

# Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far

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## I. INTRODUCTION

In the well-known Greek myth, Prometheus stole fire from the Greek god Zeus and gave it to humanity. In return for this arrogance, Zeus had Prometheus chained to a rock in the Caucasus Mountains where Prometheus was punished by an eagle eating away at his liver, which regenerated every night. Because Prometheus was immortal, he was condemned to eternal torture by the voracious eagle's pecking. After 30 years of this punishment, however, Hercules appeared, killed the eagle, and liberated Prometheus from his unending torment. In return for freeing him, Prometheus rewarded Hercules with the secret to completing the 11th of his famous Herculean labors.<sup>1</sup>

On April 20, 2010, an explosion on the Deepwater Horizon rig killed 11 workers and unleashed the worst oil spill in American history. Less than two months later, on June 16th, 2010, BP Oil—after meeting with President Barack Obama—agreed to set up a \$20 billion fund to compensate victims of the disaster. Shortly thereafter, BP selected Kenneth Feinberg to oversee the compensation fund and claims process.

In the morality play of the Deepwater Horizon oil spill, BP assumed the Promethean role of modern energy-bringer to mankind. In its arrogance for attempting to expropriate energy from miles below the ocean floor and bring oil to mankind, BP precipitated a massive calamity. As a consequence, BP faced the eternal punishment of being lashed to the American Caucasus of never-ending civil litigation, perpetually to be pecked away by claimants. Rather than endure this interminable retribution, BP instead chose to terminate its own agony as quickly as possible by creating a fund. And, Hercules—in the form of the heroic Ken

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1. Prometheus gave Hercules the secret to stealing the golden apples from the Hesperides. PIERRE GRIMAL, *THE DICTIONARY OF CLASSICAL MYTHOLOGY* 202 (Blackwell Publ'g 1996) (1951).

Feinberg—appeared to BP just in time to slay the civil litigators and liberate BP. For his efforts at enabling the BP rescue, BP rewarded Feinberg.<sup>2</sup>

The appearance of Feinberg as the heroic savior in the Gulf oil calamity was, in no small measure, a consequence of a persona whose reputation has indeed assumed mythic proportions in the public consciousness.<sup>3</sup> As is well known, Feinberg served as the special master administering the September 11th Victim Compensation Fund (the “Fund”) in the aftermath of the terrorist attack of September 11, 2001.<sup>4</sup> As is equally well known, Feinberg has also had an extended career serving as a mediator, special master, settlement negotiator, claims administrator, and more recently, as President Barack Obama’s Wall Street executive compensation czar.<sup>5</sup>

The selection of Feinberg to administer the Gulf Coast Claims Facility (GCCF) immediately commanded comparison to the September 11th Victim Compensation Fund. Indeed, Feinberg

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2. By the author’s somewhat inept count, Feinberg might well be performing approximately his seventh Herculean labor, with his preceding feats consisting of his participation as a special master in: (1) negotiating the Agent Orange class action settlement, (2) as a trustee charged with disbursing Dalkon Shield settlement payments, (3) assisting Judge Jack Weinstein of the Federal District Court for the Eastern District of New York in the Brooklyn Navy Yard asbestos cases, (4) managing the September 11th Victim Compensation Fund, (5) determining Wall Street executive salary compensation under the Troubled Asset Relief Program, (6) supervising the Hokie Spirit Memorial Fund after the Virginia Tech campus shootings, and (7) administering the Gulf Coast Claims Facility. See Terry Carter, *The Master of Disasters: Is It Just Him, or Is Kenneth Feinberg Changing the Course of Mass Tort Resolution?*, A.B.A. J., Jan. 2011; Jeff McDermott, *Kenneth R. Feinberg: A Profile in Public Service*, FED. LAW., May 2008, at 38.

3. See Steven Brill, *What’s a Bailed-Out Banker Really Worth?*, N.Y. TIMES MAG., Jan. 2010, at 32 (profile of Feinberg’s role as executive pay czar under the federal Troubled Asset Relief Program); Carter, *supra* note 2, at 33; Kimberley A. Strassel, *Mr. Fairness: The Pay Czar, BP Claims Administrator, and 9/11 Victims Fund Manager Talks About How He Makes Decisions That Alter Lives*, WALL ST. J., Aug. 7, 2010, at A11, available at <http://online.wsj.com/article/SB10001424052748703309704575413404274531476.html> (comparing Feinberg to King Solomon).

4. See KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, VOLUME I (2004), available at [http://www.usdoj.gov/final\\_report.pdf](http://www.usdoj.gov/final_report.pdf).

5. Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 667 (2003); Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51, 56 (2003); Charles J. Faruki, Book Review, FED. LAW., Oct. 2005, at 52 (reviewing KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005)); McDermott, *supra* note 2; Strassel, *supra* note 3.

himself announced that in administering the GCCF, he would be drawing on his vast knowledge and experience in administering the September 11th Victim Compensation Fund.<sup>6</sup> Many of Feinberg's initial initiatives—such as town hall meetings and outreach programs to Gulf fishermen and other claimants—duplicated techniques that Feinberg had developed during his supervision of the September 11th Victim Compensation Fund.<sup>7</sup>

But, the BP Gulf Coast Claims Facility—apart from its superficial designation as a compensation fund—bears little resemblance to the September 11th Victim Compensation Fund. Although these two “fund” mechanisms have in common the same all-powerful administrator, the two funds are entirely unlike one another. This comparison bears scrutiny and debate for several compelling reasons.

First, the September 11th Victim Compensation Fund was widely acknowledged as a *sui generis*, one-time endeavor to compensate victims of a national terrorist disaster.<sup>8</sup> Indeed, special

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6. See Strassel, *supra* note 3.

7. See Kenneth Feinberg, *Transparency and Civil Justice: The Internal and External Value of Sunlight*, 58 DEPAUL L. REV. 473 (2003); *Feinberg Says BP Fund Will Be Generous, Better than Lawsuits*, BUS. WK. (July 15, 2010), <http://businessweek.com/news/2010-07-15/feinberg-says-bp-fund-will-be-generous-better-than-lawsuits.html> [hereinafter *BP Fund Will Be Generous*] (local meeting in Jefferson Parish, Louisiana); Wendy Kaufman, *Feinberg Vows Quick Response on Gulf Oil Spill Claims*, NPR (Aug. 19, 2010), <http://www.npr.org/templates/story/story.php?storyId=129293800> (Feinberg meeting in Houma, Louisiana).

8. See, e.g., FEINBERG ET AL., *supra* note 4, at 83–84; Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 205 (2005) (“Because the Fund is *sui generis*, it is unlikely to have a profound impact on developments in the law of torts.”); Chamallas, *supra* note 5, at 53 (“Perhaps the most repeated observation made about the September 11th Victim Compensation Fund, like the horrible events which brought it into being, is that it is unique and has no close parallel in the history of United States injury and compensation law.”); Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events Not Likely to Be Duplicated*, 53 DEPAUL L. REV. 209 (2003) (comparing the World Trade Center events to the attack on Pearl Harbor on December 7, 1941); Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 771 (2003); Robert L. Rabin & Stephen D. Sugarman, *The Case for Specially Compensating the Victims of Terrorist Acts: An Assessment*, 35 HOFSTRA L. REV. 901, 907 (2007) (“9/11 was the quintessential once-in-a-lifetime disaster.”); Erin G. Holt, Note, *The September 11th Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513, 535 (2004). *But see* Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289 (2003) (arguing that the September 11th Victim Compensation Fund was not unprecedented; the federal government historically has been involved in

master Feinberg repeatedly stressed in numerous speeches and writings that the Fund was neither a model for tort reform, nor a model for any future terrorist or other disaster.<sup>9</sup> Feinberg was fairly and consistently insistent that the Fund was not a model *for anything*.<sup>10</sup> And many, if not most, academic commentators agreed with this assessment.<sup>11</sup> And yet, the September 11th Victim Compensation Fund,<sup>12</sup> in its implementation and design, is now touted as the model for the Gulf Coast Claims Facility.<sup>13</sup> It should give us some pause that the special master who repeatedly

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compensating victims of various types of calamities, including other victims of terror).

9. FEINBERG, *supra* note 5, at 178 (“It would be a mistake for Congress or the public to take the 9/11 fund as . . . a model in the event of future attacks.”); FEINBERG ET AL., *supra* note 4, at 83–84; Kenneth R. Feinberg, *Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation*, 19 WASH. U. J.L. & POL’Y 21, 29 (2005) [hereinafter Feinberg, *Negotiating the Victim Compensation Fund*] (“9/11 was unique and gave rise to a unique response. That is the only way, I think, to explain it.”); Kenneth R. Feinberg, *The Building Blocks of Successful Victim Compensation Programs*, 20 OHIO ST. J. ON DISP. RESOL. 273, 276–77 (2005) [hereinafter Feinberg, *The Building Blocks*]; Q & A: Kenneth Feinberg, *Special Master of the 9/11 Victim Compensation Fund* (C-SPAN television broadcast July 10, 2005) (stating that the 9/11 Fund was an aberration and unique); Feinberg, *supra* note 7, at 475–77; *see also* Peter T. Elikann, Book Review, 90 MASS. L. REV. 48 (2006) (reviewing FEINBERG, *supra* note 5); Robert L. Rabin, *September 11 Through the Prism of Victim Compensation*, 106 COLUM. L. REV. 464 (2006) (reviewing FEINBERG, *supra* note 5); James E. Rooks, Book Review, TRIAL, Mar. 2006, at 74 (reviewing FEINBERG, *supra* note 5).

