waivers and inconsistency in payments); *Louisiana Jindal, Caldwell Wants Court to Oversee Feinberg in BP Claims*, BAYOUBUZZ NEWS, Feb. 1, 2011, <http://www.bayoubuzz.com/buzz/latest-buzz/164361-louisiana-jindal-caldwell-wants-court-to-oversee-feinberg-in-bp-claims>.

67. See Pilié, *supra* note 17, at 177.

68. See Parker, *supra* note 55; Pilié, *supra* note 17; *BP Oil Spill to Get New Options for Compensation*, 28 No. 24 WEST. J. TOXIC TORTS 8 (2011); Laura Parker, *BP Has Made Only 1 Final Payment: \$10M to Texas Firm*, AOL NEWS, Jan. 31, 2011, <http://www.aolnews.com/2011/01/31/bp-has-made-only-1-final-payment-10m-to-texas-firm/> (noting single \$10 million final payment made to Texas firm). Mr. Feinberg has stated that without waivers, “I would be totally ineffective in trying to shut down the litigation. We’re trying to streamline the process. And end lawsuits.” Parker, *supra* note 55.

69. David Hammer, *Most BP Oil Spill Claimants Opt for One-Time “Quick payment”*, TIMES-PICAYUNE, Jan. 26, 2011, http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/most_bp_oil_spill_claimants_op.html; Jim Snyder & Carol Massar, *Feinberg Says Half of BP Fund May Cover Spill Claims*, BLOOMBERG BUSINESSWEEK, Jan. 25, 2011, <http://www.businessweek.com/news/2011-01-05/feinberg-says-half-of-bp-fund-may-cover-spill-claims.html>.

70. With regard to punitive damages, Mr. Feinberg has stated,

I’m not begrudging anybody who wants punitive damages. If you want punitive damages, don’t take anything from the fund. Punitive damages is a judicial concept. I have no idea whether punitive damages are even credible here. This is a fund designed to compensate for loss, not punish BP.

Parker, *supra* note 55.

panel to be determined.⁷¹ With regard to the decision to accept a final claim, Mr. Feinberg stated that “the alternative, suing BP, could take five years and produce the same result.”⁷² Mr. Feinberg has also suggested that claimants might seek compensation under the claims process without having to pay plaintiff’s counsel,⁷³ and the GCCF reports that only a small percentage of claimants have lawyers.⁷⁴ Indeed, many claimants fired their attorneys after the fund’s announcement and pursued fund compensation without counsel.⁷⁵ Through January 2011, the GCCF had received more than 450,000 claims and paid approximately \$2.7 billion to greater than 170,000 claimants, more than \$140 million of which went for the final quick-pay option.⁷⁶ The GCCF has denied claims due to inadequate documentation, as well as claims being insufficiently related to the oil spill.⁷⁷ Mr. Feinberg has predicted that perhaps \$10 billion of the \$20 billion fund will be returned to BP.⁷⁸

Litigation is currently pending against BP in various courts. The Judicial Panel on Multidistrict Litigation ordered all federal litigation concerning the BP Gulf oil spill be transferred to the Eastern District of Louisiana, under Judge Barbier. Additional litigation proceeds against BP in state courts, as well. Plaintiffs have brought hundreds of lawsuits.⁷⁹

For administering the Gulf Coast Claims Facility, BP is compensating Mr. Feinberg’s two-partner firm, Feinberg Rozen, at the rate of \$850,000 per month, with quarterly review and renegotiation of that fee between Mr.

71. See Gulf Coast Claims Facility Protocol for Interim and Final Claims, *supra* note 62.

72. Daniel Kruger & Tom Keane, *BP Shrimp Losses Hard to Calculate, Feinberg Says*, BLOOMBERG BUSINESSWEEK, June 25, 2010.

73. See 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 11121, 11123 (2010) (noting that Mr. Feinberg has stated, “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 a court will be. At the same time, you won’t have to pay lawyers and costs.”).

74. See Hammer, *supra* note 69 (according to the GCCF, only three percent of claimants had counsel).

75. See Light, *supra* note 73, at 11122 (relating one Louisiana attorney stating, after the fund’s creation, that “[p]eople are firing their lawyers right and left”).

76. See Parker, *supra* note 55; Snyder & Massar, *supra* note 69.

77. See Parker, *supra* note 55 (quoting Mr. Feinberg as saying he would deny as too indirect the claim of a dentist who claims reduced business because of the spill); David C. Wilkes, *An Interview with Ken Feinberg*, 82 N.Y. STATE BAR J. 10, 17 (2010) (discussing eligibility, calculation, and corroboration of losses for the BP oil spill).

78. See Louis Cooper, *Q&A: Feinberg Talks About Claims Process*, PENSACOLA NEWS JOURNAL, Feb. 8, 2011, at A1 (“[A] couple of weeks ago, just looking at the raw data . . . it seemed to me that \$10 billion would be more than adequate. . . . This (\$10 billion) is what I think, but it remains to be seen.”); Snyder & Massar, *supra* note 69 (noting Mr. Feinberg’s estimate that \$10 billion may be sufficient to compensate victims).

