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Settle or Sue?

The Use and Structure of Alternative Compensation Programs in the Mass Claims Context

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I. INTRODUCTION

Imagine a major environmental disaster – one that affects property and wildlife over a wide geographic area and leads tens or hundreds of thousands of individuals and businesses to claim billions of dollars in damages for loss of income and activities that are based on use of the damaged property and wildlife. Suppose further that not only are the surrounding communities suffering significant immediate loss, but that there is also no way to measure the long-term effects of the disaster. Chances are that you are envisioning the BP oil spill in April 2010. The event was front-page news for months. Every day, the media catalogued the various methods (many unsuccessful) to contain the spill. Almost immediately after the spill commenced, and months before the well was eventually capped and the flow of oil stopped, individuals, businesses, interest groups, and governmental entities who claimed to be affected by the spill started filing lawsuits. Within weeks, over 200 cases had been filed claiming personal injury, property damage, economic loss, and environmental damage resulting from the oil spill, many of them on behalf of classes of thousands of individuals and/or entities.¹

The litigation picture was and is extraordinarily complex and the claimants and defendant companies involved almost certainly will be embroiled in litigation for years. The cases claim damages measuring in the billions and involve complex issues of liability and causation, and daunting issues of proving and measuring long-term damage and loss. This situation highlights both the merits and the limitations of our legal system. While our system provides the mechanisms for eliciting and developing the facts and for identifying and measuring claims, the sheer volume of the claims involved here means that as a practical matter, claimants who pursue litigation are unlikely to obtain any recovery for years

alternative dispute resolution, and responding to government investigations. Mr. Neuburger devotes a significant amount of his practice to helping administer the reauthorized *September 11th Victim Compensation Fund of 2001*.

1. John Schwartz, *First the Spill, Then the Lawsuits*, N.Y. TIMES, June 11, 2010, at A14, available at <http://www.nytimes.com/2010/06/11/us/11liability.html?pagewanted=all>.

(assuming they prevail at all). Is there a “better” way? Is there a reasonable and viable alternative to what is likely to be years of costly litigation – not only in this situation, but in other mass claims situations as well?

We all know that President Obama negotiated with BP to establish a claims facility (the Gulf Coast Claims Facility, or “GCCF”) in an effort to disburse payments to those individuals and businesses directly and immediately affected by the spill. Clearly one initial goal was to forestall the potentially devastating effects on families and local areas directly impacted. And certainly the GCCF has succeeded in distributing funds to affected claimants more quickly and at less cost to the claimants than would have been the case if the claimants had simply waited for the litigation option to run its course. But critics complain that an alternative compensation program like this could undermine our legal system by avoiding the process of discovering the facts (facts that could bear on liability, damage and prevention of similar events in the future) and that an alternative compensation program is inherently inequitable because it will necessarily “homogenize” claims. On the other hand, how can the litigation system effectively address hundreds of thousands of claims? Can claimants afford the delay inherent in this process? And at some point, won’t litigation fatigue coupled with cost and risk prompt litigants to settle whether or not they have strong, legally cognizable claims? Remember that the Exxon Valdez litigation lasted for 20 years.

To help inform this debate, this article examines “alternative claims resolution programs” – when they have been established, how they have been supervised and how they operate. Part II of this article describes these claims programs, their genesis and their benefits and drawbacks. Providing a window into the practical application of claims facilities, Part III examines the establishment and workings of the GCCF. Finally, Part IV presents the challenges raised when facilities like the GCCF aim to resolve claims before litigation and how these claims facilities intersect with the simultaneous lawsuits being pursued by claimants who choose that route.

II. WHAT IS A MASS CLAIMS RESOLUTION FACILITY?

For purposes of this article, we define a mass claims

resolution facility as any operation (regardless of legal structure) that is established to conduct an administrative process through which thousands or even hundreds of thousands of damages claims are to be resolved outside of traditional litigation. In this context, the claims to be resolved typically arise out of a single incident or event or with respect to a type of product. The “administrative process” applied means that claims generally are not subjected to the type of adversarial procedures that define the United States litigation system, but instead are resolved based on a set of negotiated rules that define eligibility, necessary proof, and compensation terms.

This section examines the attributes of such claims resolution programs and considers the use of such administrative mechanisms to resolve claims in contrast to the traditional legal process. Is an administrative compensation program fair? Does it subvert the legal process? Does it invite frivolous claims? Does it dispense “justice”? Are they a necessary reality?

A. Common Attributes of Mass Claims Programs

As administrative systems, mass claims facilities eschew many of the adversarial aspects of traditional litigation. Instead, they represent “an inquisitorial model of decisionmaking.”² Claimants submit “claims” of their alleged damages to a facility that then evaluates and pays the claims based on a set of rules and procedures that define the nature of the evidence that must be supplied by the claimant. Usually established to settle litigation or avoid it in the first place, claims facilities are often created and funded by parties facing significant liability who, potentially with other interested parties such as representatives of the claimant population, design the facility’s structure and adjudicative process. This generally includes appointing key players and defining the types of injuries and damages that the facility will compensate, the amount and types of evidence necessary to prove that injury, and how much the facility will pay for each type of claim or for all claims combined.

The structures of mass claims facilities vary, but many large facilities consist of governing bodies of appointed trustees, a

2. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 *STAN. L. REV.* 1361, 1368 (2005).

claims administrator, financial and statistical consultants, and a staff responsible for evaluating and processing claims. In evaluating claims, the review staffs often follow strict eligibility and compensation rules that are designed to ensure that the correct claims are paid and that similar claims are paid equivalently. Eligibility criteria vary by facility, though many require documentary evidence, such as proof of use of the product in question, or medical verification of compensable conditions. Many facilities offer multiple filing options, such as a streamlined track requiring little if any documentation (and thus a smaller award) and a more detailed option requiring detailed evidence and offering higher possible awards.

Most mass claims facilities are designed to pay similar claims similarly, but they employ a number of different methodologies to achieve this goal. Many facilities create a “grid” with base amounts for different types of claims that can be adjusted based on some number of variables. For example, many claims facilities that are established to address claims alleging personal injuries caused by asbestos-containing products are designed to pay equal amounts to people claiming the same diseases, regardless of when those claimants file their claims, or the age, employment, education level, or dependants of the claimant. To do so, the facility will define the conditions that are eligible for compensation and the medical support required to establish those conditions, and will develop guidelines including a value grid or chart that establishes specific values, or in some cases a range of values, that can be allocated to each specific qualified disease. On the other end of the spectrum, some mass claims facilities evaluate claims on a case-by-case basis and determine damages based on documentation of injury or loss. For example, the September 11th Victim Compensation Fund (“September 11th VCF” or “VCF”) adjudicated individual claims based on general guidelines embodied in regulations issued by the United States Department of Justice.³ Though they may lack a payment schedule or grid, the more individualized processes nevertheless

3. See KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 at 4-5, 9 (2004), available at http://www.justice.gov/final_report.pdf [hereinafter SEPTEMBER 11TH FINAL REPORT].

employ other procedures and mechanisms to ensure consistent outcomes.

Mass claims resolution programs can be and often are designed to evaluate and resolve not only the identified claims but claims that are expected to arise in the future. The issue of future claims and future manifestations create significant legal and administrative issues. As a legal matter, any program that is designed to address future claims must incorporate procedural mechanisms to protect the interests of future claimants. The mechanisms might include the appointment of a representative of future claimants, procedures for providing notice or opt-out rights for future claimants, and procedures for reserving assets to ensure that the future claims receive value that is consistent with the value paid to “current” claims. These sorts of mechanisms have been employed in situations where the parties know the general nature – but typically not the number – of potential future claims. In some situations, however, there is no way to determine today the nature, type or “cost” of future damage. For example, the Deepwater Horizon oil spill may have future effects on the environment, natural resources, and wildlife, and it may be impossible today to identify or quantify those future effects. This “unknown” does not preclude the parties from developing a claims resolution system, of course, but it may force the parties to develop procedures for adjusting claim values or for periodic claims evaluation.

Mass resolution programs can be structured to incorporate aspects of the litigation system. For example, the program can incorporate procedures for hearings, appeals, and resort to individual mediation, arbitration or even litigation. In general, however, the programs are designed to encourage the majority of claimants to accept the more streamlined resolution procedures and to dissuade claimants from pursuing other more time consuming and “costly” options.

B. Types of Claims Resolution Programs/Facilities

A claims resolution program is defined by its source of authority – a factor that impacts its structure, funding, and procedures for resolving claims.⁴ We most often think of these

4. CPR INST. COMM’N ON FACILITIES FOR THE RESOLUTION OF MASS

claims facilities being utilized in the context of companies settling mass tort, class action litigation, but they also arise in other contexts: bankruptcies, legislation, and “privately” created facilities.

1. *Class Action Settlements*

A mass claims facility may be created to distribute funds obtained through the settlement of a class action. In general, state and federal rules governing class actions do not purport to address the mechanics of distributing settlement proceeds. However, a court that has certified a class must determine whether the settlement that has been proposed is “fair, reasonable, and adequate.”⁵ To an extent, that determination will rest on the terms for distributing settlement proceeds: how are eligible class members defined? Are the assets provided in settlement sufficient to compensate those eligible claimants? What procedures will be employed to determine which class members are in fact eligible? How will they be notified? While courts might take very different roles with respect to oversight of the settlement distribution, the court’s general obligations under the procedural rules governing class actions provide a basis for court supervision and oversight.⁶ Among the most notable claims facilities that were established to settle class-action litigation are the Vioxx Settlement Program, for claimants alleging that the pain reliever caused fatal heart attacks and strokes,⁷ and the Agent Orange Settlement Fund, which distributed nearly \$268 million to Vietnam veterans for injuries allegedly stemming from their exposure to chemical herbicides used during the Vietnam War.⁸

CLAIMS, MASS CLAIMS RESOLUTION FACILITIES (CPR MASTER GUIDES ON CONFLICT PREVENTION AND RESOLUTION) 5 (2011) [hereinafter MASS CLAIMS RESOLUTION FACILITIES].