10. FEINBERG, *supra* note 5, at 178; FEINBERG ET AL., *supra* note 4, at 84; *see also* Rabin, *supra* note 9, at 479 (contending that the thrust of Feinberg’s argument, that the September 11th Victim Compensation Fund would be a mistake as a precedent for future programs, is puzzling).

11. *See, e.g.*, Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 588 (2001); Rabin & Sugarman, *supra* note 8, at 913 (“[A]n ad hoc fund by its very nature runs a substantial risk of being myopic in design—fixated with excessive particularity on the event at hand. In this regard, the 9/11 Fund provides a cautionary note.”); Larry S. Stewart et al., *The September 11th Victim Compensation Fund: Past or Prologue?*, 9 CONN. INS. L.J. 153, 171 (2002) (commenting that the Fund will not likely serve as a model for future reform of the American civil justice system).

12. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

13. *See, e.g.*, Charles E. Lavis, *Interview with Ken Feinberg, the Independent Administrator of the BP Oil Spill Victim Compensation Fund*, BP OIL SPILL L. BLOG (June 20, 2010), <http://www.bpoilspilllawblog.com/2010/06/ken-feinbergs-interview-on-mee.html?utm-sou> (Feinberg drawing on the lessons of the Fund to guide his implementation of the GCCF).

disavowed his own masterwork should now be relying on his work product again, but in a different and anomalous context.

Second, almost every aspect of the Gulf Coast Claims Facility is unlike the September 11th Victim Compensation Fund. Among numerous features, the funds differ in the nature of the events giving rise to creation of the fund: authorization, rulemaking, review mechanisms, transparency, election of remedies, applicable law, assistance of counsel, litigation alternatives, as well as the role of the prospective defendants. The GCCF has raised challenging ethical and professional responsibility issues, as well as questions relating to the fund's transparency. Hence, any citations to the Fund as a precedent for the GCCF—by the special master or others—should be viewed with guarded skepticism.

Third, and perhaps most important, the Gulf Coast Claims Facility represents an unnoticed incremental trend toward the lawless, private resolution of mass claims. This resolution (in the case of the GCCF) was created by a culpable defendant, unbounded by legal norms, and administered by a heroic “special master” with limitless unreviewable discretion, who also is in the employ of the malefactor. Whatever else may be argued on behalf of the GCCF, this cannot be a good development.

The September 11th Victim Compensation Fund has been widely viewed as a tremendous accomplishment in expeditiously resolving the claims of thousands of grieving victims of an unprecedented terrorist attack.<sup>14</sup> On the other hand, with more considered distance, several scholars have raised probing questions relating to the principles underlying the Fund's compensation scheme, as well as its implementation.<sup>15</sup>

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14. See FEINBERG ET AL., *supra* note 4, at 1 (“I am pleased to report that, in my view, the fund was an unqualified success.”); Ackerman, *supra* note 8, at 224–25 (praising the September 11th Victim Compensation Fund); Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 29; Peck, *supra* note 8; 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, 559 (2009) (“By almost all measures, the Fund was a success.”).

15. See generally Alexander, *supra* note 5, at 627 (noting that future disaster compensation systems should focus on institutional design, suggesting several factors to ensure substantive and procedural fairness); Chamallas, *supra* note 5, at 79 (“[The Fund] neither reflects a consistent social vision nor furthers a coherent compensation philosophy. Instead, the Fund is a blended scheme that combines features of a tort-like system of individualized justice with a no-fault insurance system.”); Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719 (2003); Jean Macchiaroli Eggen, *Toxic Torts at Ground Zero*, 39 ARIZ. ST. L.J. 383 (2007) (proposing management plans for future massive toxic tort exposure claims); George L. Priest, *The Problematic Structure of the September 11th Victim Compensation*

A number of scholars have suggested that the September 11th Victim Compensation Fund represented a hybrid, hodge-podge of conflicting principles drawn from tort law, private and governmental insurance models, and social welfare schemes.<sup>16</sup> At least one scholar has suggested that the model for the Fund is the class action settlement mechanism—with Feinberg in the role of settlement negotiator and administrator—but otherwise lacking the attributes of a settlement class.<sup>17</sup> Others have questioned the wisdom of permitting a single, powerful administrator to so completely dominate the creation and implementation of a compensation fund.<sup>18</sup> Surveying this range of criticism, several scholars have suggested that although the Fund commendably compensated some 2,700 claimants in a short period of time, and

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*Fund*, 53 DEPAUL L. REV. 527, 527 (2003) (“Nevertheless, the September 11th Fund has generated remarkable controversy.”); Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831 (2002) [hereinafter Rabin, *Indeterminate Future Harm*]; Rabin, *supra* note 8; Rabin & Sugarman, *supra* note 8, at 913–15; Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 358 (2003) (September 11th Victim Compensation Fund failed to create either distributive justice or procedural fairness amongst recipients of the Fund). *But see* Brian Walker, *Lessons That Wrongful Death Tort Law Can Learn from the September 11th Victim Compensation Fund*, 28 REV. LITIG. 595 (2009) (arguing that lessons learned from the September 11th Victim Compensation Fund can help reform state wrongful death law).

16. *See, e.g.*, Alexander, *supra* note 5, at 636–39 (different compensation models); Chamallas, *supra* note 5, at 53–55, 58 (describing mixed features of the September 11th Victim Compensation Fund, and describing the rules and regulations adopted to govern the Fund as a “curious hybrid system”); Diller, *supra* note 15, at 721, 724, 726–66 (describing the Fund as an amalgam of tort and social welfare schemes); Priest, *supra* note 15, at 532–39; Rabin, *supra* note 11, at 576–81; Rabin & Sugarman, *supra* note 8, at 913; *see also* Rabin, *supra* note 8, at 770 (the September 11th Victim Compensation Fund is not one model, but three).

17. *See* Diller, *supra* note 15, at 721, 745–47, 757 (“Feinberg’s conception of his role draws on the model of the Fund as a mass tort settlement mechanism.”).

18. *See* Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL’Y REV. 1, 3–4 (2006), which argues that Feinberg’s role as the special master in administering the Fund should not serve as a model for the future: “Never before in modern times has Congress created a position with so much discretion and so little oversight.” *See also* Diller, *supra* note 15, at 726, 766–68 (critical of Feinberg’s overweening central role in design and implementation of the Fund).

avoided litigation, the Fund nonetheless lacked legitimacy in a democratic society.<sup>19</sup>

The serious challenges that scholars have raised with regard to the legitimacy of the September 11th Victim Compensation Fund have even more powerful resonance in relation to the Gulf Coast Claims Facility. If the Fund represented a movement toward the embrace of fund mechanisms for resolving mass tort claims, then the GCCF not only has expanded on this model but also advanced the model in an even more radical, less lawful direction. In this view, it is difficult to discern any basis for legitimacy for the GCCF. For those concerned with the rule of law, equity, and fundamental fairness, the GCCF ought to be a cause for concern.

The arc of Feinberg's career neatly demonstrates the evolution of at least three different fund models, progressing from arguably the most legitimate to arguably the least legitimate (and most lawless). This evolution illustrates a seamless progression from (1) a judicially approved and managed class action fund to (2) a congressionally mandated and supervised fund to (3) a defendant-created and directed fund. In the haste to embrace the fund approach to mass claim resolution, little attention has focused on how these "funds" have evolved from entities governed by the rule of law to a model essentially unconstrained by law.

In the ensuing sections, this Article compares several dimensions of the September 11th Victim Compensation Fund to the Gulf Coast Claims Facility. By focusing on various aspects of fund creation and implementation, the purpose of these sections is to draw attention to the ways in which the GCCF is unlike the Fund.

After this lengthy exploration of these two funds, this Article concludes with a discussion of the concept of a "fund approach" to the resolution of mass tort litigation and raises concerns about this model. This final assessment considers the Gulf Coast Claims Facility in the context of other fund resolutions of mass claims, returning to the theme 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.

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19. See Ackerman, *supra* note 8, at 206 (citing Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 285–86 (2004)); Berkowitz, *supra* note 18, at 24–26 (suggesting that the Fund's provision for a litigation alternative was illusory and another ground for the Air Transportation Safety and System Stabilization Act's (ATSA's) illegitimacy); Priest, *supra* note 15, at 545; Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457, 489 (2003) (undemocratic process in establishment of the Fund and selection of the special master).