79. See *Gulf Spill Fund Czar Paying for Ethics Advice*, *supra* note 16 (noting more than 300 lawsuits have been filed); see generally Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C.L. REV. 237 (2011) (discussing multidistrict litigation proceedings in connection with the BP Gulf oil spill).

Feinberg and BP.⁸⁰ That fee, which is separately paid by BP and not deducted from the GCCF, covers not only Feinberg Rozen's two partners, but also a senior consulting attorney, project manager, and director of special projects, as well as two additional attorneys hired specifically for the GCCF-related work.⁸¹ Additional subcontractor costs for the GCCF are passed through to BP for payment.⁸² When working as a mediator, Mr. Feinberg generally eschews the billable hour, in favor of a flat fee and success fee.⁸³ With regard to Ken Feinberg's pay structure, Ken Feinberg has stated that he works for "the escrow agreement signatories, which is the Department of Justice and BP."⁸⁴ Feinberg also stated, "I like to think I am working for the people of the Gulf. That's who I am really trying to help," noting that "[n]either the administration nor BP has exercised any undue influence over what I try to do."⁸⁵ Mr. Feinberg cannot be fired by BP, unless the United States Department of Justice also approves.⁸⁶

In February 2011, however, in response to a motion for plaintiffs, the federal multidistrict litigation court issued an opinion finding that Mr. Feinberg and the GCCF were not "independent" of BP.⁸⁷ In addition, the order regulated communications between the GCCF and claimants, citing the court's authority to control communications to putative class members.⁸⁸ Plaintiff attorneys⁸⁹ and state attorneys general⁹⁰ also have called into question Mr. Feinberg's independence from BP.

80. See Jim Snyder & Lizzie O'Leary, *Spill Fund Legal Fees So Far: \$2.5 Million*, BLOOMBERG, Oct. 8, 2010, <http://www.chron.com/disp/story.mpl/business/7239134.html> (stating firm was paid \$850,000 a month by BP); Harry R. Weber, *Feinberg Discussing Future Pay for Spill Fund Work*, WASH. POST, Jan. 18, 2011, <http://www.huffingtonpost.com/huff-wires/20110118/us-gulf-oil-spill-feinberg/>; MUKASEY MEM., *supra* note 3, at 8.

81. See MUKASEY MEM., *supra* note 3, at 6–7.

82. *Id.* at 7–8.

83. See Kenneth R. Feinberg, *Billing Reform Initiatives*, 59 ALB. L. REV. 963, 965 (1996).

84. Cooper, *supra* note 78. The Department of Justice was not a signatory to the fund trust agreement. Deepwater Horizon Oil Spill Trust Agreement, *supra* note 12, at 1.

85. See Cooper, *supra* note 78.

86. See Dan Murtaugh, *Contract: BP Sets Ken Feinberg's Salary, Will Get Oil Spill Claims Documents*, PRESS-REGISTER, Jan. 19, 2011, http://blog.al.com/live/2011/01/contract_between_bp_and_feinbe.html.

87. See Order, *supra* note 4, at 9.

88. *Id.*

89. See Light, *supra* note 73, at 11122 (noting that "the plaintiffs' bar accused [Mr. Feinberg] of being a 'tool of BP . . . who wants hardworking people to sign releases for far fewer dollars than they deserve'").

90. See Laurel Brubaker Calkins & Margaret Cronin Fisk, *BP Deliberately 'Underpaying' Claims, Mississippi Says*, BLOOMBERG, Feb. 1, 2011, <http://www.bloomberg.com/news/2011-02-01/bp-deliberately-underpaying-claims-mississippi-says.html> (stating that Mississippi Attorney General Jim Hood alleged that the fund delayed payment of claims to pressure "financially desperate" claimants to accept low settlements); Light, *supra* note 73, at 11122 (noting that the Alabama Attorney General referred to Mr. Feinberg as "a 'corporate shill' for BP"); Rowena Mason, *BP Gulf of Mexico Oil Spill Fund "Underpaying victims"*, TELEGRAPH, Feb. 3, 2011, <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8299361/BP-Gulf-of-Mexico-oil-spill-fund-underpaying-victims.html> (relating Mississippi Attorney General Jim Hood's statement that "BP is withholding interim claim payments to increase financial hardship on claimants."); Ann Zimmerman, *State Officials Step Up Criticism of BP Oil-Spill Fund*, WALL ST. J., Feb. 12, 2011, <http://online.wsj.com/article/SB10001424052748704329104576138342199677406.html> (noting that Mississippi, Florida, and Louisiana "publicly questioned Mr. Feinberg's repeated claim of independence").

