

June 2015

Symposium: Remedies for Big Disasters: The BP Gulf Oil Spill and the Quest for Complete Justice, Introduction

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Recommended Citation

Thomas, Tracy A. (2012) "Symposium: Remedies for Big Disasters: The BP Gulf Oil Spill and the Quest for Complete Justice, Introduction," *Akron Law Review*: Vol. 45 : Iss. 3 , Article 1.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol45/iss3/1>

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SYMPOSIUM: REMEDIES FOR BIG DISASTERS: THE BP GULF OIL SPILL AND THE QUEST FOR COMPLETE JUSTICE

INTRODUCTION

*Tracy A. Thomas**

On April 20, 2010, the British Petroleum (“BP”) Horizon oil well exploded in the middle of the Gulf of Mexico.¹ Eleven workers lost their lives, and many more were injured.² For three months, the spill was front-page news as the well spewed five million barrels of oil while the company fumbled about trying to get it sealed.³ Hundreds of thousands of people lost income and economic livelihoods as the oil spill contaminated waters, poisoned fishing grounds, and scared off beach tourists. The accident was a result of a series of mistakes compounding the negligence.⁴ Government and judicial inquiries continue to investigate whether something more than negligence was at play and whether BP, or its contractors, recklessly disregarded the likelihood of injury.⁵ Meanwhile, BP instigated a massive scale cleanup of waters,

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1. DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT, BP OIL COMMISSION REPORT (Jan. 11, 2011), *available at* <http://www.gpo.gov/fdsys/>.

2. *Id.*

3. “Eventually the well was capped with impressive engineering feats at a depth challenging the limits of technology.” David F. Partlett & Russell Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 68 WASH. & LEE L. REV. 1341, 1343 (2011).

4. U.S. COAST GUARD & BUREAU OF OCEAN ENERGY MGT., REG., & ENV. DEEPWATER JOINT INVESTIGATION TEAM, FINAL INVESTIGATIVE REPORT (Sept. 14, 2011), *available at* www.deepwaterinvestigation.com. The report concludes the accident and resulting pollution “were the result of poor risk management, last-minute changes to plans, failure to observe and respond to critical indicators, inadequate well control response, and insufficient emergency bridge response training by companies and individuals responsible for drilling.” *Id.* at 1-2.

5. BP may be subject to criminal prosecution. David M. Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1414 (2011).

beaches, and marine life, even as it was subjected to government sanctions and fines for harm to the environment. The company “struggled to find a solution to an ongoing disaster of immense proportions.”⁶

With pressure from President Barack Obama, BP quickly established a claims fund for those injured by the spill to seek compensation.⁷ This response was not too far afield, as the law under the 1990 Oil Pollution Act (“OPA”), enacted after the Exxon Valdez oil spill, holds BP strictly liable for all costs related to the spill and up to \$75 million for related economic damages.⁸ BP selected Kenneth Feinberg as the administrator of the Gulf Coast Claims Facility (“GCCF”). Feinberg, admired for his work as administrator of the September 11th Victim Compensation Fund, was a logical choice to manage an alternative compensation system.⁹ Known as the “master of disasters,” mediator and attorney Feinberg “has become the go-to guy for our national disasters and vexing problems, from Agent Orange to the Dalkon Shield, from the 9/11 fund to the Virginia Tech massacre,” to the pay czar for the financial bailout and now the BP oil spill.¹⁰ He has been described as “a brilliant system designer of the next-level cutting edge for alternative dispute resolution.”¹¹

The GCCF established a process where claimants could file petitions for compensation from the \$20 billion trust fund in exchange for waiving the right to sue the company.¹² The volume of claims to the fund was large, and included fisherman, seafood companies, those associated with the tourism industry—like hotels, stores, and restaurants—oil workers, and state governments, which incurred cleanup

6. Partlett & Weaver, *supra* note 3, at 1342.

7. See David Sanger, *In Week of Tests: Obama Reasserts His Authority*, N.Y. TIMES, June 25, 2010.

8. 33 U.S.C. § 2702; George W. Conk, *Diving Into the Wreck: BP and Ken Feinberg’s Gulf Coast Gambit*, 17 ROGER WILLIAMS U. L. REV. 137, 140 (2012) (explaining that though the BP fund appears to be an original initiative, it is merely BP’s statutorily compelled mechanism for oil spill losses).