## II. A COMPARISON OF THE SEPTEMBER 11TH VICTIM COMPENSATION FUND AND THE BP GULF COAST CLAIMS FACILITY

The September 11th Victim Compensation Fund was created nearly a decade ago, and with the passage of time, scholars have generated an enormous body of historical, analytical, and critical literature examining almost every aspect of the Fund.<sup>20</sup> The study of the Fund has been aided by the fact that, as the consequence of Congressional legislation and rulemaking, as well as the transparency afforded by the Fund's special master, much information about the Fund is in the public domain.<sup>21</sup> In addition, in numerous speeches, articles, books, and media appearances, Feinberg has been unusually active in publicly explaining and defending the Fund.<sup>22</sup> In contrast, the Gulf Coast Claims Facility is not the creature of federal legislation. Consequently, information relating to the GCCF has been, at this point, less accessible than information relating to the September 11th Victim Compensation Fund.<sup>23</sup>

It is not the purpose of this Article to again recite the history of the September 11th Victim Compensation Fund, which has been explained in great detail in numerous other articles.<sup>24</sup> Rather, the

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20. See generally Ackerman, *supra* note 8; Alexander, *supra* note 5; Berkowitz, *supra* note 18 (criticizing Feinberg's role as special master); Robert A. Katz, *Too Much of a Good Thing: When Charitable Gifts Augment Victim Compensation*, 53 DEPAUL L. REV. 547 (2003) (discussing collateral source rule); Rabin, *supra* note 11, at 576–87; Steenson & Sayler, *supra* note 14, at 530–60.

21. See, e.g., FEINBERG ET AL., *supra* note 4; *Award Payment Statistics—September 11th Compensation Fund of 2001*, U.S. DEP'T JUST., [http://www.justice.gov/archive/victimcompensation/payments\\_deceased.html](http://www.justice.gov/archive/victimcompensation/payments_deceased.html) (last visited Mar. 14, 2011) (reporting that the mean award for death claims was approximately \$1.7 million, with a high of \$7.1 million and a low of \$250,000, after offsets).

22. See, e.g., FEINBERG, *supra* note 5; Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9; Feinberg, *The Building Blocks*, *supra* note 9 (commenting on how he designed a successful compensation system for the September 11th victims).

23. See GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com> (last visited Mar. 14, 2011); *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/faq> (last visited Mar. 14, 2011).

24. See, e.g., FEINBERG ET AL., *supra* note 4; Ackerman, *supra* note 8, at 143–55 (establishing the September 11th Victim Compensation Fund); Alexander, *supra* note 5, at 627–28, 630–33 (legislative history of ATSA); Berkowitz, *supra* note 18, at 5–9 (same); George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN ST. L. REV. 175, 182–88 (2007); Eggen, *supra* note 15, at 413–20; Katz, *supra* note 20, at 576–80 (discussing the Fund program); Rabin, *supra* note 11, at 576–87.

ensuing sections of this Article focus on various aspects of the September 11th Victim Compensation Fund in comparison to the Gulf Coast Claims Facility.

*A. Events Giving Rise to Creation of the Funds*

The events giving rise to the creation of the September 11th Victim Compensation Fund and the Gulf Coast Claims Facility differ in significant ways that bear on the legitimacy of utilizing a fund approach to compensate alleged victims of those events.<sup>25</sup> Indeed, commentators on the September 11th Victim Compensation Fund have pointed to the unique nature of the events giving rise to creation of the Fund as a reason for *not* extending the fund approach to other types of calamitous events.<sup>26</sup> On the other hand, the GCCF was created in the context of events that scholars have suggested are not especially suitable for a fund approach to victim compensation.<sup>27</sup> As will be discussed, the events that gave rise to the September 11th Victim Compensation Fund are unlike those events that undergird the Gulf Coast Claims Facility, in significant ways for assessing the legitimacy of a fund approach to resolving claims.

Almost every narrative of September 11, 2001 focuses on the nearly unprecedented terrorist attack on American soil, comparable perhaps only to the December 7, 1941 surprise attack on Pearl Harbor.<sup>28</sup> Thus, in numerous accounts the September 11th attacks typically are characterized as a terrorist act of war, and central to this narrative are descriptions of a traumatized country in the wake

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25. Alexander, *supra* note 5, at 653; Rabin & Sugarman, *supra* note 8, at 913; see also Michael Cooper, *Two Funds, Same Goal: Compensate*, N.Y. TIMES, Aug. 22, 2010, at A14 (comparing the September 11th events and the Gulf oil spill and the consequences for evaluating compensation).

26. See, e.g., FEINBERG ET AL., *supra* note 4, at 83–84; Rabin & Sugarman, *supra* note 8, at 913 (commenting that terrorist attacks are not a solid foundation for creating a fund; the Fund offers no principle upon which to base a publically funded compensation mechanism).

27. See, for example, Rabin, *supra* note 8, at 780–81, 798, 799–803, which suggests that responsible defendants ought to be charged with the losses reflecting what is required to make a deserving plaintiff whole: “I remain unconvinced that any future special recognition of victims of terrorism outside tort would, or should, depart from this latter norm.”

28. See Alexander, *supra* note 5, at 653–57 (September 11th program formulated as an ad hoc response to events of a single terrible day); Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 29; Peck, *supra* note 8, at 209; Rabin, *Indeterminate Future Harm*, *supra* note 15, at 1843 (invoking the analogy to Pearl Harbor); Rabin & Sugarman, *supra* note 8, at 913 (same).

of the attacks.<sup>29</sup> Thus, many commentators have reiterated the central theme of national trauma, and a resulting need for unified healing, as a compelling rationale for the swift creation of a compensation fund.<sup>30</sup>

The September 11th terrorist attacks also raised several fundamental legal quandaries that became central to the September 11th narrative. For example, it quickly became evident that identifying culpable defendants, in a traditional sense, would raise challenging problems.<sup>31</sup> Clearly, the terrorists who seized and piloted the airplanes that crashed into the World Trade Center towers, the Pentagon, and Shankesville, Pennsylvania, would not be defendants.<sup>32</sup> The terrorists' countries of origin also raised difficulties as prospective defendants, including sovereign immunity defenses. Federal law circumscribed airline liability, and airport screening companies were as yet untested defendants. In the immediate aftermath of the attacks, other potential defendants such as the Twin Tower architects and builders, the Port Authority, and other agencies seemed remote possible defendants. In addition, causation problems loomed large.

As has been recited in every account of the September 11th Victim Compensation Fund, Congress responded to this unique set of events by enacting federal legislation within 11 days of the attacks.<sup>33</sup> The enabling legislation had two well-recognized goals:

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29. Ackerman, *supra* note 8, at 140–42 (shared national tragedy); *see also* Peck, *supra* note 8, at 209; Rabin & Sugarman, *supra* note 8, at 913; Steenson & Saylor, *supra* note 14, at 531.

30. *See* Ackerman, *supra* note 8, at 222 (“But only the most jaded cynic would not see in the Fund the heartfelt desire to aid one’s neighbor in time of need.”); Alexander, *supra* note 5, at 639, 653. In sounding this theme, Professor Alexander has explained:

Or the attacks might be viewed as acts directed symbolically against the entire country and its government, making the victims emblematic surrogates for all Americans. On this view, the expressive content of the act might call for an expressive act of national generosity towards the victims, who should be treated differently from other victims of torts, crimes, or disasters as a way of showing defiance to the perpetrators—in the words of one commentator, “to serve as a national expression of unity in the face of a tragedy unique in American history, as well as to help survivors.”

Alexander, *supra* note 5, at 639 (citing Michael I. Meyerson, *Losses of Equal Value*, N.Y. TIMES, Mar. 24, 2002, at D4); *cf.* Rabin & Sugarman, *supra* note 8, at 913 (suggesting that the fact that the Fund emerged from the collective conscience of the nation as a response to calamity “does not seem a solid foundation for the future, offering nothing by way of principle”).

31. Alexander, *supra* note 5, at 637.

32. *Id.*

33. *See generally* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001). The Act subsequently was amended

to limit the airlines' liability for the attacks, and thereby save the airline industry,<sup>34</sup> and to create a fund to compensate innocent victims of the attacks.<sup>35</sup> The second goal was intended to speedily heal the wounds of the unprecedented attacks and to compensate victims of the terrorist attack out of the national treasury. In this view, the entire country responded to the attacks by communally providing aid to innocent victims, against the background of uncertain responsible party culpability.<sup>36</sup>

The events giving rise to creation of the Gulf Coast Claims Facility, in contrast, were not the result of a terrorist attack on American soil but rather an explosion on a deep-water oil rig platform in the Gulf of Mexico.<sup>37</sup> Eleven oil rig workers were killed, in contrast to the nearly 3,000 people who died or were injured in the collapse of the World Trade Center Towers and the airplane crashes into the Pentagon and Shankesville, Pennsylvania.<sup>38</sup> Thus, the September 11th attacks gave rise to a relatively limited universe of personal injury and death claims, but the BP oil spill largely gave rise to environmental pollution, property damage, and business interruption claims from claimants in all 50 states.<sup>39</sup> In comparison to potential claims arising out of

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by Pub. L. No. 107-71, § 124, 115 Stat. 631 (2001), and Pub. L. No. 107-134, § 114, 115 Stat. 2435 (2002). See FEINBERG ET AL., *supra* note 4, at 3–4. For accounts of ATSA's enactment, see, for example, Ackerman, *supra* note 8, at 143–48, and Eggen, *supra* note 15, at 413–20.