III. THE QUASI-PUBLIC CLAIMS FUND: ORIGINS, BENEFITS, AND CONCERNS

To understand the quasi-public claims fund, we might situate it in the context of other types of funds. A “claims fund” is a group of money designated to pay physically or economically injured persons, according to some set of rules as to who gets paid and how much, and the claims fund may supplant other potential avenues of recovery, such as court lawsuits.⁹¹ The rules for claimant eligibility may be determined at the outset of the fund, or left to the claim administrator to craft.⁹²

On one side, we have what might be called public claims funds. The government creates such funds, and claimants likely deem these funds the most legitimate and trustworthy.⁹³ Recently, the 9/11 Victims Compensation Fund, which was created by Congress, provides an example of such a public fund.⁹⁴ There, the claims fund for 9/11 victims was drawn from public tax revenue, and 9/11 fund administrator Ken Feinberg performed pro bono—a remarkable and laudable act.⁹⁵ Further back, the federal Black Lung Program provides another example of a public fund, enabling compensation to miners diagnosed with black lung disease.⁹⁶ In the Black Lung Program, a tax on industry provided the revenue for the fund.⁹⁷ But, Congress and government officials paid through government funds publicly set the terms of compensation payments to miners,⁹⁸ and the government

91. Cf. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1361 (2005) (defining a “claims resolution facility” as “a generic term used to describe a wide range of entities that process and resolve claims made against a potential funding source”).

92. See Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1616 (1995) (noting claims facilities may be merely administrative payment schemes, or “individualized dispute resolution procedures”); Vairo, *supra* note 53, at 1392 (discussing authority of private persons to fashion compensation awards for claimants); cf. Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and Death of Adjudication*, 58 U. MIAMI L. REV. 173, 185–91 (2003); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2131 (1989) (“One clear example of such ad hoc proceduralism comes via the increased number of judicial adjuncts, who customize procedure for particular and individual cases.”).

93. See McGovern, *supra* note 91, at 1367 (stating that “[t]ypically, the more governmental the authority, the more legitimate the facility”); *id.* at 1375 (noting that “[i]n essence, the strategy is a search for legitimacy”); cf. Vairo, *supra* note 53, at 1413 (arguing that for mass tort litigation, “the process developed and implemented by trustees must be perceived as legitimate”).

94. See FEINBERG, *supra* note 54; KENNETH FEINBERG, U.S. DEP’T OF JUSTICE, FINAL REP. OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004), http://www.justice.gov/final_report.pdf; Deborah Hensler, *Alternative Courts? Litigation-Induced Claims Resolution Facilities*, 57 STAN. L. REV. 1429, 1430 n.3 (2005) (presenting 9/11 Victim Compensation fund as public alternative to private claims resolution facility); Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 438 (2003).

95. See Hechler, *supra* note 11, at 20.

96. See Black Lung Benefits Act of 1972, Pub. L. No. 92–303, 86 Stat. 15 (codified as amended in scattered sections of 30 U.S.C.); Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 683 (1989).

97. See Prunty & Solomons, *supra* note 96, at 683.

98. See *id.* at 671.

also paid the program's administrators at the Social Security Administration and U.S. Department of Labor.⁹⁹ Congress has also considered, but not passed, a public claims fund for asbestos litigation.¹⁰⁰

Because a public fund seeks full compensation of all valid claims and claim administrators have no incentive to provide plaintiffs with anything other than full compensation, claimants to a public fund might generally wish to avoid paying plaintiff counsel fees—which might amount to one-third of the total award—and instead claimants might merely submit a claims form and take compensation without counsel. With regard to the goals of the tort system, the public fund might well achieve compensation of injured claimants. But the goal of deterring tortfeasors and serving corrective justice may not be so well-served, if public tax revenue is used, as in 9/11,¹⁰¹ or if a whole industry is generally taxed, as in the Black Lung Program,¹⁰² because the specific tortfeasor is not directly paying for the harm caused. While overall social transaction costs might be low because claimants might not retain lawyers, the public fund might suffer from additional expenditures related to fraud if claims are not closely scrutinized by administrators spending general public funds. As economist Milton Friedman observed, entities spend most carefully when it is their own money at stake—not the public's.¹⁰³ Indeed, the Black Lung Program has been criticized as subject to fraud.¹⁰⁴

On the other side from public claims funds, we have another approach: private claims funds. Professor Deborah Hensler has noted that such private claims resolution facilities “are distinguished from such administrative tribunals and social welfare and other public compensation programs by the fact that they are private entities; their rules are not subject to broad public debate, and their outcomes are often protected from public scrutiny.”¹⁰⁵ Most recently, in modern mass tort litigation, such as that concerning Vioxx, a pain medication allegedly linked to heart problems, defendant Merck offered claimants a \$4.85 billion settlement, which was negotiated by Merck's lawyers and certain prominent plaintiffs' counsel,

99. See *id.* at 670.

100. See, e.g., Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 272–78 (2006).

101. See JOAN BERNOTT MAGINNIS, *THE 9/11 VICTIM COMPENSATION FUND: OVERVIEW AND COMMENT* (2007), http://www.fed-soc.org/doclib/20070326_VictimFund.pdf.