5. *See id.* at 7 (quoting FED. R. CIV. P. 23(e)(2)).

6. *Id.* at 7-8.

7. *Vioxx Settlement Update*, OFFICIAL VIOXX SETTLEMENT, <http://www.officialvioxxsettlement.com/> (last visited Nov. 22, 2011).

8. Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund at 1-2, *In re* “Agent Orange” Prod. Liab. Litig., MDL No. 381 (E.D.N.Y. Sept. 24, 1997).

2. Bankruptcy Trusts

Chapter 11 debtors may establish trusts or similar entities as part of a plan of reorganization that will be responsible for operating procedures for the resolution of mass claims. When tens or hundreds of thousands of claims with similar allegations are made against a debtor, individualized evaluation and resolution of each claim is impractical if not impossible. In such cases, debtors have developed claims resolution programs that are designed to receive, review, evaluate, and pay claims over a period of years or even decades. Typically, the debtor will provide a mechanism for funding this claims resolution program (often through a variety of different types of assets that may be paid to the program over a period of years). The program then assumes the liability of the debtor and becomes responsible for all aspects of the claims resolution process subject to the rules set forth in a plan of reorganization. This structure allows the reorganized debtor to emerge from bankruptcy free of the former liability. In the Dow Corning bankruptcy, for example, the debtor, Dow Corning, proposed a plan of reorganization that provided for the establishment of two "facilities" – one, a settlement facility and the other a "litigation" facility.⁹ Each facility was to be funded by assets of the debtor over a multiyear period.¹⁰ The claimants had the option of choosing to settle their claims based on specific terms, criteria and conditions contained in the plan of reorganization documents, or litigating their claims against an entity that for those purposes assumed the liability of the debtor.¹¹ Those claimants who elect to settle have their claims adjudicated under detailed rules that define the types of medical conditions that warrant a payment, the amount of the payment and the proof that must be provided to qualify for payment.¹² Those individuals who elect to litigate their claims proceed through certain pretrial procedures set forth in the plan of reorganization and can then pursue normal litigation.¹³ The claims resolution facility created to resolve hundreds of thousands

9. Amended Joint Plan of Reorganization at 37-38, *In re Dow Corning Corporation*, No. 95-20512 (Bankr. E.D. Mich. Feb. 4, 1999).

10. *See id.* at 56.

11. *See id.* at 38-41.

12. *Id.* at 38-39.

13. *Id.* at 52.

of tort claims asserted against the A.H. Robins Company also provides an informative example.¹⁴

The most common example of a bankruptcy-created claims resolution facility occurs in the context of personal injury claims arising out of alleged exposure to asbestos-containing products. The general structure of such asbestos “trusts” arose out of the Manville Corporation bankruptcy in the 1980s. Manville filed its bankruptcy petition in 1982 when it faced fewer than 20,000 asbestos personal injury claims.¹⁵ The Manville plan of reorganization established a trust for the purpose of resolving asbestos claims.¹⁶ The trust was funded with cash, stock, insurance assets, and a profit sharing arrangement.¹⁷ The claims (current and future) were “channeled” to the trust via a channeling injunction issued under section 105 of the Bankruptcy Code.¹⁸ Congress subsequently enacted the Bankruptcy Reform Act of 1994, which basically codified the structure adopted in the Manville plan.¹⁹ The Act (codified at Section 524(g) of the Bankruptcy Code) authorizes the establishment of a trust

14. Facing mounting liability exposure arising from claims of injury related to its Dalkon Shield contraceptive device, A.H. Robins filed a Chapter 11 petition for reorganization. After a lengthy process designed to determine the number and value of potential tort claims not yet asserted in litigation, the bankruptcy court defined the extent of the liability, and that determination paved the way for a plan of reorganization. The plan called for the establishment of a trust – to be funded by the sale of the company – that was designed to adjudicate and pay claims. The reorganization plan included certain guidelines for the determination of eligible claims and compensation amounts. The plan also provided that the district court where the claims had been filed would supervise the trust, although it would not have any power over the trust’s “day-to-day operations.” The trust eventually paid \$2.8 billion to 200,000 claimants. George Rutherglen, *Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon Shield Claimants Trust*, 12 VA. J. SOC. POL’Y & L. 673, 674-75, 683, 685-86 (2005); Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 626, 629-31, 641 (1992).

15. Kathleen M. Nilles, *Defining the Limits of Liability: A Legal and Political Analysis of the European Community Products Liability Directive*, 25 VA. J. INT’L L. 729, 759 n.167 (1985).

16. See LLOYD DIXON, GEOFFREY MCGOVERN & AMY COOMBE, ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 5 (2010), available at www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf.

17. *Id.*

18. *See id.* at 5-6.

19. *Id.* at 7.

(provided certain conditions are met) to review and resolve claims.²⁰ Provided that there is a representative of future claims and that the current claimants vote in favor of the plan by seventy-five percent in number (a “supermajority vote”), the current claims and future demands can be channeled to the trust, and if the court further finds that there has been a substantial contribution made to the trust, the channeling injunction can also apply to claims asserted against certain third-party entities that have potential derivative liability for the asbestos claims against the debtor. These “524(g)” trusts are intended to operate for decades and their plans typically impose strict guidelines and requirements so that the trusts are able to pay claims at equivalent levels through a decades-long claims process.²¹ So that similar claims – both present and future – are treated equally, the statute requires the appointment of a future claims representative to act on behalf of future claimants, the creation of trust distribution plans calling for generally equal treatment of similar claims, and the formation of “mechanisms . . . that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.”²² To date, more than fifty Section 524(g) trusts have been established.²³

3. *Governmental/Legislative Facilities*

Beginning as early as the Whiskey Rebellion and the War of 1812, the federal and state governments have established administrative programs to resolve claims that otherwise would result in mass tort and disaster-related litigation.²⁴ Because the processes for these types of claims funds are usually mandated by

20. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4113-17 (codified as amended at 11 U.S.C. § 524).

21. See 11 U.S.C. § 524(g) (2006).

22. See *id.* § 524(g)(2)(B)(ii)(V), (h)(1)(B).

23. See DIXON, MCGOVERN & COOMBE, *supra* note 16, at 29.

24. Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1118-20 (2010). Examples of disaster-related funds include the September 11th VCF and the Minnesota Bridge Collapse Emergency Relief Fund. Funds designed to avoid mass tort litigation include the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 to -11 (2006), and the Ricky Ray Hemophilia Relief Fund Act, *id.* § 300c-22.

statute, administrators of government-created claims funds generally are obligated to follow statutory guidelines and must interpret and implement the legislative intent.²⁵ Perhaps the best-known recent government claims facility is the September 11th VCF. The VCF was created less than eleven days after the 9/11 attacks. Congress enacted legislation to limit the liability of the airlines (and certain other entities) for damages claims arising out of the September 11th attacks. In conjunction with that limitation on liability, Congress established an administrative compensation program, funded by the federal government, for the purpose of providing compensation for victims of the attacks. The program was implemented through regulations – which were subject to notice and comment. The Fund was operated through a Special Master appointed by the Attorney General of the United States. Congress set forth general guidelines in the statute but left the development of the detailed guidelines and the decision-making authority to the Special Master and the Department of Justice.²⁶ The VCF has been cited as an example of a claims resolution program in which considerable discretion was vested in the Special Master.²⁷ The decisions of the Special Master were, by statute, final and not subject to judicial review. Importantly, however, the guidelines of the VCF program – as set forth in the regulations – were subject to challenge and were challenged in litigation contesting the regulations.²⁸

Congress reauthorized the VCF in late 2010 for the purpose of

25. MASS CLAIMS RESOLUTION FACILITIES, *supra* note 4, at 9.

26. Mike Steenson & Joseph Michael Saylor, *The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524, 526, 531-33 (2009). Because a primary goal was to dissuade victims and their families from suing the beleaguered airline industry, the fund's establishing statute, the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 (2006)), based the compensation scheme on the tort system's calculation of damages. Steenson & Saylor, *supra* at 532. However, many of the details necessary to implement the scheme – who qualified for compensation, how to determine awards, the appeals process – were absent from the statute and were instead left to the discretion of Special Master Kenneth Feinberg. *Id.* at 534.

27. *See, e.g.*, Steenson & Saylor, *supra* note 26, at 533.

28. *See, e.g.*, Colaio v. Feinberg, 262 F. Supp. 2d 273 (S.D.N.Y. 2003).

providing compensation to rescue and recovery workers, clean-up workers, and those in the area of the 9/11 attacks, for ongoing and latent injuries suffered as a result of the attacks.²⁹ In reauthorizing the VCF, Congress did not alter the original regulations except to add the new eligibility criteria and to eliminate provisions that are no longer relevant.

4. *Private "Self Help" Claims Facilities*

Companies facing presumptive or actual mass claims may elect to create a claims facility without the supervision of courts and outside the scope of any litigation.³⁰ That is, an entity facing potential claims may choose to establish a procedure for reviewing and evaluating claims before they are filed in the court system. Bypassing the court system generally allows affected parties considerable flexibility in designing and implementing the claims process.³¹ For example, they may choose to run the claims process themselves, entirely delegate the process to an "independent" third party or elect a middle-ground approach and retain some control or input over an independently run process.³² The parties are also free to determine the remedies available to claimants and the scope of the release (if any) necessary to obtain those remedies.³³ Finally, because they are not bound by statutes or court oversight, administrators of private claims funds may have more flexibility to modify the claims process to address new or unforeseen developments.³⁴

C. Strengths and Weaknesses of Claims Facilities

Is an administrative claims resolution program good? Is it good for the parties? Good for the civil justice system? Does it advantage one party over another?

Although every claims resolution program presents unique

29. James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, §101, 124 Stat. 3623, 3624-27 (to be codified as amended at 42 U.S.C. 300mm)

30. As discussed in Part IV *infra*, a party intending to create a claims process outside judicial control may nonetheless find itself unable to do so.