34. FEINBERG ET AL., *supra* note 4, at 3; Ackerman, *supra* note 8, at 143; Alexander, *supra* note 5, at 630–31; Berkowitz, *supra* note 18, at 1; Conk, *supra* note 24, at 181.

35. FEINBERG ET AL., *supra* note 4, at 3; Ackerman, *supra* note 8, at 144; Alexander, *supra* note 5, at 631–32; Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 21; Steenson & Sayler, *supra* note 14, at 532.

36. See, e.g., FEINBERG ET AL., *supra* note 24, at 3; Ackerman, *supra* note 8, at 144 (“The Fund reflected the national outpouring of grief and sympathy in the wake of the unprecedented attacks of September 11th.”); Conk, *supra* note 24, at 181.

37. BP, DEEPWATER HORIZON ACCIDENT INVESTIGATION REPORT—EXECUTIVE SUMMARY (2010), available at [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/incident\\_response/STAGING/local\\_assets/downloads\\_pdfs/Deepwater\\_Horizon\\_Accident\\_Investigation\\_Report\\_Executive\\_summary.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report_Executive_summary.pdf); Cooper, *supra* note 25.

38. See *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 278 (S.D.N.Y. 2003) (background events giving rise to September 11th litigation); Cooper, *supra* note 25.

39. Cooper, *supra* note 25; Jim Snyder, *BP Spill Claims from 50 States Confront Administrator Feinberg*, BUS. WK. (Aug. 16, 2010), <http://www.businessweek.com/news/2010-08-16/bp-spill-claims-from-50-states-confront-administrator-feinberg.html> (reporting that BP had received more than 142,400

the September 11th attacks, the scope of potential BP claimants and liability was enormous. Whereas the September 11th attacks implicated problematic defendants enmeshed in complicated causation issues, in contrast, the BP oil spill involved an identifiable, responsible party with more readily apparent culpability.<sup>40</sup>

At least one primary justification for creation of the September 11th Victim Compensation Fund centered on the idea that the claimants were innocent victims of a national traumatic event.<sup>41</sup> In light of this rationale, a number of scholars, as well as Feinberg, have argued that the Fund experience should be cabined to the unique terrorist events giving rise to creation of the Fund.<sup>42</sup> Consequently, these scholars have argued that the Fund experience should not be extended to provide relief in the wake of other calamitous events such as naturally occurring hurricanes, earthquakes, or the like.<sup>43</sup> Commentators have used this theory to rationalize the federal failure to create a relief fund in the aftermath of Hurricane Katrina, for example.<sup>44</sup> And, extending this argument, commentators have suggested that compensation fund approaches seem entirely unsuitable where a mass tort occurs and there is a readily ascertainable culpable defendant.<sup>45</sup>

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claims from all 50 states; most claims based on economic losses, rather than death or injury).

40. The Coast Guard almost immediately designated BP as a “responsible party” under the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, § 102, 104 Stat. 484, 489. The OPA states:

[E]ach responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

*Id.* The OPA includes a \$75 million cap for oil spill-related environmental damage. *Id.* § 1004, 104 Stat. at 492. In the aftermath of the Deepwater Horizon explosion and spill, legislation was introduced in the Senate to end this cap. See Barry Meier, *Calls to Update Maritime Laws*, N.Y. TIMES, July 6, 2010, at B1, available at <http://www.nytimes.com/2010/07/06/business/06seas.html>.

41. Ackerman, *supra* note 8, at 144; Conk, *supra* note 24, at 181.

42. FEINBERG ET AL., *supra* note 4, at 83–84; Feinberg, *The Building Blocks*, *supra* note 9; Rabin & Sugarman, *supra* note 8, at 913.

43. See Rabin & Sugarman, *supra* note 8, at 914.

44. *Id.*

45. See Rabin, *supra* note 8, at 780–81, 798, 799–803, which suggests that responsible defendants ought to be charged with the losses reflecting what is required to make a deserving plaintiff whole: “I remain unconvinced that any future special recognition of victims of terrorism outside tort would, or should, depart from this latter norm.”

In contrast to these limiting arguments, other scholars have argued that there is no reasoned basis for distinguishing between innocent victims of the September 11th attacks and the innocent victims of other similar disasters that also have caused national trauma.<sup>46</sup> If the concepts of “innocent victim” and “national trauma” have meaning, then there is little rational basis for choosing among types of claimants for fund relief.<sup>47</sup> Thus, in this view, the creation of the September 11th Victim Compensation Fund was inherently unfair to victims of the first attack on the World Trade Center in 1993, the victims of the Oklahoma federal office bombing (a domestic terrorist event), the victims of the attacks on the Navy ship *USS Cole* in Yemen, and the victims of the embassy bombing in Kenya.<sup>48</sup> In this same vein, these critics argue that there is no reasoned basis for not extending fund compensation to innocent victims of natural disasters, such as the innocent victims of Hurricane Katrina.<sup>49</sup>

Despite the debate concerning the nature of the events that support creation of a fund approach to compensation (or not), those commentators who have addressed this issue do seem to agree on this point: that a mass disaster traceable to the actions of a responsible party, which gives rise to legal liability, is not the sort of scenario that justifies creation of a fund.<sup>50</sup> In other words, the events surrounding the BP Gulf oil spill rather precisely characterize the type of disaster that most commentators agree should not lead to creation of a fund.

### *B. Authorization for the Funds*

Just as the events that gave rise to the September 11th Victim Compensation Fund and the Gulf Coast Claims Facility differ, so do the authorizations for each of these funds. Congress authorized the creation of the September 11th Victim Compensation Fund by

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46. See FEINBERG ET AL., *supra* note 4, at 79 (suggesting that the status of victims cannot be used to justify the enactment of a unique compensation statute); Alexander, *supra* note 5, at 653–54; Rabin, *supra* note 11, at 588.

47. Alexander, *supra* note 5, at 653–54; Rabin, *supra* note 8; Rabin & Sugarman, *supra* note 8, at 914.

48. See FEINBERG ET AL., *supra* note 4, at 79; Alexander, *supra* note 5, at 653–54; Rabin, *supra* note 8.

49. Rabin & Sugarman, *supra* note 8, at 914.

50. Rabin, *supra* note 8, at 798, 801 (pointing out that after a fire at a Rhode Island nightclub killed 100 people, “[t]ort defendants were not hard to identify”).

a federal statute enacted 11 days after the terrorist attacks.<sup>51</sup> The enabling statute performed several functions: it limited the liability of the airlines,<sup>52</sup> created the compensation fund,<sup>53</sup> and authorized the appointment of a special master to administer the fund.<sup>54</sup> Although Congress enacted the legislation with unprecedented speed,<sup>55</sup> the relevant congressional committees nonetheless entertained witness testimony and received legislative suggestions from various interested groups and individuals.<sup>56</sup>

In creating the September 11th Victim Compensation Fund, the theme of national tragedy was central to the legislation's purpose.<sup>57</sup> Hence, the source of compensation funds for September 11th victims was to come from the federal treasury and taxpayer monies;<sup>58</sup> the concept of a national tragedy was used to justify calling upon all American citizens to contribute in a communal fashion to help innocent fellow Americans in a time of calamity.<sup>59</sup>

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51. See FEINBERG ET AL., *supra* note 4, at 3; Ackerman, *supra* note 8; Alexander, *supra* note 5, at 627–28, 630–33 (legislative history of ATSA); Steenson & Sayler, *supra* note 14, at 534–39.

52. FEINBERG ET AL., *supra* note 4, at 3; Ackerman, *supra* note 8, at 143; Alexander, *supra* note 5, at 636–38; Berkowitz, *supra* note 18, at 1. According to the caption of the ATSA, the Act was designed “[t]o preserve the continued viability of the United States transportation system.” Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230, 230 (2001).

53. FEINBERG ET AL., *supra* note 4, at 3; Ackerman, *supra* note 8, at 143; Alexander, *supra* note 5, at 630–31. Title IV of the ATSA, which created the September 11th Victim Compensation Fund, was designed to reduce lawsuits against the airlines for their alleged failure of due care in preventing or reducing the harm from terrorist attacks. See Alexander, *supra* note 5, at 671–72.

54. Air Transportation Safety and System Stabilization Act, § 404, 115 Stat. at 237–38; FEINBERG ET AL., *supra* note 4, at 3–4. Attorney General John Ashcroft appointed Feinberg to the post of special master. See September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,275 (Dec. 21, 2001); see also Alexander, *supra* note 5, at 666–67; Berkowitz, *supra* note 18, at 2; Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 22–23; Steenson & Sayler, *supra* note 14, at 534–35.