102. See Prunty & Solomons, *supra* note 96, at 683.

103. See MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 116 (1990).

104. See Prunty & Solomons, *supra* note 96, at 734 (noting that “the program has been plagued by fraud and abuse”); cf. John Schwartz, *Claims to BP Fund Attract Scrutiny*, N.Y. TIMES, Oct. 2, 2010, <http://www.nytimes.com/2010/10/03/us/03feinberg.html> (discussing fraudulent claims in connection with the \$20 billion BP fund).

105. Hensler, *Alternative Courts?*, *supra* note 94, at 1430; see also Vairo, *supra* note 53, at 1394 (discussing the “hybridization of complex claims resolution,” including not only judiciary and other government officials, but also private parties); cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (noting that judges have increasingly been supported by “a wide range of outsiders—masters, experts, and oversight personnel”); Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 431–37 (1999) (likening mass tort litigation to “private aggregate claim resolution”).

representing their clients.¹⁰⁶ In the Vioxx fund, each plaintiff desiring to take part had to agree individually to settle his or her claims.¹⁰⁷ An earlier example of a private claims fund might be the attempts by asbestos companies to create and fund a separate entity to settle asbestos claims—for example, the Asbestos Claims Facility and Center for Claims Resolution in the 1980s.¹⁰⁸

Unlike the public fund, which seeks to offer just compensation, the private fund might be seen as essentially a settlement offer that may discount full compensation, but provide claimants quick and certain recovery. As a result, claimants likely need to retain and pay their own lawyers to evaluate the fund's offer. For example, claimants would likely need advice of counsel about whether to accept a Vioxx deal offered by Merck, and perhaps negotiated by the lawyers for other claimants. Similarly, claimants would understandably question the offers of asbestos companies seeking to settle their claims, thinking the asbestos companies and their claims fund staff served the asbestos companies' interests, rather than public justice, and disputes might arise not only as to amount of compensation, but also as to types of compensated injuries.

With regard to the tort goals of deterrence and compensation, the success of the private fund, which is tantamount to mass settlement, depends on the deal struck. But we might expect that properly incentivized attorneys vying in an adversary system, with tort law as the backdrop and the threat of trial always present, would result in deals that generally appropriately would deter tortfeasors, and that might or might not compensate the needs of claimants, depending on the merit of their claims. Of course, the ending of formal litigation through a private claims fund also saves substantial attorneys' fees—particularly among defense attorneys who predominantly bill by the hour.

Between these two poles—the public fund and the private fund—enters the Gulf Coast Claims Facility created after the BP Oil Spill.¹⁰⁹ The GCCF is best considered a quasi-public fund. Like the private fund, the GCCF is funded by the defendant—here, BP—and its administrators are paid by BP. But before we consider the GCCF to be just like the Vioxx settlement, we need to consider the full context of the fund's creation. That context is what renders the fund quasi-public, and its administrators quasi-judicial.¹¹⁰

106. See David Voreacos & Allen Johnson, *Merck Paid 3468 Death Claims to Resolve Vioxx Lawsuits*, BLOOMBERG, Jul. 27, 2010, <http://www.bloomberg.com/news/2010-07-27/merck-paid-3-468-death-claims-to-resolve-vioxx-suits.html>; Official Vioxx Settlement, <http://www.officialvioxxsettlement.com/> (last visited July 9, 2011).

107. See Official Vioxx Settlement, *supra* note 106.

108. See Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13 (Autumn 1990); Hensler, *supra* note 92, at 1608–09.

109. Gulf Coast Claims Facility, <http://www.gulfcoastclaimsfacility.com/> (last visited July 9, 2011).

110. Cf. Vairo, *supra* note 53, at 1400 (raising the concern that private claims administrators have received an “ad hoc judicial mantle”).

The Gulf Coast Claims Facility shows elements of both the private and public claims fund. Like other private funds, the GCCF is funded solely by defendants, and claimants choose to settle any legal claims in return for participating in the fund.¹¹¹ But like other public funds, the GCCF offered a governmental guarantee of a trustworthy process that would fairly and fully compensate claimants. In particular, the President and the White House negotiated the creation of the GCCF with BP. In the President's first nationwide Oval Office address, which was devoted to the BP oil spill, the President promised that the fund would be administered by an "independent third party," and would not be "controlled by BP."¹¹² The President also promised that the claims would be paid in a "fair . . . manner."¹¹³ In promising all this, the President should be considered to have given a public imprimatur to the BP fund. That combination of private and public is what makes the Gulf Coast Claims Facility a quasi-public claims fund.¹¹⁴

There are some analogs to the quasi-public fund presented by the GCCF. Close to the private fund, but with some public oversight, are claims funds created in the context of bankruptcy or class-action settlements. Examples of bankruptcy claims funds include the asbestos trusts, Dalkon Shield Claimants Trust, or Dow Corning Silicone Gel Breast Implant Trust,¹¹⁵ and class-action-settlement claims funds include Agent Orange, Fen-Phen, Polybutylene (PB) Pipes Facility, and Prudential Claims Facility.¹¹⁶ In bankruptcy and class-action settlements, such private claims funds receive some judicial oversight when the judge approves a bankruptcy reorganization plan in Chapter 11 or class settlement under Rule 23.¹¹⁷ But no prior fund has been negotiated with the tortfeasor by the