9. Myriam Gilles, *Public-Private Approaches to Mass Tort Victim Compensation: Some Thoughts on the Gulf Coast Claims Facility*, ___ DEPAUL L. REV. at *2-3 (forthcoming 2012) (noting that in the 9/11 fund “Feinberg ultimately came out a hero who, working pro bono for three years, had taken on a difficult and emotional task, and done a tremendous job.”).

10. Terry Carter, *The Master of Disasters*, 97 A.B.A. J. 32 (Jan. 2011).

11. *Id.* (describing how Feinberg “knows how to look at a complex problem and design a system that tends to the needs of all stakeholders, is efficient and is sensitive also to what the public might think.”).

12. See GULF COAST CLAIMS FACILITY, www.gulfcoastclaimsfacility.com (last accessed March 23, 2012).

costs and lost tourism revenues.¹³ Litigation also proceeded against the company in a consolidated class action including private and governmental plaintiffs.¹⁴ The private plaintiffs in the case reached a settlement with BP in March 2012, for \$7.8 billion.¹⁵ The agreement replaces the GCCF fund with a new fund to be administered by the court. By this time, the company had paid out more than \$8 billion to claimants and spent over \$14 billion responding to the spill.¹⁶

The BP Claims Fund has drawn criticism on all fronts.¹⁷ This reaction distinguishes it from its predecessor, the 9/11 fund, which is generally considered to be the model for a successful alternative payment system.¹⁸ With BP, there has been a general suspicion of the company's benevolence.¹⁹ Legal scholars sounded the alarm about the truncating of the judicial process and its guarantees of careful fact-finding, transparency, and accountability.²⁰ BP has criticized administrator Feinberg, complaining that he was too generous.²¹

13. Partlett & Weaver, *supra* note 3, at 1343; Amy Schoenfeld, *Where BP's Money is Landing*, N.Y. TIMES, July 3, 2010 (reporting that "economists estimate that more than seven million businesses will suffer from" the spill).

14. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, MDL No. 2179, 2011 WL 323866, at *1 (E.D. La. Feb. 2, 2011).

15. John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES, Mar. 2, 2012. In addition to economic damages, the company will provide compensation and medical services for twenty-one years for those physically injured in the spill. *Id.*; see Michael Kunzelman, *Judge Considers Gulf Oil Spill Settlement* (AP), AKRON BEACON J., Apr. 26, 2012, at A7 (reporting that judge indicated he is leaning toward granting preliminary approval of class-action settlement).

16. *Id.*; Press Release, BP announces settlement with PSC, subject to written final agreement, to resolve economic loss and medical claims from Deepwater Horizon accident and oil spill (Mar. 3, 2012), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7073667>.

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

18. Gilles, *supra* note 9, at *2-3 (noting the 9/11 fund "has been celebrated from virtually all quarters," and "heralded as an efficient, generous and fair means of compensating individuals harmed in widespread disasters.").

19. Partlett & Weaver, *supra* note 3, at 1344 (concluding "that the fund created a far from perfect solution to a difficult problem. In the stress of the rush to compensate victims, the fund failed to achieve the benefits that the parties desired. Its confused structure instilled suspicion among claimants who are being wooed by an alternative suitor—a large class action lawsuit—in which more lucrative damages are promised.").

20. Gilles, *supra* note 9; Linda Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819 (2011) (arguing that "the GCCF represents a radical and troubling departure from other fund resolutions of mass claims, about which rule-of-law advocates ought to be concerned."); Conk, *supra* note 8, at 143.

21. See Campbell Robertson, *BP Spill Fund Raises Limit for Shrimp and Crab Losses*, N.Y. TIMES, Nov. 30, 2011 (company opposes increase of fisherman's losses to four times demonstrable losses); John Schwartz, *BP Says Settlement Terms are Too Generous*, N.Y. TIMES, Feb. 17, 2011;

Claimants balked at the average claims payout of a measly \$10,000. The federal district court admonished Feinberg for misleading claimants to believe that he was an independent trust fund administrator.²² “Mr. Feinberg has become the man the Gulf Coast loves to hate. Residents yell at him in meetings, coastal politicians and the news media accuse him of acting in bad faith, and plaintiffs’ lawyers say he is working for BP.”²³

This symposium, sponsored by the Remedies Section of the Association of American Law Schools, asks the question of what “complete justice” looks like for remedies and compensation for big disasters like the BP oil spill. The contributors address whether the GCCF fund provides complete justice, and whether it should serve as a precedent for future alternative systems. Their surprising answer on both accounts is no.