55. See Berkowitz, *supra* note 18, at 1. Berkowitz criticizes the haste with which Congress enacted the legislation, suggesting that, “[d]espite its practical and noble intentions, the [ATSA], and the Fund in particular, is a hastily constructed legislative patchwork that fails on a variety of counts.” *Id.* at 2.

56. See Ackerman, *supra* note 8, at 146–47 (describing congressional House and Senate hearings on the proposed legislation); Berkowitz, *supra* note 18, at 5 (describing the contributions and suggestions put forward by the Association of Trial Lawyers of America to Congress).

57. Alexander, *supra* note 5, at 639.

58. FEINBERG ET AL., *supra* note 4, at 4.

59. See Air Transportation Safety and System Stabilization Act, § 406, 115 Stat. at 240. In creating the Fund, Congress stated that whatever compensation awards the special master granted were “the obligation of the Federal Government.” *Id.*

The Gulf Coast Claims Facility, in contrast, has a less clear and more ambiguous genesis.<sup>60</sup> Indeed, it is difficult to pinpoint the precise legal authorization for the GCCF, and the parties involved and commentators have suggested different sources of authority.<sup>61</sup> Shortly after the oil rig explosion on April 20, 2010, the Coast Guard designated BP as a “responsible party” under the Oil Pollution Act (OPA).<sup>62</sup> This designation as a “responsible party” triggered a duty on the part of BP to pay for all costs related to the oil spill and its clean up.<sup>63</sup>

Pursuant to this designation, BP set up numerous claims offices throughout the Gulf Coast states, hired hundreds of claims processors, and paid walk-in claims for approximately two months.<sup>64</sup> Little is known or publicized about the hiring and training of these claims adjusters. The OPA does not, by its terms, require creation of a claims facility or a fund or any other

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60. See Kate Baxter-Kauf & Brett Mares, Environmental Justice Implications of the Efforts to Provide Compensation for Victims of the BP Oil Spill 6–7 (Nov. 1, 2010) (on file with *Louisiana Law Review*) (submitted to the National Commission on the BP Deepwater Horizon Spill and Offshore Drilling) (“It remains unclear whether the GCCF was instituted under the regulatory purview of the OPA. Though it shares many characteristics with the fund structure established by federal regulations, neither BP nor the federal government has definitively stated that the OPA controls the GCCF’s function.”).

61. See, e.g., *Recovery in the Gulf: What the \$20 Billion BP Claims Fund Means for Small Business: Hearing Before the H. Comm. on Small Bus.*, 111th Cong. 4 (2010) [hereinafter *Recovery in the Gulf*] (statement of Kenneth R. Feinberg) (“This is a purely private facility. It is not a facility of the Federal Government or a subfacility of an agency. It is a private compact creating this independent facility which I will design and administer.”).

62. See GULF COAST CLAIMS FACILITY, PROTOCOL FOR EMERGENCY ADVANCE PAYMENTS (2010), available at [http://www.tpcg.org/emgevents/pdf/AUGUST%2023%202010%20PROTOCOL%20\\_2.pdf](http://www.tpcg.org/emgevents/pdf/AUGUST%2023%202010%20PROTOCOL%20_2.pdf); Baxter-Kauf & Mares, *supra* note 60, at 7.

63. GULF COAST CLAIMS FACILITY, *supra* note 62 (The Coast Guard “directed BP to maintain a single claims facility for all Responsible Parties to avoid confusion among potential claimants.”).

64. See *BP to Appoint Independent Mediator to Ensure Timely, Fair Claims Process*, BP (May 26, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062448>; Ira Teinowitz, *How to Claim Money from BP’s \$20 Billion Fund*, WALLET POP (June 18, 2010), <http://www.walletpop.com/2010/06/18/how-to-claim-money-from-bps-20-billion-fund/> (describing BP’s prior processing of claims through the auspices of its contractor, ESIS, and that BP made the determination whether to pay claims, and indicating that under the new ICF facility, award decisions would be made available to hear appeals from award determinations); *BP Creates Special Team to Speed Up Claim Payments*, ABC NEWS (Aug. 3, 2010), <http://www.abcnews.go.com/Business/wireStory?id=11313798> [hereinafter *BP Creates Special Team*] (reporting that BP was encouraging businesses to contact their adjuster or BP to process claims).

mechanism for victim compensation; the OPA is entirely vague concerning how a responsible party must satisfy its duties under the OPA.<sup>65</sup> Thus, against the backdrop of this vague statutory mandate, various commentaries have suggested that this initial BP claims process between May and August 23, 2010 was chaotic, ad hoc, unsystematized, and largely unregulated.<sup>66</sup> And, these initial BP claims efforts experienced numerous complaints by frustrated and angry applicants.<sup>67</sup>

Nearly two months after BP had created an ad hoc claims processing effort in the Gulf States, executives from BP and President Obama agreed on June 16, 2010 that BP would contribute \$20 billion to rectify claims as a consequence of the rig explosion and resulting oil spill.<sup>68</sup> This sum was to be paid into an escrow account to cover BP's ongoing and future liabilities. Although the \$20 billion amount was widely reported in the media,<sup>69</sup> BP did not actually place this entire amount into escrow.<sup>70</sup> Instead, only \$3 billion was transferred to an account.<sup>71</sup>

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65. See GULF COAST CLAIMS FACILITY, *supra* note 62 (“Under OPA, Responsible Parties must establish a claims process to receive certain claims by eligible claimants. USCG . . . directed BP to maintain a single claims facility . . .”).

66. *But see* Strassel, *supra* note 3 (praising BP's initial compensation efforts). Feinberg took over the GCCF from BP on August 23, 2010. See Associated Press, *BP to Stop Handling Claims Relating to Gulf Spill on Wednesday*, NOLA.COM (Aug. 17, 2010), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/bp\\_to\\_stop\\_handling\\_claims\\_rel.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/bp_to_stop_handling_claims_rel.html) (BP announcing it had paid approximately \$368 million to individuals and businesses, excluding governmental entity claims).

67. *BP Creates Special Team*, *supra* note 64 (reporting that BP was encouraging businesses to contact their adjuster or BP to process claims); Kaufman, *supra* note 7 (irate criticisms of Louisiana residents to BP payouts); see Campbell Robertson, *As Claims for Oil Spill Losses Shift to Administrator, Queries Follow*, N.Y. TIMES, Aug. 24, 2010, at A14, available at [http://www.nytimes.com/2010/08/24/us/24claims.html?\\_r=1&ref=us](http://www.nytimes.com/2010/08/24/us/24claims.html?_r=1&ref=us) (“Dealing with BP . . . has been a nightmare.”).

68. Thomas Perrelli, Associate U.S. Attorney General, purportedly led negotiations with BP to set up the claims facility. See Jim Snyder, *Feinberg to Meet U.S. Senator as Complaints Mount over BP Claims*, BUS. WK. (Sept. 28, 2010), <http://www.businessweek.com/news/2010-09-28/feinberg-to-meet-u-s-senator-as-complaints-mount-over-bp-claims.html>.

69. See Press Release, BP, BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966>. The BP press release announced that Feinberg would administer the Independent Claims Facility (ICF), that funds would be available to satisfy “legitimate claims,” and that the ICF would adjudicate all OPA claims and tort claims, excluding federal and state claims. *Id.* BP also indicated that the fund did not cap its liability but that money left over in the fund once all legitimate claims were resolved would revert to BP. *Id.*; see also Jesse Lee, *A New Process*

Through a controversial but little noticed agreement with President Obama, BP's remaining obligations pursuant to this \$20 billion commitment are to be funded, in the future, by BP's ongoing oil drilling revenues, largely derived from its offshore drilling efforts in the Gulf.<sup>72</sup> This largely unnoticed arrangement has made the federal government, in effect, future partners with BP in assuring continued offshore oil drilling in the Gulf.<sup>73</sup> Indeed, when the federal government subsequently sought a moratorium on offshore oil drilling in the Gulf,<sup>74</sup> the government's side deal with BP regarding funding of the escrow account placed the federal government in conflict with the interests of future claimants in

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*and a New Escrow Account for All Oil Spill Claims from BP*, WHITE HOUSE BLOG (June 17, 2010, 2:35 PM), <http://www.whitehouse.gov/blog/2010/06/17/a-new-process-and-a-new-escrow-account-gulf-oil-spill-claims-bp>. The White House blog indicated that the facility would develop standards for recoverable claims that would be published and that a panel of three judges would be available to hear appeals of the administrator's decisions. *Id.*

70. Press Release, *supra* note 69.

71. *Id.*

72. See Monica Langley, *BP Near Deal on Fund*, WALL ST. J., Aug. 10, 2010, at A1, available at <http://online.wsj.com/article/SB10001424052748704388504575418602719011146.html> (discussions between Obama Administration and BP to use future revenues from BP's Gulf of Mexico operations to guarantee its \$20 billion cleanup and compensation fund; speculation that the deal could produce backlash in Congress).