31. MASS CLAIMS RESOLUTION FACILITIES, *supra* note 4, at 9.

32. *Id.*

33. *Id.*

34. *Id.*

issues, there are certain factors that are inherent in any sort of administrative resolution mechanism. In general, an administrative claims resolution program will not examine claims with the same depth that is likely to occur in a trial. Administrative resolution programs may be required to promote consistency measured by objective criteria and thus may tend to “homogenize” claims for purposes of valuation. Inevitably, if measured against a litigation outcome, a claims resolution program is likely to pay more for some claims and pay less for others. From the perspective of the claimant, an administrative program may be faster than litigation, and a claimant may obtain compensation years earlier than would be the case were the claim to be pursued through trial. An administrative program may also be more flexible and allow claimants to amend claims and to supplement and clarify submissions. This section notes some of the issues inherent in and criticisms raised with respect to an administrative program.

1. Advantages of Administrative Claims Programs

Some argue that administrative claims programs provide an avenue for a defendant to escape full discovery and to minimize damages – and are thereby detrimental to claimants, the judicial system, and the broader general public. Others contend that the phenomenon of mass claims means that a defendant may be forced into a resolution mechanism that results in “overpayment” or payment to claimants who are “undeserving” because the alternative prospect of potential decades of litigation will be costly and disruptive and will divert important resources from the true business of the company. In general, we do not view this debate as susceptible to an all-encompassing resolution. The relative merits of these contentions may well vary depending on the particular situation, the options available, the magnitude and number of claims, and the resources of the alleged defendant. For example, if privacy, prompt resolution, and closure are of paramount concern, then an administrative system may be preferable from any perspective, regardless of whether one believes that some claimants could have obtained higher compensation in the litigation system. If disclosure and punishment of wrongdoing are of paramount concern, then it may be that an administrative system would undermine those goals

and would therefore not be preferable. (And, of course, we do not discount the possibility of a hybrid system in which litigation continues as to certain claimants or certain issues in parallel with an administrative compensation program.) In this section, our focus is on the benefits that claims facilities offer (against the backdrop of our litigation system):

Speed – By aggregating cases, claims facilities can compensate huge numbers of claimants more quickly than the tort system.³⁵ Litigation tends to move more slowly. The process of developing the case and scheduling hearings and trials in courts with crowded dockets may result in a multi-year process (not including appeals). An administrative system, on the other hand, may be able to develop a compensation program in a matter of weeks. While it may take a significant amount of time for parties to develop the criteria and guidelines for an administrative program, once the program is established, the claims facility should be able to evaluate thousands or tens of thousands of claims in a matter of months.³⁶ The rate at which claimants are paid after a facility is established depends on the complexity of the claims evaluation process, but even the most elaborate and individualized process compensates claimants more quickly than litigation.³⁷ Even class action lawsuits, which consolidate scores

35. For example, within just three years of the terrorist attacks, the September 11th VCF paid out over seven billion dollars to more than 5,500 claimants. SEPTEMBER 11TH FINAL REPORT, *supra* note 3, at 1. In its first year, the GCCF paid more than 204,000 claimants more than five billion dollars. *The Gulf Coast Claims Facility After Its First Year of Operation (August 23, 2010 – August 22, 2011) An Executive Summary*, GULF COAST CLAIMS FACILITY, 1 (Aug. 23, 2011), <http://www.gulfcoastclaimsfacility.com/ANNIVERSARYREPORT8.23.11.pdf>.

36. See Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 388-89 (2007). For example, just 14 weeks after September 11th, the VCF opened its doors on December 21, 2001, the same day that the Department of Justice and Special Master Kenneth Feinberg issued Interim Final Regulations describing the processes for submitting and determining claims. Final Regulations were issued and claim forms were released to the public less than three months later on March 13, 2002. See SEPTEMBER 11TH FINAL REPORT, *supra* note 3, at 5.

37. McGovern, *supra* note 2, at 1379. For example, the GCCF determines a claim's eligibility and compensation within 90 days of the claim's submission. *Gulf Coast Claims Facility Protocol for Interim and Final Claims*, GULF COAST CLAIMS FACILITY, V.A.1 (Feb. 8, 2011), http://www.gulfcoastclaimsfacility.com/proto_4.php [hereinafter *GCCF*].

of individual cases, cannot match the speed offered by claims facilities and in any event, often end up employing facilities to efficiently distribute settlements to claimants.

Cost - Claims are also resolved less expensively via claims facilities than in the tort system.³⁸ A process that determines values based on defined parameters is inherently cheaper than an adversarial system that requires multiple-party input and emphasizes strategic behavior. And the more that a fund standardizes the claims process, the lower the transaction costs will be.³⁹ Claims facilities can also channel more funds to claimants and less to attorneys.⁴⁰

Claims are paid more consistently - While the tort system can produce apparent inconsistent results for similarly situated cases, claims resolution facilities have the ability to employ a variety of mechanisms to ensure that similar claims are paid similarly.⁴¹ Indeed, defining parameters that determine the value of claims promotes consistency and fairness and helps keep transaction costs down. To maximize consistency, administrative claims programs may classify claims by objective criteria, pay claims based on a matrix or schedule that takes into account defined factors, or apply formulas to individual circumstances.⁴² For example, as noted above, many asbestos facilities classify claimants by their asbestos-related disease, and provide ranges,

Protocol]. The September 11th VCF issued eligibility and presumed award determinations within forty-five days after submission of a claim requesting evaluation through the expedited "Track A" process. SEPTEMBER 11TH FINAL REPORT, *supra* note 3, at 15.

38. Administration costs for the September 11th VCF amounted to just 1.2% of the benefits awarded to claimants. See SEPTEMBER 11TH FINAL REPORT, *supra* note 3, at 77. Even if one were to include the pro bono work provided by The Feinberg Group law firm, the number would be only marginally higher. In the Dalkon Shield facility operating expenses amounted to less than 6.9% of the total amounts paid to claimants. Rutherglen, *supra* note 14, at 702.

39. Rutherglen, *supra* note 14, at 676-77; MASS CLAIMS RESOLUTION FACILITIES, *supra* note 4, at 31.

40. As an example, while more than seventy-five percent of the money that passed through the Dalkon Shield trust went to claimants, that number is estimated at less than fifty percent in the tort system. Rutherglen, *supra* note 14, at 702-03.

41. See McGovern, *supra* note 2, at 1379-80.

42. MASS CLAIMS RESOLUTION FACILITIES, *supra* note 4, at 101.

averages, and maximum values for each category.⁴³ In addition, a claims resolution facility can account for future claims and can employ mechanisms to ensure that future claims are paid in the same manner as then-current claims.

More claimants may receive a payment – One can debate whether this is a benefit: a defendant that funds a claims facility might conclude that distributions to claimants are inflated because claims are not tested through the rigors of the tort system. Moreover, claimants with more significant claimed injuries might argue that their recovery is being diluted by the distribution of funds to claimants with less significant injuries. But these arguments go to the details of the rules for distributing assets and not to the mechanism that can be employed to evaluate and pay claims. A claims facility can address differences in the quality of claims in a variety of ways: by offering multiple tracks (under which claimants may elect a simple process with lower payments or a more rigorous process with the potential for higher payment);⁴⁴ by establishing stringent documentation requirements; or by stratifying payments based on “tort system” factors like income, age, and condition.

Cost certainty – In the uncertain world of mass tort and disaster litigation, claims facilities offer finality and cost certainty – a benefit to defendants and claimants alike. Claimants get money up front, without having to endure the risks and costs of litigation.⁴⁵ Moreover, provided that the facility is established with appropriate controls and guidelines to reserve assets for future claims, claimants whose injuries manifest later or who

43. *Id.*

44. For example, the Dalkon Shield facility offered claimants three different options for filing claims. Under the simplest, a claimant would receive a \$725 payment simply for timely submitting a claim along with an affidavit stating that the claimant used the Dalkon Shield and “was injured or believes she may have been injured as a result of such use.” Rutherglen, *supra* note 14, at 689 (citation omitted). Similarly, the GCCF offers a subsequent “Quick Payment” option to claimants who previously received an Emergency Advance Payment. An individual choosing this option submits no additional paperwork and receives a final award of \$5000 (businesses receive \$25,000) within 14 days of signing a release of liability. *GCCF Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, FAQ 18, available at <http://www.gulfcoastclaimsfacility.com/faq> (last visited Nov. 22, 2011) [hereinafter *GCCF FAQs*].

45. McGovern, *supra* note 2, at 1380.

otherwise delay filing claims are still left with a solvent entity from which to seek compensation.⁴⁶ For defendants, establishing an administrative claims program helps to establish and maintain a predictable cash flow, which in turn facilitates planning in general.⁴⁷ Perhaps most importantly, the cost certainty allows the marketplace to more accurately value the company, minimizing the initial free fall and subsequent lagging of stock prices associated with uncertain liability.⁴⁸ This clearly benefits the defendant, but there is also a benefit to claimants: a company that is not plagued by uncertain litigation exposure will be more secure and thus will have more flexibility in funding the administrative system. Indeed, some claims resolution programs may be funded with stock or profits of the defendant. In fact, Section 524(g) trusts must “own, or by the exercise of rights granted under such plan . . . be entitled to own if specified contingencies occur, a majority of the voting shares of – (aa) each such debtor; (bb) the parent corporation of each such debtor; or (cc) a subsidiary of each such debtor that is also a debtor . . .,” so the amount of money available to pay claimants may be directly tied to the defendant’s stock price.⁴⁹

Flexibility to tailor the claims program – Rather than being hamstrung by the rigid procedural rules of litigation, mass claims facilities allow the parties developing the program to tailor it to their particular goals, needs, and constraints. The goals and purposes for each claims facility are different: some aim to compensate the most costly claims; some seek to compensate the majority of claims that have a less defined or less costly injury while leaving the most significant cases to be resolved in a different process; some seek to capture all potential claims. Some facilities provide services; some facilities provide access to benefits

46. See Georgene Vairo, *Why Me? The Role of Private Trustees in Complex Claims Resolution*, 57 STAN. L. REV. 1391, 1397 (2005) (discussing the traditional litigation model in which some plaintiffs are overly rewarded, depleting assets and leaving little for others).