111. See Carter, *supra* note 51 (noting multidistrict litigation plaintiffs' executive committee member Stephen Herman's comment on Mr. Feinberg that "[i]t's extremely dangerous for someone . . . to be cloaked in this specter of independence, when in fact he's nothing more than a defense lawyer trying to settle cases for BP"). In the 9/11 fund, which I have characterized as a public fund, claimants also agreed to forego any separate claim if they participated in the fund. See FEINBERG, *supra* note 54, at 21 (noting the "unique statutory choice: sue in court or participate in the fund, one or the other").

112. See Remarks by the President to the Nation on the BP Oil Spill, *supra* note 5.

113. *Id.*

114. *Cf.* Order, *supra* note 4, at 8 (referring to BP fund as "a hybrid entity, rather than one that is fully independent of BP").

115. See Hensler, *Alternative Courts?*, *supra* note 94, at 1431; Vairo, *supra* note 53, at 1397 (noting the increasing use of bankruptcy by asbestos companies to resolve mass tort actions and seek global peace), 1400 (discussing "paramount importance" of prepackaged asbestos bankruptcy plans under 11 U.S.C. § 524(g)); Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 93-95 (2004).

116. See SCHUCK, *supra* note 52, at 143-67; Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373 (1998) (discussing continuing attempts to certify settlement class actions); Hensler, *Alternative Courts?*, *supra* note 94, at 1431; Vairo, *supra* note 53, at 1399 (noting continuing approval of class settlements, notwithstanding *Amchem* concerns); see generally Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 897, 913 (2007) (listing class-action settlements and bankruptcy-trust-paid tort claims from 1960s onward); Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405 (1999).

117. See FED. R. CIV. P. 23(e) (court must approve class settlement as "fair, reasonable, and adequate"); Hensler, *Alternative Courts?*, *supra* note 94, at 1435 (describing bankruptcy court approval of Chapter 11 reorganization plan including Dalkon Shield Claimants' Trust Fund).

President of the United States and promised by the President to offer “fair” compensation to claimants.

The quasi-public claims fund offers several benefits. First, the quasi-public claims fund allows for the relatively swift creation of a claimant fund, designed in part by an elected branch of government that should be committed to justice. This swiftness was of course extremely important in the context of the BP spill, where economic losses posed a threat to the economies of entire regions abutting the Gulf. Indeed, the BP Gulf oil spill arguably presented a kind of systemic threat to the Gulf area economy that could be likened to the recent global financial crisis that also spurred the Executive Branch to intervene.¹¹⁸ The quasi-public claims fund may also lead to wide compensation of claimants, as well as deter tortfeasors, and serve corrective justice, because the tortfeasor pays for the fund. Furthermore, the quasi-public fund may also assist defendants in obtaining public goodwill by quickly admitting its problems and offering compensation to injured parties.¹¹⁹

But what about attorneys’ fees? Will the quasi-public claims fund save attorneys’ fees? If claimants choose the fund, rather than litigation, then defense counsel fees are likely saved, since defense counsel generally bills hourly. But what about plaintiffs’ counsel? If claim valuations are questionable, claimants might benefit from counsel’s assessment of whether to participate in the fund or seek a possible better deal through litigation, but claimants would then need to pay counsel substantial fees, perhaps the one-third traditional contingent fee. Plaintiffs’ counsel could agree to limit their fee to less than one-third of the total recovery, given the certainty and ease of recovery, in light of ethical requirements of only charging a reasonable fee.¹²⁰ But, the surest way to limit plaintiffs’ counsel fees and thereby reduce overall societal transaction costs for the fund, would be if claimants chose to apply for fund compensation without retaining counsel.¹²¹

This question—whether claimants need counsel—has been significant for the Gulf Coast Claims Facility. It stems from the central confusion attending the quasi-public fund, because it shares aspects of public justice, where claimants might not need counsel, as well as private settlement negotiation, where claimants would desire counsel. The problem also has not been avoided by BP’s recent proposal to pay for legal-aid counsel for

118. See Board of Governors of the Federal Reserve System, Troubled Asset Relief Program (TARP) Information, <http://www.federalreserve.gov/bankinfo/tarinfo.htm> (last visited July 9, 2011).

119. In addition to seeking public goodwill, BP of course also had to satisfy its responsibilities for private economic loss claims under the Oil Pollution Act of 1990. 33 U.S.C. § 2705(a) (2011) (stating that “responsible party shall establish a procedure for the payment or settlement of claims for interim, short-term damages”). The Gulf Coast Claims Facility, however, goes beyond BP’s responsibilities under the Oil Pollution Act, because the Facility also seeks to settle claims for personal injury and death. Order, *supra* note 4, at 10; Gulf Coast Claims Facility Protocol for Interim and Final Claims, *supra* note 62.