73. See *id.* ("If this unusual collateral agreement is inked, it would represent a new level of interaction between BP and the federal government. Both sides have been tied together, for good or bad, since the Deepwater Horizon rig sank in April."). This agreement between BP and President Obama is highly similar to the pact that the state Attorneys General entered into with tobacco company defendants in settling the state Attorneys General's lawsuits against tobacco companies for reimbursement for tobacco-related health injuries as a consequence of the sale of tobacco products to citizens. Under the terms of the Master Settlement Agreement with the tobacco companies, the tobacco defendants' ongoing financial liabilities to state treasuries are to be paid out of future tobacco sales revenues. It has largely gone unnoticed that the tobacco Master Settlement Agreement with the states has effectively made the states stakeholders in the future well-being of the tobacco companies with regard to the manufacture and sale of tobacco products. The state treasuries get paid their settlement shares as long as the tobacco companies can sell cigarettes and other tobacco products in those states. Similarly, BP has promised to fund the GCCF from future, ongoing oil production revenues.

74. See Clifford Krauss & John M. Broder, *BP Says Limits on Drilling Imperil Spill Payouts*, N.Y. TIMES, Sept. 3, 2010, at A1, available at <http://www.nytimes.com/2010/09/03/business/03bp.html> (BP signaling its reluctance to cooperate with fines and fund payments unless it is able to continue to operate in the Gulf of Mexico; concern over drilling overhaul bill passed by House on July 30, 2010).

seeking compensation, because continued funding of those compensation obligations are contingent on BP's ability to continue deep-sea offshore and other drilling in the Gulf.<sup>75</sup>

Although there was extensive media coverage of BP's agreement with President Obama to place \$20 billion in escrow, the precise legal basis for this agreement is unclear.<sup>76</sup> There is no Executive Order creating the fund, nor is there any official governmental order authorizing the Gulf Coast Claims Facility. It is difficult to ascertain what parties were present when President Obama consummated this deal. Unlike the September 11th Victim Compensation Fund, there is no congressional statutory enactment undergirding the GCCF. In fact, Congress held no hearings to lay the groundwork for creation of a fund, nor was Congress involved at all in the creation of the GCCF. In the same vein, there is no Executive Order or congressional legislation creating a fund administrator or appointing a special master to oversee, manage, and administer the GCCF.<sup>77</sup>

The legal basis for the GCCF remains obscure, murky, and uncertain. In congressional hearings after BP selected Feinberg as the attorney to oversee the fund,<sup>78</sup> Feinberg explained to a congressional subcommittee that he was operating pursuant to a "compact."<sup>79</sup> Feinberg was not asked, nor did he explain, what he meant by this "compact," and indeed, there is no evidence in any public or private records of a "compact" authorizing the creation of the GCCF or appointing Feinberg. And, in subsequent colloquies, Feinberg abandoned this "compact" conceit and instead vaguely suggested that he was operating under the authority of the OPA.<sup>80</sup> But, at the time of his selection to oversee the GCCF, Feinberg

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75. *Id.*

76. See Neil King Jr., *Feinberg Ramps Up \$20 Billion Compensation Fund*, WALL ST. J., June 22, 2010, at A6, available at <http://online.wsj.com/article/SB10001424052748704256304575321072301455004.html> (noting that the fund was created as a "voluntary compact" but without any act of Congress, executive order, or other legal anchor).

77. *Id.* See Strassel, *supra* note 3, which reports that, according to Feinberg, "the administration and BP got together . . . and decided, both, that coming up with a guaranteed sum to pay eligible claims was a creative alternative to years and years of protracted litigation."

78. See *Graves: Small Businesses Affected by Oil Spill Need Fast, Fair Compensation*, HOUSE SMALL BUS. COMMITTEE (June 30, 2010), <http://smallbusiness.house.gov/News/DocumentSingle.aspx?DocumentId=193107> (report of Feinberg's testimony before the House Small Business Committee).

79. See *Recovery in the Gulf*, *supra* note 61, at 4.

80. See Brian J. Donovan, *BP Oil Spill Victims: Gulf Coast Claims Facility, Litigation or Oil Spill Liability Trust Fund?*, COUNTERCURRENTS.ORG (Nov. 16, 2010), <http://www.countercurrents.org/donovan161110.htm>.

seemed unaware of the OPA, and he certainly did not indicate that his authority derived from OPA.<sup>81</sup>

### *C. Implementing Standards and Regulations*

Because the statute authorizing the creation of the September 11th Victim Compensation Fund lacked specific detail with regard to implementing standards, one of Feinberg's first tasks after his appointment as the special master to oversee the Fund was to create standards and regulations to govern claimant compensation.<sup>82</sup> Over the course of the Fund's existence, two different approaches to creating standards and regulations emerged during the Fund experience. The first approach embodied legal formalism; the second embraced a free form, ad hoc discretionary pattern.

Thus, the initial promulgation of rules and standards to govern the September 11th Victim Compensation Fund was subject to the federal rulemaking process, complete with a standard "Notice and Comment" period for proposed regulations.<sup>83</sup> In this capacity, Feinberg and his staff worked with congressional subcommittees and other experts to draft proposed standards and regulations to govern the claims process.<sup>84</sup> Interim proposed standards, regulations, and governing criteria, as well as sample compensation scales, were published for prospective claimants to

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81. See *Recovery in the Gulf*, *supra* note 61, at 4.

82. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 407, 115 Stat. 230, 240 (2001); FEINBERG ET AL., *supra* note 4, at 4-7; see Ackerman, *supra* note 8, at 148-56 (describing administrative rulemaking process after enactment of ATSA); Alexander, *supra* note 5, at 661; Berkowitz, *supra* note 18, at 2 ("Congress failed to set bright-line rules, enunciate exclusionary definitions, or articulate a principled system of compensation. There is simply no 'rationale, restraint, ethic or coherence' in the definition of awards, leaving the Special Master unilaterally responsible for filling in nearly every detail of the program.").

83. See generally 5 U.S.C. § 553 (2006) (notice-and-comment procedures under the federal Administrative Procedure Act); September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 55,901 (proposed Nov. 5, 2001); FEINBERG ET AL., *supra* note 4, at 4-7. The Interim Final Rule was published on December 21, 2001. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21, 2001). The Final Rule was published on March 13, 2002. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104). See Ackerman, *supra* note 8, at 149-55 (describing the notice-and-comment rulemaking process for development of the interim and final rules); Dauber, *supra* note 8, at 342-48 (detailing numerous submissions during the notice-and-comment period); Katz, *supra* note 20, at 577-78 (describing notice-and-comment procedure).

84. FEINBERG ET AL., *supra* note 4, at 4-5.

review.<sup>85</sup> During this notice-and-comment period, the Justice Department received more than 2,600 comments on the proposed regulations to implement the Fund.<sup>86</sup> After the comment period expired, and all comments purportedly were reviewed by Feinberg's staff, Feinberg issued final regulations governing the claims process.<sup>87</sup>

However, the resulting standards that were issued as a consequence of this federal rulemaking turned out to be less firm and "final" in comparison to other federal rulemaking.<sup>88</sup> In commenting on Feinberg's rules, one critic noted that "All of Feinberg's regulations, whether restrictive or expansive, exhibited his vast discretion. He construed his grant of authority to include few governing standards and pointedly rejected the idea that he was obligated to provide reasoned explanations for his decisions."<sup>89</sup>

Thus, a second discernable characteristic of the September 11th Victim Compensation Fund was that the "final rules" governing the Fund turned out to be rather elastic and changeable. Indeed, as will be seen below, a signal characteristic of the Fund's implementation was Feinberg's frequent modification of announced rules and standards, often in response to angry challenges from different aggrieved claimants.<sup>90</sup> When confronted with new complaints and grievances, Feinberg then arrogated to

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85. *Id.* at 5–7; Ackerman, *supra* note 8, at 149–55, 210–11; *see, e.g., Explanation of Process for Computing Presumed Economic Loss*, U.S. DEP'T JUST., [http://www.usdoj.gov/archive/victimcompensation/vc\\_matrices.pdf](http://www.usdoj.gov/archive/victimcompensation/vc_matrices.pdf) (last revised Aug. 27, 2002); *see also* Berkowitz, *supra* note 18, at 11 (describing the process of generating the tables).

86. FEINBERG ET AL., *supra* note 4, at 5–6; Ackerman, *supra* note 8, at 149, 210–11; *see* September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,275.

87. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233; FEINBERG ET AL., *supra* note 4, at 5. But *see* Schneider, *supra* note 19, at 489, which criticizes the establishment of the Fund and the appointment of a special master as undemocratic and notes that September 11th families were given little opportunity to shape the process and the selection of the administrator, although there were many comments on the Interim Final Rule posted on the website.

88. *See* Ackerman, *supra* note 8, at 152, which comments on the final rule for calculating awards: "The Special Master thereby gave himself flexibility to depart from his formulaic methodology where he felt the circumstances warranted."