47. Defendants are also sometimes able to capture the time value of money by paying net present value prices for nominal dollar damages. MASS CLAIMS RESOLUTION FACILITIES, *supra* note 4, at 44; McGovern, *supra* note 2, at 1380.

48. McGovern, *supra* note 2, at 1380.

49. See 11 U.S.C. § 524(g)(2)(B)(i)(III) (2006); MASS CLAIMS RESOLUTION FACILITIES, *supra* note 4, at 38.

programs in lieu of cash compensation. Some facilities address medical conditions; some address economic loss. The nature of the claims, the claimant population, and the nature and availability of supporting evidence are all factors that will be taken into account, and that will drive the terms, guidelines, rules, and procedures of the facility. Claims fund designers can control a number of variables, including how much power and authority to delegate to the facility, the eligibility requirements and classifications for claimants, the types of reviews, appeals, and remedies available, and the timing of claims, evaluations, and awards.

Flexibility to adjust the claims program – Depending on the how much authority it has, a claims facility may also be able to adjust to changing or unforeseen circumstances. For example, a claims administrator may want to alter the process if it becomes clear that certain forms of proof are unobtainable by claimants or if the cost of processing certain claims turns out to be substantially higher than expected.⁵⁰ Similarly, adjustments may be necessary if claims are being made more quickly or slowly than originally expected.⁵¹

2. *Disadvantages of Claims Facilities*

Of course, administrative claims programs have drawbacks, many of which are the flipside of specific benefits. Put another way, the precise characteristics that make administrative compensation programs useful also represent weaknesses that may be less prevalent in the judicial system. Among the disadvantages:

Some claimants may get lower recoveries – In exchange for relieving themselves of the risks and costs of litigation, claimants may receive a lower amount from a claims facility than what might be available in a courtroom.⁵² In other words, while there is no guarantee of success in litigation, the biggest possible verdict is likely higher than the biggest possible award from a claims facility. Because the very purpose of claims facilities is to pay similarly situated claimants similarly, this inherently means that some claimants would have been paid more through litigation

50. MASS CLAIMS RESOLUTION FACILITIES, *supra* note 4, at 12.

51. *Id.* at 43-44.

52. McGovern, *supra* note 2, at 1380.

and some would have been paid less.⁵³ In fact, an administrative compensation system can be structured to avoid the possibility that all assets of a company will be diverted to those who win the race to the courthouse – leaving other claimants with no recourse. This is a significant benefit in situations involving alleged latent injuries. This concern, of course, is one of the reasons for addressing mass liability claims through a class or bankruptcy proceeding. Claims facilities also typically exclude punitive damages.⁵⁴

“Wrong” claims may get paid – Lacking the same degree of judicial oversight or the checks and balances inherent in an adversarial system, claims funds may, either systemically or individually, compensate “wrong” claims or over- or under-compensate certain types of claims.⁵⁵ In an optimistic view, these errors are unintentional or at worst due to improper planning. For example, a fast and inexpensive claims process invites greater

53. Not only do claims facilities attempt to standardize the ordinary fluctuations of case-by-case verdicts, but they also attempt to standardize payments across time. Thus, because the predicted current and future asbestos liabilities often exceed the debtor’s assets, many 524(g) trusts lack sufficient assets to pay claims “in full.” Instead, to ensure that funds remain available for future claims, the trusts pay claimants only a discounted amount of their full claim. See MASS CLAIMS RESOLUTION FACILITIES, *supra* note 4, at 6-7. Alternatively, in litigation, current claimants might be paid in full, but claimants whose diseases manifest themselves later might be unable to collect anything from an insolvent defendant.

54. See, e.g., Rutherglen, *supra* note 14, at 690 (discussing the exclusion of punitive damages in the September 11th VCF and the Dalkon Shield trust and stating that “preserving a right to recover punitive damages is fundamentally inconsistent with encouraging parties to accept alternatives to litigation”).

55. What constitutes a “wrong” claim is of course in the eye of the beholder. While most would probably agree that it is “wrong” to pay claimants who were not actually damaged, there is less agreement about the propriety of paying claims that may not be compensable in some jurisdictions in the tort system. For example, is it “wrong” that asbestos trusts distribute assets to claimants who allege a non-malignant condition and do not claim to be impaired by the condition, even though some of those claimants would be barred from bringing such a claim today in certain jurisdictions? See DIXON, MCGOVERN & COOMBE, *supra* note 16, at 33-34. Of course, many of those same claimants may have been able to pursue their claims in the tort system at the time the debtor filed its petition for bankruptcy. And to the extent that such a trust seeks to treat similar claims consistently, how would a trust determine to exclude certain claimants where the claimants may be able to bring claims in a number of different jurisdictions?

numbers of claimants than litigation, which combined with the comparatively lower proof requirements, leads to a greater likelihood that insufficient, illegitimate, or fraudulent claims get paid.⁵⁶ Some argue that a negotiated mass claim resolution program creates the potential for deals that will divert funds to particular groups or types of claimants – perhaps those represented by certain law firms – and unfairly exclude others.⁵⁷

Less discovery into underlying facts – If an administrative program is set up early in the life cycle of a litigation, one could argue that this procedure may deprive the general public of useful information that would otherwise be uncovered in litigation. Litigation may sometimes be the only window through which certain facts are made visible and the benefits of this disclosure can be widespread. Most notably, as a result of the 1998 Master Settlement Agreement with forty-six states, the United States tobacco industry made more than thirteen million documents publicly available.⁵⁸ In fact, analysis of these documents continues to this day, resulting in new health discoveries and other revelations.⁵⁹ By settling or preventing

56. MASS CLAIMS RESOLUTION FACILITIES, *supra* note 4, at 15; McGovern, *supra* note 2, at 1383-84. Claims facilities may err too far on the other end of the spectrum however, and in trying to ensure that only proper claims are paid, establish strict documentation requirements that are impossible for certain legitimate claimants to satisfy. See, e.g., Letter from Pam Bondi, Attorney General, State of Fla., to Kenneth R. Feinberg, Feinberg Rozen, LLP (Feb. 16, 2011), available at [http://myfloridalegal.com/webfiles.nsf/WF/JDAS-8E7KAK/\\$file/AGBondiLettertoFeinberg.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JDAS-8E7KAK/$file/AGBondiLettertoFeinberg.pdf) (raising concerns about “the heavy burden of proof” required of GCCF claimants and questioning how a business could ever document “tourists that never showed up”).

57. Some commentators believe that in any class action settlement, there is a potential for collusive deals between defense attorneys and class counsel at the expense of claimants or for deals that value some claimants over others. See, e.g., Lahav, *supra* note 36, at 395; Zimmerman, *supra* note 24, at 1127-28. Of course, the oversight role of the court and the procedures outlined in the federal and state rules are intended to prevent such an outcome. Even public funds, which are seemingly more “fair” because they are created by legislatures, nonetheless can raise related issues about why certain defendants or industries are protected at the expense of others or claimants. See Zimmerman, *supra* note 24, at 1128 n.102.

58. See *Legacy Tobacco Documents Library*, UNIV. CAL. S.F., <http://legacy.library.ucsf.edu/> (last visited Aug. 11, 2011).

59. See, e.g., Semira Gonseth et al., *The Tobacco Industry’s Past Role in Weight Control Related to Smoking*, EUR. J. PUB. HEALTH (Apr. 7, 2011), available at <http://eurpub.oxfordjournals.org/content/early/2011/04/07/eurpub>

litigation, establishing an administrative claims program may serve to deter the disclosure of useful health and safety information.⁶⁰ Given that claims facilities often are used to resolve mass torts resulting from disasters or allegedly dangerous or defective products, the underlying facts may be particularly helpful in exposing potential hazards or preventing or mitigating future catastrophes.⁶¹ But this argument ignores the reality of litigation, i.e., that the vast majority of cases settled before trial or before verdict and further assumes that the litigation environment is the best or only way in which we can gain an understanding of the facts and conduct the appropriate inquiries. In a “mass claim” situation it is likely that there will be some investigation by a governmental or public interest entity,⁶²

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60. See, e.g., Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 119-21 (1999).

61. As an example, some have questioned the long-term effects of the dispersants that were considered and ultimately used in response to the BP oil spill. Press Release, Nadler Chairs Judiciary Hearing on Ensuring Justice for Victims of the Gulf Coast Oil Disaster (July 21, 2010), available at http://nadler.house.gov/index.php?option=com_content&task=view&id=1522&Itemid=119. Information about these dispersants might help scientists address unforeseen circumstances in the Gulf or devise best practices for future oil spills.

62. For example, in addition to being addressed at dozens of congressional hearings, the BP oil spill has been the subject of several state and federal investigations, by entities such as the United States Coast Guard, the Bureau of Ocean Energy Management, Regulation and Enforcement, and the United States Chemical Safety and Hazard Investigation Board. Richard Wray, *BP Makes Record Loss As Tony Hayward Quits*, GUARDIAN, July 27, 2010, <http://www.guardian.co.uk/business/2010/jul/27/tony-hayward-leaves-bp-1m-payoff>. On top of it all, President Obama established the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, which issued its final report in January 2011. See *About the Commission*, OIL SPILL COMM'N, <http://www.oilspillcommission.gov/page/about-commission> (last visited Nov. 22, 2011). Similarly, in the wake of September 11th, Congress held countless hearings and appointed an independent commission, The National Commission on Terrorist Attacks upon the United States, “to prepare a full and complete account of the circumstances surrounding the September 11, 2001 terrorist attacks, including preparedness for and the immediate response to the attacks.” See *About the Commission*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., <http://www.9-11commission.gov/> (last visited Nov. 22, 2011). Product and drug recalls are likely to be investigated by the Food and Drug Administration, Consumer Product Safety

although it may be that claimants have to raise the profile of the issues and be persistent to achieve such an investigation. And, of course, most claims facilities fail to eliminate all litigation, and it may take only one case for the facts to come to light.