120. See MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (requiring that fees be reasonable).

121. See Carter, *supra* note 51, at 37 (noting Mr. Feinberg’s statement that a gulf coast shrimper “doesn’t need a lawyer, doesn’t have to pay a lawyer 40 percent of what he receives”).

claimants.¹²² First, legal aid lawyers may not be as skilled or experienced as plaintiff tort litigators in ascertaining their chances of prevailing at trial, and for how much, and evaluating tort settlement offers. In any event, the quasi-public fund would be more efficient for society if no claimant counsel were needed at all. Lastly, the method of payment of the legal aid lawyers only opens up another area for analysis for potential incentives and bias.

That the GCCF is a quasi-public claims fund is apt to cause confusion from claimants on the important question of whether claimants should retain counsel in connection with their decision to participate in the GCCF or sue.¹²³ Is the GCCF a public fund where claimants may comfortably seek payments without their own counsel? Or is the GCCF a private fund presenting a settlement offer that must be carefully evaluated with the aid of counsel? The President's involvement and promise of an "independent third party" running the fund suggest the former, but BP's supplying the GCCF funds and paying the GCCF administrators might suggest the latter. In fact, claimants have likely been confused about the status of the fund,¹²⁴ and plaintiffs' counsel have questioned the running of the fund, perhaps in part because of their financial interest in justifying their services to claimants.¹²⁵

Although the White House negotiated the overall size of the BP fund, the White House did not negotiate the specific details of which claimants would receive compensation or how much compensation.¹²⁶ Those important issues were left to the claims administrator, Ken Feinberg, to determine.¹²⁷ Who qualifies for economic loss? What businesses should be included? How far inland may they be? What type of proof is required to document a claim? In deciding whether to pursue the fund, and whether they needed, and should pay for, counsel, claimants understandably turned to scrutinizing the fund's structure. Was it in fact run by an "independent third party" such that they could trust that the claim offers were "fair," as the President had promised they would be?

IV. TRANSPARENCY AND INDEPENDENCE IN THE QUASI-PUBLIC FUND

To counteract concerns of claimant confusion and incentivize claimants to opt-in without having to retain and pay for attorneys, the quasi-public claims fund should seek to provide (1) transparency in its claims

122. See Dan Murtaugh, *Gulf Coast Claims Facility Pays Lawyers to Offer Free Legal Advice*, PRESS-REGISTER, Jan. 25, 2011, http://blog.al.com/live/2011/01/gulf_coast_claims_facility_pay.html (noting the GCCF paying for seventeen attorneys at a dozen legal aid groups).

123. See Order, *supra* note 4, at 12 (finding "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").

124. See Fisher, *supra* note 1.

125. See Order, *supra* note 4, at 9.

126. See FACT SHEET: Claims and Escrow, *supra* note 45.

127. See Deepwater Horizon Oil Spill Trust Agreement, *supra* note 12.

administrator compensation structure¹²⁸ and (2) a claims-administrator compensation structure that preserves independence.¹²⁹

Because some confusion about roles is inherent in the quasi-public claims fund, we should expect that claimants will want more information and may become concerned that they are being misled. Who is paying the administrators and designers of the fund? How much are they getting paid? Might claim-administrator pay be renegotiated or changed by the defendant, which could run the risk of incentivizing those administrators to favor the defendant's interests rather than claimants, if leftover claim funds are returned to the defendant? To stop this concern, and to encourage claimants to participate in the fund, the claim administrators of a quasi-public fund should provide clear descriptions to claimants of the pay structure for claims administrators.

Mr. Feinberg and his firm initially may have avoided discussing their pay structure because they feared it would anger claimants to hear how much Mr. Feinberg and his firm were being paid and by whom.¹³⁰ Instead, Mr. Feinberg may have believed it best that claimants focus on what they are receiving, rather than ask about how fund administrators are being paid.¹³¹ For example, in response to early reporter inquiries on Mr. Feinberg's compensation, Mr. Feinberg said that his compensation "would be confidential."¹³²

But, the larger problem in not embracing pay transparency for the fund is that it may have increased claimants' suspicions, and, as a result, perhaps diminished participation,¹³³ because claimants may not trust that the process is neutral. Here, the claimants have suffered economically because of the oil spill of BP and likely are skeptical of BP's intentions with the fund. They likely are worried that BP might be shaping the fund so as to maximize the funds returned to BP and may fear that the President and the White House have moved their focus onto other pressing matters.

Apart from transparency, claims administrators in a quasi-public claims fund should, of course, also be paid in a method that is optimally designed to enhance neutrality and independence. Obviously, if one discloses that a claims administrator will get a bonus from the tortfeasor if the claims administrator gives out little money, then claimants will not sign up

128. In a recent article, Mr. Feinberg discussed the value of transparency in mass torts, but did not address specifically the topic of transparency in claim-administrator compensation. Kenneth R. Feinberg, *Transparency and Civil Justice: The Internal and External Value of Sunlight*, 58 DEPAUL L. REV. 473 (2009).