89. Berkowitz, *supra* note 18, at 13.

90. Ackerman, *supra* note 8, at 155 ("Some victims' families seemed to fault the Special Master for failing to arrive at a[n award] figure that could actually represent the monumental loss they had suffered . . . ."); Diller, *supra* note 15, at 739–40.

himself the rulemaking process, whose rule modifications were not subject to the notice-and-comment procedure that had occurred at the outset of the Fund. Hence, although the Fund was launched with a formalism befitting a federal statutory program, it quickly deteriorated into something resembling ad hoc, on-the-fly rulemaking by its special master.<sup>91</sup>

The different ways in which standards, rules, and regulations were generated to govern the Fund have bearing on an assessment of the Fund's ultimate legitimacy.<sup>92</sup> At the outset, the federal notice-and-comment rulemaking approach provided the Fund with an aura of participatory democracy and legality.<sup>93</sup> However, as implementation of the Fund progressed, the formalistic rulemaking processes were jettisoned in favor of ad hoc, discretionary decisionmaking by a single all-powerful special master, subject to weak (if non-existent) review.<sup>94</sup>

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91. Berkowitz, *supra* note 18, at 11. In commenting on regulations promulgated pursuant to his delegated authority, Berkowitz has suggested of Feinberg: "He can act sua sponte, devising his awards as he pleases, disregarding the economic and emotional needs of vulnerable families, and issuing regulations to enforce his discretion." *Id.*

92. Compare Ackerman, *supra* note 8, at 149 (contending that Feinberg's rulemaking process reflected several values of democratic governance), *with id.* at 206 (citing Reuben, *supra* note 19, at 285–86), and Priest, *supra* note 15, at 545 ("The September 11th Fund will remain controversial because the source of the definition of its awards—however able and committed—is not in any sense democratic. Coupled with the lack of an internal rational or constraint, the awards granted by the Fund will continue to remain problematic."). Other commentators have suggested that the Fund signaled the beginning of a "broad regressive trend." See Conk, *supra* note 24, at 253.

93. Ackerman, *supra* note 8, at 149, 208; Feinberg, *supra* note 7, at 474–75 (outreach to victims during rulemaking process).

94. See generally Ackerman, *supra* note 8, at 156–79 (describing and analyzing various criticisms of the Fund and its administration); Chamallas, *supra* note 5, at 57 ("Under the broad Congressional mandate, the Special Master of the Fund has enormous discretion, more than is usually given to a judge or jury."). Cf. Priest, *supra* note 15, at 545 (criticizing the standards of Fund awards as non-democratically promulgated); Steenson & Sayler, *supra* note 14, at 534 (Feinberg's "untrammelled discretion" not subject to congressional or administrative oversight). In commenting on his sizeable discretion, Feinberg noted: "And Congress in its infinite wisdom added a fourth requirement: the Special Master will exercise his discretion to see that justice is done. Congress delegated to me: 'Make sure that this works. Use your discretion to make it work. We do not know what we are getting into, so take it from here.'" Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 23. See also Alexander, *supra* note 5, at 667–68, which criticizes Feinberg's expansive rulemaking authority in administering the Fund:

Nevertheless, this structure should not be adopted for future compensation programs. Combining legislative and adjudicative powers in a single person, and making that person exempt from any

In implementing the Fund, at least four forces converged as the impetus to abandon formal rulemaking and acquiescence in the special master's ad hoc rulemaking. First, the special master realized that the universe of potential Fund claimants was relatively small and that his source of compensation funding—the entire federal Treasury<sup>95</sup>—was essentially infinite.<sup>96</sup> Thus, the special master realized he would be able to satisfy any and all claims, including expanded grounds for those claims. Against this backdrop, Feinberg could operate as a heroic special master by capitulating to the demands of angry claimants that he modify or change announced standards in liberal favor of the claimants.<sup>97</sup>

Second, Feinberg also recognized that virtually none of his actions would be subject to meaningful judicial or congressional review.<sup>98</sup> As such, he could modify existing promulgated rules and standards without significant fear of challenge, repercussions, or review. Third, with every progressive rule modification that the

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administrative or judicial review, can lead to conflicts of interest, blind spots, poor organization, and the appearance of arbitrariness or bias. Institutional design should not depend on finding a single individual with a unique set of talents and experience; rather, it should assist whoever is assigned to the institution to make good decisions.

95. Chamallas, *supra* note 5, at 55; Rabin & Sugarman, *supra* note 8, at 907, 909.

96. Priest, *supra* note 15, at 544 (“[T]here is no constraint on awards under the September 11th Fund. Its budget is unlimited, and its definitional principles vague. It is, therefore, not surprising that many victim families have argued for larger awards.”); Rabin & Sugarman, *supra* note 8, at 907–08 (“[F]unding of the 9/11 plan was open-ended so that the Special Master was not provided with any aggregate limit on the compensation that might be paid out to victims of the disaster.”).

97. Diller, *supra* note 15, at 747; Priest, *supra* note 15, at 544. Commenting on this phenomenon, Professor Diller observed:

Whether due to settlement or the actual threatened bankruptcy of defendants, administrators of mass tort settlement funds are placed in the position of allocating a fixed amount among a large number of claimants. The Fund does not present this problem, as it has no cap. Ironically, the open-ended nature of the Fund makes its administration more difficult because the Special Master cannot parry discontent about awards with claims that he would have liked to have awarded more but that the Fund is simply inadequate. Absent such a limit, he cannot play claimants off against each other, but must be prepared to justify each award as an appropriate amount of compensation on its own terms.

Diller, *supra* note 15, at 747.

98. Alexander, *supra* note 5, at 667; Berkowitz, *supra* note 18, at 14–16 (noting that Feinberg had the ability to oversee the review of his own awards, both theoretically and operationally); Steenson & Sayler, *supra* note 14, at 534–35.

special master announced that went unchallenged, the special master became further empowered to do whatever he thought best, expedient, or just, in his own view. With unlimited funding, the special master became the dispenser of generous largesse.<sup>99</sup> In turn, Feinberg also understood that capitulation to claimant demands, and the provision of compensatory largesse, effectively bought-off claimant dissatisfaction.<sup>100</sup>

Finally, during administration of the Fund claims process, the universe of claimants discovered that Feinberg was willing to acquiesce and capitulate to their demands if those demands were pressed insistently enough in the public domain as well as other forums.<sup>101</sup> Thus, over time the Fund processes locked its claimants and the special master in an interesting psychological synergy, whereby the claimants could achieve their liberal compensation goals and Feinberg could emerge as the empathetic, heroic special master,<sup>102</sup> without consequence to either party. Although scholars have discussed the psychological ramifications of the September 11th events for victims of the disaster,<sup>103</sup> scarce attention has been paid to the motivations driving a much-heralded, singular justice-provider, who possesses increasingly god-like powers.<sup>104</sup>

The September 11th Victim Compensation Fund experience with the promulgation of standards and regulations governing claim compensation provides an interesting contrast to that of the Gulf Coast Claims Facility. Because the GCCF was not authorized pursuant to congressional enactment or executive branch oversight, the creation of criteria governing the GCCF claim process was

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99. Feinberg, *The Building Blocks*, *supra* note 9, at 276 (noting the average Fund award was \$1.8 million: “Just give every victim \$1.8 million of the taxpayers’ money, tax free. There won’t be any mass torts.”); Rabin & Sugarman, *supra* note 8, at 907–08.

100. Feinberg, *The Building Blocks*, *supra* note 9, at 276.

101. Describing his program for the success of the Fund, Feinberg indicated:

So that, in capsulized form, is the way the program worked. The recipe for success was pretty clear: make very generous payments; outreach to the families; keep going after them and corral them; let them know that there are no tricks, and that there is nothing hidden here. This is a transparent attempt by the American people to help. Offer due process considerations. Give everybody the opportunity to be heard. Make yourself available. Reach out to these people. It worked.

Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 27.

102. A good deal of Feinberg’s reflection on his efforts is devoted to his descriptions of demonstrating empathy for the claimants’ concerns. *See id.*

103. *See generally* Schneider, *supra* note 19; Tyler & Thorisdottir, *supra* note 15.

104. *See infra* Part II.D.3 (discussion and criticisms of Feinberg as an unfettered, unaccountable administrator).

subject neither to formal nor informal rulemaking.<sup>105</sup> Simply, the GCCF is a largely privatized enterprise not subject to public legitimacy constraints.

As best as can be ascertained, Feinberg and his staff<sup>106</sup> made no background study of proposed standards for the GCCF prior to the announcement of rules, or if they did, they made scant effort to publicize their efforts. Indeed, due to a lack of transparency,<sup>107</sup> it is difficult to know who has been responsible for drafting the GCCF protocol rules, what sources have been relied on in drafting standards, and which parties (if any) have participated in the process.<sup>108</sup> The administrator made scant effort to publish proposed protocol rules and regulations in advance of their implementation.<sup>109</sup> And, although Feinberg made well-publicized

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105. Strassel, *supra* note 3 (reporting that Feinberg expected to issue ground rules for claims by the middle of August; still “noodling over specifics”).

106. See Lee, *supra* note 69. The White House blog indicated that the facility would develop standards for recoverable claims that would be published and that a panel of three judges would be available to hear appeals of the administrator’s decisions.