Common law does not develop – Another criticism of administrative claims resolution programs is that they deprive society of important precedent that results from judicially resolved litigation.⁶³ Legal precedent is an important reference not only for future courts that will be deciding similar issues, but also to guide behavior and provide order to the general public.⁶⁴ Although many of the key issues in a specific mass tort litigation may be factual and therefore of questionable precedential value, some key legal issues can arise, and decisions on those issues will be important not just in subsequent litigations involving similar claims but to the broader public as well.⁶⁵ A counterargument to this criticism is that the vast majority of cases that are filed in federal or state courts are resolved through settlement anyway and that mass claims account for a very small percentage of litigation overall. Moreover, legal principles may still develop outside the courtroom because novel compensation systems may “facilitate discussions about the proper evolution of the law.”⁶⁶

Claimants may want their “day in court” – Claimants themselves are not typically involved in the creation of claims facilities, and some commentators believe that their actual interests are not being represented.⁶⁷ Claimants want to

Commission, or other federal agencies charged with overseeing the product in question.

63. See Vairo, *supra* note 46, at 1402.

64. David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L.J.* 2619, 2622-23 (1995).

65. Vairo, *supra* note 46, at 1406, 1413.

66. *Id.* at 1413 (The September 11th VCF “provided the opportunity to rethink the collateral source rule”).

67. Though plaintiffs’ attorneys are sometimes involved in establishing claims programs, they may either place their own interests above those of the claimants or may not fully understand what the claimants actually value. See Lahav, *supra* note 36, at 395 (“The fear is that the attorneys will take their own interests into account at the expense of the true interests of the claimants”); Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 *LAW & CONTEMP. PROBS.* 199, 199 (1990) (“Lawyers typically believe that clients evaluate their legal experiences by the size of the outcome upon settlement and the speed with which the outcome is delivered; they do not think clients are concerned with how the problems are

participate in their own cases, tell their story to a neutral third party, and have some control over their fate – something they cannot do when their claims are valued by a formula or matrix.⁶⁸ A study involving detailed interviews with American asbestos victims revealed that the victims had a preference for adjudication – they wanted to face the asbestos companies in court – that was distinct from their desire to be paid.⁶⁹ Similarly, a study of September 11th VCF claimants showed that money was not the deciding factor in determining whether to join the fund, and the decision involved “a deeply troubling trade-off between money and a host of nonmonetary values that respondents thought they might obtain from litigation.”⁷⁰ Notably, the VCF offered every claimant the opportunity for a hearing, and over sixty-eight percent of the claimants who filed a claim for the death of a victim of the attacks opted for the hearing process.⁷¹ A system designed to settle claims in the most efficient manner may actually be the opposite of what claimants want.

III. THE GULF COAST CLAIMS FACILITY

Against this backdrop, how does the Gulf Coast Claims Facility compare? And how should it be evaluated? The GCCF is a truly unique creation. Its origin, coupled with the different types of claims involved, the employment of local claims “adjusters,” and the amount of funds initially committed, distinguishes it from most other administrative claims program.⁷²

solved or how the favorable outcomes are reached.”).

68. See Lahav, *supra* note 36, at 396.

69. Tyler, *supra* note 67, at 203. The study suggested that if offered equal settlements through a quick arbitration or through a longer, drawn-out trial, many victims would choose the latter. *Id.*

70. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences With the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 647 (2008). Though ninety-seven percent of potential litigants chose to enter the fund, more than three-quarters of fund claimants responding to the survey said that their decision was in no way based on how much they thought they would be paid by the fund versus through litigation. *Id.* at 664-65.

71. See SEPTEMBER 11TH FINAL REPORT, *supra* note 3, at 111.

72. The twenty billion dollars that BP allotted to the GCCF is nearly three times as much as the September 11th VCF paid to claimants. See SEPTEMBER 11TH FINAL REPORT, *supra* note 3, at 1. To put that figure in more perspective, in 2010, no company made twenty billion dollars in profits and

Thus, the tough questions ordinarily asked about claims facilities are even more difficult here and may not even be the correct ones. But before these questions can be explored, it is important to understand the creation, structure, and mechanics of the GCCF.

A. The Creation of the GCCF

Like all claims funds, the GCCF is defined and understood by the source of its creation. Unlike most funds however, the GCCF does not cleanly fall into one of the four categories, but instead falls somewhere on the spectrum between governmental and private establishment. Designed to fulfill statutory obligations as well as to settle other claims, the GCCF is essentially the result of a “handshake” agreement between the Obama administration, BP, and the Fund’s administrator, Kenneth Feinberg.⁷³

In the face of concerns over the original claims process that BP had established to fulfill its obligations under the Oil Pollution Act of 1990 (OPA),⁷⁴ the company met with President Obama in June 2010.⁷⁵ Following the meeting, the White House and BP

only 124 nations had a higher GDP. *See Top Companies: Most Profitable*, CNN MONEY (May 3, 2010), http://money.cnn.com/magazines/fortune/fortune500/2010/full_list/; *The World Factbook 2010*, CENTRAL INTELLIGENCE AGENCY, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Nov. 22, 2011).

73. *See Jackie Calmes, For Gulf Victims, Mediator with Deep Pockets and Broad Power*, N.Y. TIMES, June 22, 2010, at A17, available at <http://www.nytimes.com/2010/06/23/us/23feinberg.html> (according to Mr. Feinberg, “[a]ll of the design, all of the implementation and all of the administration’ of the claims process ‘is basically a handshake between the Obama administration, BP and me.”).

74. Passed in the wake of the *Exxon Valdez* oil spill, OPA requires parties responsible for oil spills to pay certain removal costs and damages. *See* 33 U.S.C. §§ 2701-2762 (2006). By accepting the government’s designation of it as a “responsible Party,” BP was required to “establish a procedure for the payment or settlement of claims for interim, short-term damages.” *See id.* § 2705(a); Letter from James H. Dupree, President, BP Exploration and Production Inc., to Thomas Morrison, Chief, Claims Division, U.S. Coast Guard (May 3, 2010), available at <http://www.uscg.mil/foia/docs/DWH/2094.pdf>.

75. Katelyn Sabochik, *The President’s Meeting with BP Executives: “An Important Step Towards Making the People of the Gulf Coast Whole Again”*, WHITE HOUSE BLOG (June 16, 2010, 3:51 PM), <http://www.whitehouse.gov/blog/2010/06/16/important-step-towards-making-people-gulf-coast-whole-again>. At that meeting, President Obama expressed specific concerns about BP committing sufficient and timely funds to the affected individuals. *See id.*

issued separate statements outlining the arrangement.⁷⁶ Both parties called the resulting entity an “independent claims facility” that would be administered by Mr. Feinberg and funded with twenty billion dollars from BP.⁷⁷ In addition to paying OPA claims like BP’s original claims process, this new facility would also pay tort claims brought by individuals and businesses (but not government entities).⁷⁸ The White House statement provided a few additional details, including that the facility would develop and publish standards for recoverable claims, that a panel of three judges would be appointed to hear appeals of the fund’s decisions, that dissatisfied claimants maintained all current rights to go to court, and that the facility’s decisions under current law would be binding on BP.⁷⁹ Beyond these broad guidelines, the facility’s remaining details went entirely unstated.

The structure and function of this claims resolution program are interesting and significant. This specific structure was created with the imprimatur of the federal government, but it is not a governmental facility. And while the GCCF is in the business of resolving claims against BP (and entities that might assert claims against BP) both BP and the GCCF describe the operation as independent from BP.⁸⁰

Others had previously raised concerns over aspects of the process itself, such as the litigation waiver that BP required in exchange for payment. *See, e.g.,* Stephanie Condon, *BP Told to Stop Distributing Oil Spill Settlement Agreements*, CBSNEWS (May 3, 2010, 11:52 AM), http://www.cbsnews.com/8301-503544_162-20003978-503544.html.

76. *See* Press Release, BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966> [hereinafter BP Press Release]; Press Release, The White House Office of the Press Secretary, FACT SHEET: Claims and Escrow (June 16, 2010), <http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow> [hereinafter White House Fact Sheet].

77. BP Press Release, *supra* note 76; White House Fact Sheet, *supra* note 76. Both statements made clear that the twenty billion dollars was neither a floor nor a cap. BP Press Release, *supra* note 76; White House Fact Sheet, *supra* note 76.

78. BP Press Release, *supra* note 76; White House Fact Sheet, *supra* note 76.

79. White House Fact Sheet, *supra* note 76.

80. BP’s Memorandum in Opposition to “Plaintiffs’ Motion to Supervise Ex Parte Communications Between BP Defendants and Putative Class Members” at 21, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Jan. 10, 2011),

While the GCCF is the result of an agreement between BP and the federal government, this is not truly a “governmental” claims fund: it is not funded by the government and the government did not establish any of the specific criteria for evaluating claims. Importantly, (and in contrast to the statutory, governmentally-controlled VCF) there is no requirement that an individual elect between litigation and the GCCF before receiving an evaluation from the GCCF.⁸¹ In addition, the GCCF does accept claims that are not covered under the OPA. On the other hand, it is clear that both BP and various state and federal governments have taken a strong interest in the GCCF and are monitoring the operations.⁸² BP has an express right to review certain claims and the federal government is spearheading a process to have an independent audit of the operation.⁸³

ECF No. 963. In his February 11, 2011 order, discussed *infra*, Judge Carl J. Barbier found that Feinberg is not completely independent of BP, but recognized that the GCCF independently evaluates and pays individual claims. See Order and Reasons at 8, *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), ECF No. 1098 [hereinafter Order and Reasons]. However, while both BP and Feinberg maintain that the company had no input on the claims process, the claims protocol also notes “BP has also authorized the GCCF to process certain non-OPA claims involving physical injury or death.” *GCCF Protocol*, *supra* note 37, at I.A.