129. See McGovern, *supra* note 91, at 1387 (stating with regard to "[i]ndependence, neutrality, and experience," that "[t]hese qualities are necessary for the operation of a claims facility"); Vairo, *supra* note 53, at 1393 (arguing for "independent trustees," but raising concerns about the "repeat player problem" involving recurring appointment of only a few individuals in each claim fund).

130. See Stier, *supra* note 1.

131. See *id.*

132. See *id.*

133. Mr. Feinberg has stated that his test for success of the fund is the participation rate of claimants, which he sees as an indicator of "whether people think the program is fair." Parker, *supra* note 55. Mr. Feinberg aims for a participation rate of 90% in the GCCF. *Id.* (noting that the 9/11 fund had a 97% participation rate, and the Virginia Tech fund had a 100% participation rate).

or at least will feel they need the advice of plaintiffs' counsel about whether to participate.

So, how should a fund pay a claims administrator to preserve independence? If the tortfeasor is effectively admitting responsibility, it does make sense for the tortfeasor to pay administrator salaries, rather than split the costs with claimants. Nor should society have to pay via tax revenue. So some one-sidedness of pay may be unavoidable. As a result, here, the Gulf Coast Claims Facility was right to conclude that only BP should pay the claims administrators.¹³⁴

But, the method of pay could be such as to minimize the risk of claims administrators' catering to the defendant by reducing fund payouts and returning to the defendant from the leftover money in the fund. Here, for example, billions of dollars are projected to return to BP after claimants are paid.¹³⁵ As a result, claimants might think there is a risk that claims administrators might seek to please BP by limiting claim awards—and in return, the claims administrators might hope for greater pay from BP. One solution would be for the claims administrator to be paid via a flat fee—either one fixed sum or monthly payments for the duration—that is not subject to renegotiation during the fund's existence.

But what if the amount of work is unknown, varying, or unpredictable? Then, a single fixed fee may not be flexible enough. That was the situation with the BP fund, as former Attorney General Michael Mukasey opined in an evaluative report.¹³⁶ The Gulf Coast Claims Facility's response to this problem was to use a fixed fee, paid monthly and subject to renegotiation.¹³⁷ One benefit of that approach is that a flat fee does not involve BP in approving or disapproving specific billable hours.¹³⁸ But the problem arises from the renegotiation of the monthly fee.¹³⁹ When the renegotiation occurs, claimants might worry that BP could seek to reward claim administrators for minimizing awards, and claim administrators might be seeking to curry favor with BP.

134. As Mr. Feinberg has stated,

Who else should pay for the cost of the entire program but the wrong-doer? Every time somebody says to me, "Well, there's a conflict of interest because BP is ultimately footing the bill," I say, "Do you have a better idea?" You can't ask the claimants to pay. You can't ask the federal and state and local government to foot the bill. You can't ask [ethics consultant] Gillers or Feinberg or anybody else to work for free. So who but BP should pay the bill?

Id.

135. See Snyder & Massar, *supra* note 69.

136. MUKASEY MEM., *supra* note 3, at 27 (stating that "[b]ecause of the uncertainties, the relatively long duration of the Facility, and the need to ensure that fee payments are consistent with efforts expended . . . , we recommend that the parties continue the fees at the current rate, but agree to revisit the issue at intervals of [four] months or some other fixed period").

137. See Order, *supra* note 4, at 9–10 (noting that BP pays a flat fee to Mr. Feinberg and his firm each month, and that fees are to be evaluated after January 15, 2011 and quarterly thereafter); see also MUKASEY MEM., *supra* note 3.

138. See MUKASEY MEM., *supra* note 3, at 9 (noting that "hourly billing invites a level of scrutiny and management by the party paying the fee that is incompatible with the independence that is a hallmark of this engagement").

139. See *id.*

My proposal here would be that the bills of the claims administrator be reviewed and approved by a trusted third party by which defendant agrees to be bound. Something similar is generally done in class-action settlements, where the defendants often agree to settle cases with plaintiffs and pay whatever plaintiff attorneys' fees the judge determines are reasonable.¹⁴⁰ Perhaps a panel of retired federal judges could serve this purpose here? Or perhaps the Gulf Coast Claims Facility's trustees, which include Washington University Law Dean Kent Syverud and former federal judge John Martin, Jr.,¹⁴¹ could assist? The third-party panel might undertake the task pro bono, following Mr. Feinberg's laudable charitable efforts in the 9/11 fund. Or because the effort in reviewing bills is likely much more predictable, the third party reviewing the bills might itself be paid on a single, fixed fee or a monthly or annual fixed fee not subject to renegotiation. Indeed, the GCCF trustees are to be paid \$100,000 a year, without renegotiation.¹⁴²