Ken Feinberg opens the discussion in his essay, *Unconventional Responses to Unique Catastrophes*, explaining the impetus and limitations of the GCCF.²⁴ He describes the unusual origins of the fund and explains why such remedial alternatives are, and should be, rare. He then details some of the difficulties of evaluating claims, including questions of proof and causation. For example, waiters with lost income fail to claim earnings on tax returns. Two fishermen in the same area receive significantly different awards because of a lack of documentation of income. And remote claimants, like Disney World, seek compensation for trickle-down losses. Feinberg explains how the GCCF administrative system assessed claims using the common law standards for proving compensatory damages, including documentation of proof and limits on consequential damages.

Feinberg then explains why he believes such alternatives to the tort system should remain rare. Practically, he thinks they will remain the exception because they are only likely to be created when some unusual impetus—such as a congressional response to a national tragedy like 9/11 or a unique corporate response like BP—trigger the opt out of the default litigation process. Philosophically, he identifies comparative

Conk, *supra* note 8 (observing that Feinberg’s payments have greatly exceeded those historically available under OPA confining losses only to fishermen and those who suffered property damage).

22. *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on Apr. 20, 2010, MDL No. 2179, 2011 WL 323866, at *5 (E.D. La. Feb. 2, 2011); *but see* Partlett & Weaver, *supra* note 3, at 1344–45 (noting that Feinberg has power to negotiate and settle claims without BP’s assent).

23. John Schwartz, *Man with \$20 Billion to Disburse Finds No Shortage of Claims or Critics*, N.Y. TIMES, Apr. 19, 2011, at A14.

24. 45 AKRON L. REV. 575 (2012).

equity concerns with proceeding with alternative systems for some tragedies, but not for others, thus creating an uneven and potentially arbitrary remedial process. Feinberg cautions, however, that the reality of the retraction of class and aggregate actions necessitates that we stay open to the possibility of these types of alternative remedial systems where appropriate.

Responding to Feinberg's cautious endorsement of the limited use of administrative remedies, Professor Myriam Gilles identifies some reservations about the trend to replicate this approach.²⁵ Gilles notes that while the GCCF is modeled after the 9/11 fund, there are significant differences between a public plan for national tragedy and a private settlement fund for corporate negligence.²⁶ While factors like defendant insolvency and litigation delay might indicate the need for administrative alternatives, difficulties for prioritizing certain disasters and plaintiff groups, as well as the loss of public accountability in her view, weigh against the use of these remedial options. Gilles cautions against the rush to create private, administrative solutions that contain none of the protections or transparency of a public enforcement system.

Professor John Goldberg then places the question of the claims fund into the larger philosophical questions of the purpose of tort compensation systems and procedural justice. Goldberg was involved in the BP case through his work in drafting an expert advisory report for Feinberg that assessed the legal standards for recovery of economic loss.²⁷ In his essay for this symposium, *Doing Justice in the Face of a Disaster*, Goldberg situates the focus on compensatory justice with the other "competing metrics of justice" of distributive justice, responsibility-based justice, procedural justice, accountability justice, and comparative justice.²⁸ He concludes that "in the wake of disaster, the doing of justice may require compromises" among these different aspects of justice. Like Feinberg, he finds it unlikely that compensatory justice requires compensation "for everyone who suffers a loss because of a disaster, no matter how remote or haphazard the connection."²⁹ He also appreciates the problems of comparative justice noted by Feinberg with inconsistency across disasters, where some victims of certain

25. See Gilles, *supra* note 9.

26. *Id.*

27. John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill*, reprinted in 30 MISS. C. L. REV. 335 (2011) (appendix); see also John C.P. Goldberg, *OPA and Economic Loss: A Reply to Professor Robertson*, 30 MISS. C. L. REV. 203 (2011).

28. 45 AKRON L. REV. 583 (2012).