81. Compare *GCCF FAQs*, *supra* note 44, at FAQ 53, with Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 (2006)) at sec. 405(c)(3)(B)(i). It is interesting to compare the September 11th VCF: although the statute that established the VCF granted considerable discretion to the Special Master, the VCF was governed by statutory mandates and regulations issued by the Department of Justice. The Special Master was under the supervision and operated under the auspices of the Attorney General. See *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 279-82 (S.D.N.Y. 2003); Steenson & Saylor, *supra* note 26, at 532-34.

82. See generally Letter from Gulf Coast State Attorneys General to Kenneth Feinberg (July 14, 2010), attached as Exhibit A to Statement of Interest on Behalf of the State of Mississippi, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179* (E.D. La. Jan. 24, 2011), ECF No. 1060-1; Letters from Kenneth Feinberg, Administrator, Gulf Coast Claims Facility, to Gulf Coast Attorneys General (various dates), attached as Exhibit 1 to BP’s Supplemental Memorandum in Opposition to “Plaintiffs’ Motion to Supervise Ex Parte Communications Between BP Defendants and Putative Class Members”, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179* (E.D. La. Jan. 26, 2011), ECF No. 1071-1.

83. See George Altman, *Senate Amendment Would Require Audit of Oil*

B. Covered Claims and Payment Options

Under OPA, the GCCF was required to cover four types of claims: (1) removal and cleanup costs; (2) real or personal property damage; (3) lost profits or earning capacity; and (4) subsistence use of natural resources.⁸⁴ Additionally, BP authorized the GCCF to cover claims for personal injury or death, even though those claims are not recoverable under OPA.⁸⁵ Alternatively, BP or the GCCF could have chosen not to cover personal injury claims or could have chosen to cover additional claims, such as those for pure mental or emotional suffering.⁸⁶

While OPA governs the processing and evaluating of the first four types of claims, it provides no direction on how personal injury and death claims should be determined. Instead, that determination is, according to the GCCF, “guided, as applicable, by other federal law and pertinent state law.”⁸⁷ Additionally, while OPA requires claimants to present one of the first four types of claims to the GCCF in the first instance,⁸⁸ personal injury or death claims do not need to be filed with the GCCF, and claimants may sue BP for this damage even while seeking payment for their OPA claims from the GCCF.⁸⁹

GCCF claimants can pursue several different payment options. First, from August 23, 2010, through November 23, 2010, they could apply for Emergency Advance Payments.⁹⁰ As implied by the name, these payments were designed to provide emergency relief for any of the five types of covered claims, and as such were subject to a less-rigorous evaluation than later claims and were

Spill Claims Facility, ALA. LIVE, (October 22, 2011, 7:20 AM), http://blog.al.com/live/2011/10/senate_amendment_would_require.html.

84. 33 U.S.C. § 2702(b) (2006).

85. *GCCF Protocol*, *supra* note 37, at I.A.

86. See Cal Woodward, *Gulf Oil Spill Exposes Gaps in Public Health Knowledge*, 182 CAN. MED. ASS'N J. 1290, 1290-92 (2010), available at <http://www.cmaj.ca/content/182/12/1290.full>.

87. *GCCF Protocol*, *supra* note 37, at V.A.2.

88. If a claimant declines the GCCF's offer, it may then either sue BP or file a claim with the National Pollution Fund Center (NPFC), which OPA established as an alternative source of compensation. See 33 U.S.C. §§ 2712, 2713(a), (c) (2006).

89. *GCCF Protocol*, *supra* note 37, at II.E.

90. *GCCF FAQs*, *supra* note 44, at FAQ 14.

intended to be evaluated and paid in a shorter period of time.⁹¹ Claimants did not need to sign a release to receive Emergency Advance Payments.⁹²

Additionally, claimants may apply for Final Payment awards regardless of whether they previously applied for, received, or were denied an Emergency Advance Payment.⁹³ A Final Payment Claim accounts, in one lump sum, for all past losses as well as an estimate of all future losses caused by the oil spill.⁹⁴ Claimants must submit documentation demonstrating their past losses as well as evidence supporting what they claim their future damages will be.⁹⁵ After evaluating the claimant's submission and calculations made by experts the Fund retained, it makes an offer to the claimant.⁹⁶ A claimant may accept or reject the offer, or may submit additional support for his or her claimed damages, which the Fund will then consider.⁹⁷ In order to accept the GCCF's offer, a claimant (and his or her spouse) must sign a Release and Covenant Not to Sue, which prevents them from filing any other claims against BP or anyone else for damages related to the spill.⁹⁸ If the claimant rejects the offer, he or she may then file a claim with the NPFC or sue BP.⁹⁹

Instead of applying for all past and estimated future damages at once, claimants may also choose to apply for Interim Payment Claims, which account only for *past* damages caused by the oil spill. Under this option, claimants provide documentation evidencing the losses they sustained from the time of the spill until the filing date.¹⁰⁰ The Fund then evaluates these documents

91. *Gulf Coast Claims Facility Protocol for Emergency Advance Payments*, GULF COAST CLAIMS FACILITY, at III.E (Aug. 23, 2010), http://www.gulfcoastclaimsfacility.com/proto_1.

92. *Id.* at III.G.

93. *GCCF FAQs*, *supra* note 44, at FAQ 35.

94. *Id.* at FAQ 34.

95. *Id.* at FAQ 40.

96. *Id.* at FAQs 42, 45.

97. *See id.* at FAQ 45.

98. *Id.* at FAQs 46-47.

99. *Id.* at FAQ 53. Claimants may also appeal Final Claim determinations exceeding \$250,000 and BP may appeal Final Claim determinations exceeding \$500,000. *See id.* at FAQs 116, 120. Appeals are heard by a three-person panel appointed by Jack M. Weiss, Chancellor of the Louisiana State University Paul M. Hebert Law Center. *Id.* at FAQs 122, 124.

100. *Id.* at FAQs 61, 62.

and makes an offer. A claimant may reject an Interim Payment offer and instead file a claim with the NPFC or in court.¹⁰¹ Or the claimant can accept the offer, which unlike the Final Payment Claim, does not require a release.¹⁰² After accepting an Interim offer, a claimant may continue to file subsequent Interim Payment Claims, no more often than each quarter, until August 22, 2013, or may file a Final Payment or Quick Payment Claim.¹⁰³

Finally, a Quick Payment Claim is essentially a streamlined way of being compensated for any future damages and is available to claimants who were paid an Emergency Advance Payment or an Interim Payment.¹⁰⁴ Rather than going through the full-review Final Payment process, a claimant may choose, without submitting any more documents, to receive an additional payment of \$5,000 for individuals and \$25,000 for businesses.¹⁰⁵ Claimants must sign a release to receive a Quick Payment.¹⁰⁶

C. Claim Consideration and Valuation

Although OPA mandates that responsible parties set up a claims facility where claimants must first file a claim, it also expressly allows claimants to reject the facility's offer and pursue the claim in court or with the NPFC.¹⁰⁷ Thus, while a court may ultimately decide whether someone is an appropriate claimant or how much that person should get paid, nothing requires the responsible party to predict or follow those anticipated decisions at the initial stage. Parties can tailor their eligibility criteria and award determinations to their own goals or expectations.

As a result, the GCCF had to determine how closely a claimant's alleged harm – especially claimants seeking lost profits or income – must be tied to the oil spill in order for the claimant to be able to collect. Theoretically, nearly every American could conceivably claim some injury or damage due to the oil spill, so the Fund needed to establish some limitations.¹⁰⁸ To this end, the

101. *GCCF Protocol*, *supra* note 37, at V.D.

102. *GCCF FAQs*, *supra* note 44, at FAQ 65.

103. *Id.* at FAQs 59, 68.

104. *Id.* at FAQ 21.

105. *Id.* at FAQ 18.

106. *Id.* at FAQ 25.

107. 33 U.S.C. § 2713(a), (c) (2006).

108. The zone of affected people and businesses gets exponentially larger

GCCF retained Harvard Law School professor John C.P. Goldberg to analyze the extent of BP's liability for lost income under OPA and relevant state law. It is again worth noting that nothing required the GCCF to predict or follow OPA and relevant law at this stage. Instead, it could have decided to over- or under-compensate and then let the claimants sort out the difference in litigation with BP. In fact, even now it is unclear whether the GCCF follows OPA and relevant law, or whether it covers more claims than required.¹⁰⁹

OPA entitles claimants to “[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources”¹¹⁰ According to Professor Goldberg, this provision should be read as limiting lost income damages only to those who lost income *due to property or resources being damaged by the oil spill*.¹¹¹ Consequently, while “[p]hysical proximity to the Oil Spill”

with each step away from direct harm. Theoretically, for example, if the fisherman cannot fish, they cannot sell to restaurants or distributors, and those entities in turn might claim that as a result they had to pay more for supplies and pass that cost along to customers. Of course, this chain of events assumes that seafood from other sources is more expensive or less desirable.

109. Compare GCCF Protocol, *supra* note 37, at II.G (“The GCCF will only pay for harm or damage that is proximately caused by the Spill. The GCCF’s causation determinations of OPA claims will be guided by OPA and federal law interpreting OPA. Determinations of physical injury and death claims will be guided by applicable law.”) with Press Release, Kenneth R. Feinberg, Gulf Coast Claims Facility Releases Final Protocol Outlining Final & Interim Payment Stage (Nov. 24, 2010), http://weartv.com/newsroom/documents/claims_facility_final_interim_payment_stage.pdf (“The Goldberg Memorandum makes clear that proximity to the spill is a major requirement for a valid legal claim under the Federal Oil Pollution Control Act (OPA). But, according to Feinberg, ‘the GCCF will be much more generous than current Federal or State Law. Proximity is not a bar to a GCCF claim’”), and Letter from Kenneth R. Feinberg to the Honorable Jim Hood, Attorney General, State of Miss. (Nov. 22, 2010) attached as Exhibit 1 to BP’s Supplemental Memorandum, *supra* note 82 (“I refer you to the enclosed Memorandum of Law prepared by Professor John Goldberg This Memorandum was prepared independently and without the input of anybody at the GCCF. It confirms my view that the GCCF will find eligibility, and calculate damages, well beyond the requirements of OPA.”).

110. 33 U.S.C. § 2702(b)(2)(E) (2006).