A final concern arises from the large overall amount of money being paid—\$850,000 a month—to Feinberg Rozen by BP. Even if the fees are fixed or paid by a third party, might the overall payments to claims administrators be so great as to create a sense of bias toward the defendant? Being personally guaranteed millions from the defendant might incline one to save the defendant some money in making awards. Complicating this concern is the general expectation in the United States that judges are paid less, frequently much less, than top lawyers in private practice. People are not accustomed to thinking of judges making \$850,000 a year, much less \$850,000 a month, as Feinberg Rozen is being paid in the Gulf Coast Claims Facility,¹⁴³ or \$8,000 a day, as the special masters in the Toyota unintended acceleration litigation are being paid.¹⁴⁴ Feinberg Rozen's being paid \$850,000 a month by BP may well be in line with high private-level compensation, in a world where top private defense attorneys in major cities like New York (where Feinberg Rozen has an office), can charge more than \$1,000 an hour,¹⁴⁵ and the nation's top plaintiff attorneys can make even more through contingency fees if successful.¹⁴⁶ In contrast, federal

140. See FED. R. CIV. P. 23(e), (h).

141. See Deepwater Horizon Oil Spill Trust, *supra* note 12.

142. See *id.* at Schedule B-2-1.

143. See MUKASEY MEM., *supra* note 3, at 1. The Mukasey Memorandum discloses that in connection with preparation of the memorandum, Feinberg Rozen compensated Michael Mukasey and his firm, Debevoise Plimpton, at their usual billing rates. *Id.* at 3.

144. Order No. 6: Appointing Special Masters (Pursuant to Stipulation) at 9, *In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Prods. Liab. Litig.*, No. 8:10ML2151 JVS(FMOx) (C.D. Cal 2010), available at [http://www.cacd.uscourts.gov/Cacd/RecentPubOp.nsf/f4820525d8f9b4878825770c0050bb9a/987093A5C09A63628825778300761E41/\\$file/SA10ML02151%20JVS%20Order%206.pdf](http://www.cacd.uscourts.gov/Cacd/RecentPubOp.nsf/f4820525d8f9b4878825770c0050bb9a/987093A5C09A63628825778300761E41/$file/SA10ML02151%20JVS%20Order%206.pdf).

145. See Vanessa O'Connell, *Top Lawyers Push \$1,000-Plus an Hour Club*, WALL ST. J., Feb. 23, 2011, <http://online.wsj.com/article/SB10001424052748704071304576160362028728234.html>.

146. See MUKASEY MEM., *supra* note 3, at 1, 11–25 (applying judicial criteria used to assess the reasonableness of class-action fees under Rule 23, and finding Feinberg Rozen compensation “within the range of reasonable compensation”). One criticism of the fee assessment completed by former Attorney General Mukasey is that it compares Mr. Feinberg's fee to the prior fees of plaintiff lawyers in

district court judges are currently paid under \$200,000 a year.¹⁴⁷ One might argue that judges' salaries should be raised closer to the high payments to top lawyers in private practice, who may serve as third-party neutrals.¹⁴⁸ In light of Mr. Feinberg's quasi-judicial status in the GCCF and the desire to increase the perceived legitimacy of the GCCF and claimant participation in the fund, another solution might be for Feinberg Rozen to accept a level of compensation that is also a hybrid of public and private—perhaps something more than the compensation of a public employee like a federal judge, who also benefits from life tenure,¹⁴⁹ but substantially less than the current top-market private pay.

V. CONCLUSION

My advice is twofold for the Gulf Coast Claims Facility in particular, and the quasi-public claims fund generally—whose entry into the mass tort toolbox should be welcomed for its potential to respond to rapidly developing crises, especially where the tortfeasor admits responsibility. First, quasi-public funds, such as the GCCF, should embrace transparency in claim-administrator pay, and second, they should create a structure for pay that best preserves the independence and neutrality of ethical actors like Mr. Feinberg—either through a non-renegotiable fixed fee, or through a separate panel overseeing claim administrator compensation. That approach will maximize claimant participation in the fund, and reduce claimants' needs to retain their own counsel, thus furthering swift claimant compensation and greatly reducing transaction costs compared to litigation.

specific class-action settlements, *id.* at 23–24, but plaintiff class-action lawyers are, of course, compensated additionally for the risk they will not succeed in obtaining a settlement and be paid nothing, whereas Mr. Feinberg needs no risk premium since his fees are guaranteed.

147. See Adam Liptak, *How Much Should Judges Make?*, N.Y. TIMES, Jan. 19, 2009, <http://www.nytimes.com/2009/01/20/washington/20bar.html> (noting that in 2009, federal district court judges were paid \$169,300 annually).

148. See *Are Public-Sector Workers Overpaid or Underpaid?*, ECONOMIST, Feb. 24, 2011, http://www.economist.com/blogs/schumpeter/2011/02/government_employer; Thomas L. Friedman, *Singapore and Katrina*, N.Y. TIMES, Sept. 14, 2005, <http://www.nytimes.com/2005/09/14/opinion/14friedman.html> (describing Singapore's "good governance" and noting the prime minister is paid \$1.1 million, Supreme Court Justices are paid slightly under \$1 million, and judges and senior civil servants are generally well compensated).

149. U.S. CONST. art. III, § 1.