29. *Id.*

disasters like BP or 9/11 are compensated, but victims of other disasters like Hurricane Katrina are not. This inequity among disasters may call for a more uniform governmental or judicial protocol in response.

Thus, it seems that commentators of the remedial aspects of the BP disaster are uncomfortable, if not critical, of the use of alternative remedial systems. However, perhaps we should not be so quick to reject them.³⁰ Other commentators have found much to like about these alternative compensation programs.³¹ These programs offer speed, lower costs, cross-claim consistency, certainty, increased payments, cost certainty, and flexibility.³² And so maybe, “[t]he Gulf Coast Claims fund could—and should—serve as a model for how to compensate victims after a big industrial disaster.”³³

It is a myth that the judicial system offers “complete justice” that “makes the plaintiff whole.”³⁴ In general, plaintiffs are routinely left less than whole, as the payment of attorney fees, legal rules of measuring damages at the lowest value, and tort reform caps on recovery limit the ideal of “making a plaintiff whole.” Specifically in the oil spill context, recovery for economic damages is limited because the common law rule precludes broad recovery for third-party economic losses, the OPA narrowly circumscribes recovery to only directly injured parties and property, and the OPA caps total damages at \$75 million.³⁵ Compounding this recovery problem is the delay of litigation and the time-value of money, which exacerbate the unsatisfying result of

30. Partlett & Weaver, *supra* note 3, at 1345-46 (implying that BP can serve as a model for alternative compensation systems for disasters “that will inevitably dot our futures,” if such compensation schemes that compete with the traditional tort system recognize that claimants’ trust and confidence must be garnered through mechanisms that will include strong claims for restitution by claimants).

31. See Deborah E. Greenspan & Matthew A. Neuburger, *Settle or Sue? The Use and Structure of Alternative Compensation Programs in the Mass Claims Context*, 17 ROGER WILLIAMS U. L. REV. 97 (2012); Joe Nocura, Op-Ed, *The Phony Settlement*, N.Y. TIMES, Mar. 12, 2012.

32. Greenspan & Neuburger, *supra* note 31, at 109-12.

33. Nocura, *supra* note 31.

34. See DAVID I. LEVINE, DAVID J. JUNG & TRACY A. THOMAS, REMEDIES: PUBLIC AND PRIVATE 448 (5th ed. 2006) (“The usual explanation for compensatory damages is that compensatory damages make the plaintiff whole.”).

35. See Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 4 (2011); *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927) (common law limitation); 33 U.S.C. § 2702; see also Gilles, *supra* note 9, at *11 (discussing proposed legislation to retroactively raise the statutory cap on economic damages caused by oil spills to \$10 billion).

litigation.³⁶ And most cases, like BP, ultimately settle, thus usually avoiding the transparency of a full public airing.

Moreover, these types of alternative compensation programs fit nicely within the context of the movement toward alternative dispute resolution (“ADR”). Like other forms of ADR, these remedial systems offer efficiencies and effective solutions on both the individual and systemic level that are beneficial in the disaster context.³⁷ The very premise of ADR is to offer a more flexible, realistic, and responsive process designed to result in better solutions to problems. The GCCF—resembling part arbitration with its final, expert decision maker, or part Early Neutral Evaluator with its early fact-finding process, or part settlement conference—borrows from established ADR processes to create new remedial options for a catastrophe. These types of alternative remedial systems should not be so easily discounted, particularly for big disasters.

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.³⁸ Alternative compensation systems, like the BP claims fund, offer potentially powerful solutions to uniquely difficult problems.

36. See Gilles, *supra* note 9, at *3 (discussing the ongoing claims and “messy results” of the consolidated case of 9/11 rescue workers a decade after the disaster).

37. See generally Robert M. Ackerman, *Mitigating Disaster: A Communitarian Response*, 9 CARDOZO J. CONFLICT RESOL. 283 (2008); Michael Tsur, *ADR—Appropriate Disaster Recovery*, 9 CARDOZO J. CONFLICT RESOL. 371 (2008); Maria R. Volpe, *Taking Stock: ADR Responses in Post-Disaster Situations*, 9 CARDOZO J. CONFLICT RESOL. 381 (2008).

38. Greenspan & Neuburger, *supra* note 31, at 136.