111. JOHN C. P. GOLDBERG, LIABILITY FOR ECONOMIC LOSS IN CONNECTION WITH THE DEEPWATER HORIZON SPILL 37, 48 (2010), available at <http://www.gulfcoastclaimsfacility.com/Goldberg.Memorandum.of.Law.2010.pdf>. From a practical standpoint, this would mean that a beachfront hotel

is not required for compensation, a claimant must be able “to link the alleged damage to the Oil Spill – as opposed to other factors such as a general downturn in the Gulf region economy or other financial uncertainty unrelated to the Oil Spill”¹¹² Thus, a business not located anywhere near the Gulf could still be paid by demonstrating that certain customers in the affected region could no longer purchase its goods or services because of a decrease in customers or seafood caused by the spill.¹¹³ The key for all claimants, regardless of location, is that they must show “both actual financial loss and a connection between the loss and the Oil Spill,” and the GCCF says that it becomes harder to show a connection to the spill, the farther a claimant is physically located from the Gulf region.¹¹⁴

Moreover, because it is not always easy to determine a claimant’s precise damages, the GCCF needed to determine how to value claims and the type of supporting documentation that is necessary to substantiate a claim. Regardless of the forum or mechanism, claimants seeking compensation have to provide information that supports the determination of entitlement to and the appropriate amount of compensation. An operation of the size and scope of the GCCF – which covers a huge geographic area and varied claim types – must guard against inappropriate claims.

Finally, the GCCF – in the context of Final Payments – must make a determination of future damages. Any computation of

would be able to collect lost profits if guests stayed away because oil actually reached the beach at or near the hotel’s property. In this case, the hotel’s lost income was due to property actually being damaged (even if the hotel did not own the property). In contrast, a beachfront hotel in a place like St. Petersburg, Florida, which the oil never approached, could not collect lost profits caused by a drop in guests. In this case, even if guests actually stayed away, they did so out fear or misunderstanding that oil reached the property, not because there was any actual damage to property. *See id.* at 39-42.

112. *Gulf Coast Claims Facility Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology*, GULF COAST CLAIMS FACILITY, 2 (Feb. 18, 2011), http://www.gulfcoastclaimsfacility.com/FINAL_RULES.pdf [hereinafter *GCCF Methodology*].

113. *Attachment A: Establishing Evidence of a Connection to the Spill*, GULF COAST CLAIMS FACILITY, 11 (Feb. 18, 2011), http://www.gulfcoastclaimsfacility.com/FINAL_RULES_A.pdf. For example, a trucking company with cancelled contracts for hauling Gulf seafood or an ice cream distributor with reduced sales to affected hotels and restaurants may be able to establish a sufficient connection to the spill. *See id.*

114. *GCCF Methodology, supra*, note 112, at 6-8.

future damages involves estimates that are necessarily based on assumptions. And those assumptions may or may not prove to be accurate in hindsight. (Of course, the alternative is to allow claimants to submit claims periodically for damages incurred since the “last” evaluation.) After retaining experts and considering public comments, the GCCF established a formula to calculate future damages, which it posted on its website and reevaluates every four months based on the currently available data.¹¹⁵

Claimants unsatisfied with the formula for future damages can instead choose to continuously file Interim Claims reflecting their actual losses during the past period. While it is generally easier to calculate actual past losses, this is not always an exact science, as in the case of start-up businesses. Thus, the GCCF reviews and evaluates each claim “on its own merits and specific circumstances” and in the case of start-ups, it considers other documents such as business plans, comparable businesses, and industry trends.¹¹⁶

The GCCF also had to determine whether certain amounts would be added to or deducted from awards. In addition to their damages, the GCCF will compensate claimants for “the reasonable cost of estimating the damages claimed” but will not pay for attorney’s fees or other costs associated with preparing their claim.¹¹⁷ Nor will it pay for punitive damages, even though they might be collectible in litigation.¹¹⁸ Further, the Fund deducts from Interim and Final Payments any amounts that the claimant has received from BP or the GCCF (such as Interim or Emergency Advance Payments), as well as from other “collateral” sources such as insurance or unemployment benefits.¹¹⁹ Traditionally, collateral payments are not deducted from tort awards, though some states have sought to change that traditional rule.¹²⁰

115. *Id.* at 3-4.

116. *Id.* at 4.

117. *GCCF Protocol*, *supra* note 37, at II.F.

118. Memorandum in Support of Motion to Supervise *Ex Parte* Communications Between Defendant and Putative Class Members at 14, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Dec. 21, 2010), ECF No. 912-1 [hereinafter Memorandum in Support].

119. *GCCF Protocol*, *supra* note 37, at V.G.

120. *See Collateral Source Rule Reform*, AMERICAN TORT REFORM

Finally, one additional important feature of the GCCF is that free legal assistance is available to claimants.¹²¹ BP provides the funding for these services, but the GCCF website states that the funding does not affect the advice provided.¹²² The legal services program assists only with filing claims with the GCCF and does not provide assistance with litigation or NPFC claims.¹²³

Although the GCCF was designed to resolve claims wholly outside of litigation, the two processes are inherently linked. The GCCF does not operate in a vacuum. Each claim settled by the GCCF is one less claim pursued in litigation, meaning one less putative class member in the pending class actions. The claim values established in the GCCF could well influence perceived values in the litigation system. The next section examines, using the GCCF as an example, the interplay between mass claims resolution facilities and our traditional adversarial legal system.

IV. THE INTERSECTION OF COURTROOMS AND CLAIM FACILITIES

Administrative claims systems often are created to adjudicate claims after a settlement is reached. While one paramount goal of a mass settlement is to achieve complete closure, that goal is often not achieved. If the settlement occurs in a class action context, there will typically be a right to opt out of the class, and those claimants who opt out will retain the right to litigate. In the bankruptcy context, claims may be channeled into a trust that will resolve the claims through a mass claims facility, but the claimants always retain the right to litigate (after exhausting all administrative remedies). As a practical matter, in the context of settlement and bankruptcy claim facilities, few claimants will seek to litigate their claims because the settlement terms are designed to make litigation a less attractive option. On the other hand, in the context of “ad hoc” or statutory mechanisms, claimants may be required to choose between litigation and resolution through the administrative process. In general, therefore, some form of litigation will proceed even if most claims

ASSOCIATION (2007), <http://www.atra.org/issues/index.php?issue=7344> (providing a multi-state survey on application of the collateral source rule).

121. *GCCF FAQs*, *supra* note 44, at FAQ 10.

122. *Id.* at FAQ 12.

123. *Id.* at FAQ 10.

are resolved through an administrative process.

This “parallel track” raises issues about how the litigation process affects the claims resolution process and how the claims resolution procedures might affect litigation. This section examines the questions that can arise in this context and how those issues have been addressed.

Some argue that claims resolution facilities unfairly allow a defendant to dictate all of the settlement terms. But is that really true? If there is a viable litigation option, the administrative program will not be successful unless it provides some incentive to the claimants. Although a private party may design a facility without the input of claimants, their attorneys, or a court, the party must nonetheless “bargain” with the universe of claimants in order to draw them to the facility. If a facility wants to attract people to it and away from litigation, it will have to provide terms and compensation that are favorable or at least comparable to litigation. Unless the claims resolution program is the product of collusion, if the amounts or terms offered to claimants do not exceed or approach what they reasonably expect from litigation, claimants will pursue that route rather than the claims facility.¹²⁴ Key considerations, then, are transparency, communication, and disclosure. There is nothing inherently wrong with non-independent parties settling litigation, and in fact, adverse parties regularly do so.

Given the numerous advantages a claims facility offers over litigation, many claimants may prefer it, or at least appreciate having an additional option. And as long as it is just an option, meaning claimants can choose to pursue their claim in litigation or through a claims fund, is there any cause for concern or a reason for courts to intervene? Although GCCF claimants are statutorily required to present their OPA claims to the GCCF in the first instance, nothing prevents them from rejecting the GCCF's offer and then suing BP. In fact, about 18,000 claimants have rejected BP's Final Payment offer and may now pursue their

124. See Rutherglen, *supra* note 14, at 677. As an example, because the primary goal of the September 11th VCF “was to persuade potential plaintiffs to opt out of the tort system . . . , compensation from the Fund had to be similar to an award obtained via the traditional tort system.” Steenson & Sayler, *supra* note 26, at 532.

claims in court if they so choose.¹²⁵ Moreover, personal injury claimants do not even need to file a GCCF claim and may instead directly sue BP. Yet, clearly some personal injury claimants appreciate the GCCF option, as more than 100 people have accepted personal injury payments from it.¹²⁶

The BP oil spill litigation and the GCCF present a useful case study. Most claimants who pursue damages allegedly caused by the BP oil spill will proceed in one of two ways: either they will accept an offer made by the Facility or they will reject it and pursue their claim through litigation. And although the GCCF is designed to operate independent of, and indeed avoid, litigation, the two tracks are inextricably linked. At the same time that the GCCF is accepting and paying claims, hundreds of consolidated cases are pending against BP. A claimant who chooses one route may not choose the other. Thus, anything that affects a claimant's decision to pursue one route over the other inherently affects both processes.

Various questions, complaints and criticisms have been raised about the GCCF, ranging from how it communicates with claimants, how it reviews and evaluates claims, what it requires of claimants to establish their claims and receive compensation, and how it makes individual claim determinations and valuations. The judge presiding over the consolidated cases has already addressed some complaints about what the GCCF can or cannot do. More specifically, the judge has issued guidance regarding the disclosures to be provided to claimants. The judge has not interfered with the GCCF's guidelines for the evaluation of claims but has directed the GCCF to make its operations and relationships clear to claimants and to avoid describing the GCCF as wholly independent from BP. But aside from the merits of the various criticisms, interesting questions arise about whether and how the judge should be addressing these criticisms. A judge

125. Of the 83,435 Final Payment Offers made, only 65,984 have been accepted. See GCCF Overall Program Statistics, GULF COAST CLAIMS FACILITY, 1 (Nov. 22, 2011) http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf.

126. See *id.* at 6. Many more people likely filed personal injury claims but either were denied or rejected the Fund's offer. However, the GCCF's website does not post the number of personal injury claims *made*, just the number of personal injury claims *paid*. See *id.*

presiding over a class action has some authority and obligation with respect to the class members and of course has authority to manage his or her cases. There is some precedent for a court presiding over a class action to limit the communications between a defendant and members of the class.¹²⁷ But if an individual seeks to settle, with full disclosure of relevant information, should the court interfere?¹²⁸

Here, however, BP and the GCCF were accused of misleading claimants into settling their claims. First, before the GCCF was even launched, BP's initial settlement tactics were criticized as deceptive. The company was accused of "trying to pull the wool over" the eyes of local fishermen by requiring them to sign litigation waivers in order to be hired to help in the cleanup process.¹²⁹ Further, then-Alabama Attorney General Troy King expressed concerns that BP was requiring people to waive their rights to sue in exchange for just \$5000 and warned citizens to "proceed with caution and understand the ramifications before signing something like that."¹³⁰

Even after the GCCF took over, there were allegations that claimants were being misled into resolving their claims through the facility by being led to think that an independent and neutral body, and not an interested agent of BP, was evaluating their claims. The argument went that not only did BP and the GCCF claim to be independent, but even the White House called Kenneth Feinberg an "independent claims administrator."¹³¹ Parties may approach and evaluate an offer made by a party that

127. See, e.g., *Turner v. Murphy Oil USA, Inc.*, No. 05-4206 (E.D. La. Nov. 14, 2005), ECF No. 39; *Hampton Hardware, Inc. v. Cotter & Company*, 156 F.R.D. 630 (N.D. Tex. 1994).

128. To the extent that the GCCF is simply a process for settling claims between two parties, there is nothing extraordinary about one party making an offer that the other determines whether to accept. Typically, a court does not supervise a negotiation and the "defendant" does not advertise the mechanism by which the offer was determined.

129. Eli Saslow, *Louisiana Fishermen Contemplate Livelihoods Forever Changed by Gulf Oil Spill*, WASH. POST, May 4, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/03/AR2010050304585.html>; Josh Wingrove, *BP Pulls Disputed Waiver for Workers*, GLOBE AND MAIL (Toronto), May 3, 2010, at A11.

130. Condon, *supra* note 75. Notably, the GCCF's \$5000 Quick Payment Award also requires the claimant to sign a release.

131. See, e.g., White House Fact Sheet, *supra* note 76.

it knows to be adverse much differently from an offer made as a result of a process that claims to be independent and that seemingly has a Presidential seal of approval.

Thus, a few months after the GCCF was established, attorneys representing plaintiffs in the consolidated Deepwater Horizon multidistrict litigation asked the judge overseeing the case to restrict Mr. Feinberg's and the GCCF's communications and for other measures that they believed would help claimants make better-informed decisions about whether to join the GCCF.¹³² While the court "encourage[d] and commend[ed] any claims process that will fairly, quickly, and efficiently resolve claims in this litigation," it also recognized the need for transparency so that claimants can "learn, comprehend, and appreciate" how the facility works and "fully evaluate the rationale behind the communications made to them by the facility."¹³³ Though it found that not every measure requested by the plaintiffs was "appropriate or necessary," the court did determine that the GCCF was not fully independent of BP and that the relationship between the two "led to confusion and misunderstanding by claimants."¹³⁴ Thus, in balancing the need for transparency with the GCCF's "ability to fairly and efficiently process claims," it ordered BP, the GCCF, and Mr. Feinberg to: (1) refrain from directly contacting any claimant represented by counsel; (2) refrain from saying the GCCF and Mr. Feinberg are "neutral" or completely "independent" from BP; (3) begin all communications with potential claimants by informing them of their right to consult with an attorney; (4) refrain from telling claimants not to hire a lawyer or otherwise giving them legal advice; (5) tell claimants of their options if they reject a final payment; and (6) advise claimants that the pro bono attorneys and other representatives that were available to assist them were being paid by BP.¹³⁵

Importantly, what troubled Judge Barbier was not whether the GCCF and Mr. Feinberg were or were not independent of BP, but rather whether they were honestly representing the nature of

132. See Memorandum in Support, *supra* note 118, at 1-2.

133. See Order and Reasons, *supra* note 80, at 7-8.

134. See *id.* at 12-13.

135. *Id.* at 8, 14.

their relationship.¹³⁶ In his view, the only way that claimants could fairly evaluate the GCCF's offer and decide whether it was worth giving up their right to sue BP and all other defendants was if they knew whether that offer was being made by BP and its agents or by a truly neutral and independent party.¹³⁷ Indeed, the issue was not that BP's agent could never make a fair offer, only that to be a fair offer, claimants must know that BP's agent made it. Judge Barbier passed no judgment – positive or negative – on the administrator himself, on the nature of his relationship with BP, or on whether Mr. Feinberg could make fair determinations. Similarly, though he required the Fund to disclose that BP was paying for the pro bono attorneys offered to claimants, he passed no judgment on the acceptability of that arrangement.

By framing the issue on the perceptions and understandings of the claimants rather than on the competency of the claims system, Judge Barbier's decision supports the notion that claims facilities represent a bargain between parties to a dispute and that claimants, armed with full knowledge, are capable of determining how best to resolve their claims. The court has concluded that against the backdrop of pending litigation, one of the defendants is free to try to remove claims from the litigation through settlement and claimants are free to decide whether to pursue their claims against the party through the facility or in court. However, for this bargain to be fair, the parties must be able to accurately consider the offers being made. Thus, issues such as the administrator's qualifications, conflicts, and compensation, or to whom he answers, might not need to be regulated as long as the claimants are aware of them. Nor might there be a problem with the defendant making attorneys available to assist claimants, as long as the claimants know about the connection.

Judge Barbier relied on Rule 23 and the Manual for Complex Litigation to restrain the GCCF's and Mr. Feinberg's communications with potential class members after finding that they were not entirely independent of BP.¹³⁸ The ad hoc status of

136. *Id.* at 7-8.

137. *Id.* at 7-8, 12-13.

138. *Id.* at 11. Rule 23 "allows courts to issue orders 'to protect class members and fairly conduct the action' and 'impose conditions on represented parties,'" while the Manual for Complex Litigation says that "[t]he court

the GCCF raises interesting questions about court oversight. Does the court's authority under Rule 23 give the court the authority to address any other complaints about the claims facility? Could it order the removal of the claims administrator? Adjust the timing of payouts or extend the claim-filing deadline? Courts can and do exercise this authority when overseeing claims facilities that they approved to *settle* class actions, but may courts do so over facilities that are established outside the confines of a certified class or a confirmed bankruptcy plan?¹³⁹ And if these courts can make these determinations, what standard are they supposed to follow? Courts that supervise settlement claims funds do so pursuant to their Rule 23(e)(2) authority to ensure that settlements are "fair, reasonable, and adequate."¹⁴⁰ In contrast, Judge Barbier found that any claim of the GCCF's independence was "a direct threat to this ongoing litigation."¹⁴¹ Should judges be able to mitigate anything they perceive to be direct threats to their litigation? How threatening must an action be before the court can address it?

For example, the GCCF is establishing damages theories well in advance of those determinations being made in the litigation, and so litigants may have a hard time rejecting those determinations. Could Judge Barbier order the GCCF to apply a different proximate cause standard and compensate those hotel owners in Florida who lost business even though the oil never got close to their property?

It is also important to consider the effect that the litigation may have on the administrative claims process. For example, if plaintiffs lose the first group of cases brought to trial against the

must protect the interests of absent class members, and Rule 23(d) gives the judge broad administrative power to do so. . . ." See *id.* at 4 (citation omitted).

139. The judge overseeing the Dalkon Shield trust replaced the fund's trustees after they appointed necessarily conflicted attorneys as counsel for the trust. See Rutherglen, *supra* note 14, at 686-87. The court overseeing the Agent Orange program made several modifications, including extending the filing date and allowing certain claimants to receive lump sum payments instead of installments as originally mandated. Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund, *supra* note 8, at 13-14.

140. FED. R. CIV. P. 23(e)(2).

141. Order and Reasons, *supra* note 80, at 12-13.

defendant, remaining claimants might lose significant leverage and so the facility could theoretically begin offering lower payments. Whereas facilities created to settle class action litigation or pursuant to a confirmed bankruptcy plan are bound by the settlement agreement or plan of reorganization and are thus subject to the court's oversight, there may be nothing requiring an ad hoc facility to follow the methodology and guidelines it created for itself. As another example, Judge Barbier recently found that OPA does not bar plaintiffs from seeking punitive damages against BP and other Responsible and non-Responsible Parties.¹⁴² Though settlement and bankruptcy facilities might be statutorily or contractually prohibited from treating present and future claimants differently, what would prevent the GCCF from increasing the offers made to future claimants to discourage them from filing litigation claims for punitive damages? These various issues underscore the tenuous balance that exists.

In this unusual context, the court and the GCCF have demonstrated restraint and deference to each other, while still retaining the necessary control over their own functions.

V. CONCLUSION

A mass claim situation necessitates unusual procedures. The litigation system has limitations that make it difficult if not impossible to address and resolve mass claims in a timely and fair fashion. At some point, there is societal interest in delivering compensation efficiently and addressing situations that have caused devastating injury. The GCCF and other administrative compensation systems allow claimants to obtain compensation years if not decades sooner than would be possible through litigation. Of course, reasonable parties can differ as to the structure and criteria employed in any administrative scheme. Society does have an interest in ensuring that such systems are accountable, and that they operate in a way that allows the claimants to truly evaluate their options.

142. See Order and Reasons, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, at 26-27, MDL No. 2179 (E.D. La. Aug. 26, 2011), ECF No. 3830, available at [http://www.laed.uscourts.gov/OilSpill/Orders/8262011RevisedOrder\(MotionsToDismissB1Complaint\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders/8262011RevisedOrder(MotionsToDismissB1Complaint).pdf).