Among the numerous transparency issues enmeshed in the GCCF, there is no indication in the public domain concerning who has staffed Feinberg’s offices or facilities, and who has been involved with drafting standards, settling claims, or reviewing internal appeals. Nor is there any documentation concerning the credentials and experience of GCCF staff. In addition, there is no documentation of the nature and level of training afforded persons working under Feinberg’s supervision in administering the GCCF. See Alexander, *supra* note 5, at 669, which criticizes the lack of transparency in the selection of Feinberg’s staffers to administer the Fund: “There were no published criteria for the selection of Special Master Feinberg’s subordinate adjudicators. Though the individuals selected had impressive resumes, the list was criticized for including ‘too many corporate defense lawyers and too many people plucked from Mr. Feinberg’s Rolodex of friends, former colleagues and fellow mediators.’”

107. See *infra* Part II.C.2 (discussion of lack of transparency in implementation of the GCCF); see also Neil King Jr., *Feinberg Criticized for Spill-Compensation Terms*, WALL ST. J. (Aug. 24, 2010), <http://online.wsj.com/article/SB10001424052748704340504575447802502224486.html> (contending that Feinberg was laying down rules for the claims fund with little input from the states most affected).

108. King, *supra* note 107. See also Editorial, *The Gulf Claims Racket*, WALL ST. J., Aug. 26, 2010, at A14, which reports that the state Attorneys General for Alabama, Mississippi, and Florida had taken “Mr. Feinberg behind the woodshed for a couple of hours to express our concerns about the draft claims protocol he had circulated.”

109. Kaufman, *supra* note 7 (Feinberg promising local Louisiana residents that he would quickly make public a 10-page document detailing how calculations for awards would be made); Ian Urbina, *BP Settlements Likely to Shield Top Defendants*, N.Y. TIMES, Aug. 20, 2010, at A1, available at <http://nytimes.com/2010/08/20/us/20spill.html> (reporting on proposed protocol for emergency payments from internal documents from lawyers at the fund).

tours of Gulf Coast towns in the weeks after the oil spill and held several “town hall” meetings,<sup>110</sup> he nonetheless did not provide for a formal public notice and comment on proposed standards.<sup>111</sup> Instead, he seemed to suggest that these “town meetings” somehow served as a surrogate for a notice-and-comment regime. In the absence of formal rulemaking, Feinberg’s staff issued emergency and final protocol rules governing the GCCF.<sup>112</sup>

On the other hand, following the arc of his experience with the September 11th Victim Compensation Fund, Feinberg, in administering the Gulf Coast Claims Facility, quickly segued into the rulemaking model that evolved during his administration of the Fund. Thus, skipping over any formal rulemaking process for the GCCF, Feinberg resorted to the same ad hoc decisionmaking model that characterized his supervision of the Fund in its later stages. And, similar to the Fund experience, once a set of rules were set forth in the public domain, Feinberg repeatedly defaulted to a pattern of concessions, amendments, and modifications in response to constituent challenges.<sup>113</sup> However, in contrast to the Fund, Feinberg’s on-the-fly rule modifications in administering the

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110. Kaufman, *supra* note 7 (reporting on a town meeting in Houma, Louisiana where local residents complain of fuzzy details of Feinberg’s claims-processing standards: “I’ve seen your little paper and stuff, but it doesn’t say what will be deducted . . . Just the same thing BP did, when it came to a claim, no one knows how it works. And there is no paper stating how. I would like something in my hand.”); *Feinberg Releases “Emergency Protocol” for BP Oil Spill Claims*, AL.COM (Aug. 20, 2010), [http://blog.al.com/live/2010/08/feinberg\\_releases\\_emergency\\_pr.html](http://blog.al.com/live/2010/08/feinberg_releases_emergency_pr.html) (reporting Feinberg’s early release of emergency payment protocol; Feinberg stating that the guidelines were “the result of many town hall meetings throughout the Gulf, listening to the people affected by this disaster”).

111. King, *supra* note 107 (noting that Feinberg’s dozens of town hall meetings had not shielded him from accusations of secrecy and coziness with BP; criticism from Alabama Attorney General Troy King, accusing Feinberg of acting as a “corporate shill”).

112. See GULF COAST CLAIMS FACILITY, *supra* note 62; *Gulf Coast Claims Facility Now Processing Oil Spill Claims*, GULF COAST CLAIMS FACILITY (Aug. 23, 2010), <http://www.gulfcoastclaimsfacility.com/press1.php>; see also Angel Gonzalez, *Oil-Fund Czar Vows Ample Payouts*, WALL ST. J., Aug. 23, 2010, at A3 (criticisms from Florida Attorney General Bill McCollum, arguing that protocols fell far short of protections mandated by OPA and were even less generous to Floridians than the prior BP process); King, *supra* note 107 (criticism from Alabama Attorney General Troy King, accusing Feinberg of acting as a “corporate shill”).

113. See Robertson, *supra* note 67 (noting shifting policies on real estate reimbursement and lost property values; change from BP position); Campbell Robertson & John Schwartz, *Rethinking the Process for BP Spill Claims*, N.Y. TIMES, Sept. 15, 2010, at A16, available at <http://www.nytimes.com/2010/09/16/us/16feinberg.html> (Feinberg rethinking parts of his process).

GCCF have been made in response to objections and requests not only from claimants,<sup>114</sup> but from BP itself.<sup>115</sup>

The reasons for the administrator's decisions to act in this fashion are speculative, but they follow the trajectory of the September 11th Victim Compensation Fund experience. Once again, Feinberg is functioning in a setting where he believes he has unlimited financial resources to compensate the universe of claimants. And, even more pronounced than the Fund setting, Feinberg is accountable to no one<sup>116</sup> and subject to virtually no review.<sup>117</sup> In this setting, the psychological motivation to prevail as the celebrity administrator of the Gulf Coast oil calamity presents an enormous ego-driven temptation, which in turn is conducive to heroic gestures of sympathy, largesse, and ad hoc justice.

As discussed above, the Fund and the GCCF provide contrasting models of rulemaking to implement the funds' compensation schemes. The three following examples illustrate the ways in which Feinberg, as the special master overseeing the Fund and as administrator of the GCCF, developed and implemented detailed programmatic rules for each fund.

### *1. Eligibility*

The federal legislation authorizing creation of the September 11th Victim Compensation Fund provided only general guidance concerning who would be an eligible claimant to the Fund.<sup>118</sup> The statute provided compensation from the Fund for any person who had suffered physical harm or death at the scene of the crashes, aboard the planes, at the time of the crashes, or in their immediate aftermath.<sup>119</sup> After Congress enacted the enabling statute, however,

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114. Robertson & Schwartz, *supra* note 113 (Gulf Coast claimant suggesting: "How they churned out these checks I don't know . . . . BP took care of us way better than this man did . . .").

115. See Urbina, *supra* note 109 (BP influence on scope of waiver and release, requiring GCCF fund claimants to waive right to sue not only BP, but all other major defendants involved with the spill).

116. Feinberg has made repeated protestations of his complete independence in administering the GCCF. See *infra* Part II.D.4 (discussion of Feinberg's independence and conflict-of-interest challenges).

117. See *infra* Part II.D.3-4 (discussion of Feinberg's lack of accountability and review in administering the GCCF).

118. See generally FEINBERG ET AL., *supra* note 4, at 18-29; Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 22; Steenson & Saylor, *supra* note 14, at 540-41.

119. FEINBERG ET AL., *supra* note 4, at 19-22; Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(c)(2)(A)-(C), 115 Stat. 230, 239 (2001); September 11th Victim Compensation Fund of 2001, §

the general eligibility requirements were further refined through a notice-and-comment rulemaking process.<sup>120</sup> Over the months of debate surrounding eligibility requirements, Feinberg concluded that the Fund had to align its eligibility requirements with state law to avoid conflicts with the administration of a decedent's estate.<sup>121</sup>

Pursuant to the rulemaking process, eligibility requirements for making a claim in the Fund were refined to embrace definitions of who was a legal representative<sup>122</sup> and what constituted the "vicinity" of the disaster sites.<sup>123</sup> Regulations also refined the statutory criteria of "immediate aftermath"—limiting claims to a 24-hour reporting period after the incidents—and "physical harm."<sup>124</sup> As a consequence of various regulations, eligibility was thus both geographically and temporally circumscribed. The types of claims eligible for compensation also were limited to personal injury and wrongful death causes of action.<sup>125</sup> Future claimants for exposure-only injuries (such as respiratory ailments) were notably excluded.<sup>126</sup> In addition, property damage, business interruption,

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104.2(c)(1)–(2), 66 Fed. Reg. 66,274, 66,282 (Dec. 21, 2001). The ATSA originally provided for compensable economic loss, which embraced pecuniary loss, including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, burial costs, and loss of business or employment opportunities. Compensable non-economic loss included physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and all other non-pecuniary losses of any other kind or nature. *See* Air Transportation Safety and System Stabilization Act, § 402(5), (7), 115 Stat. at 237; *see also* Alexander, *supra* note 5, at 684–86; Peck, *supra* note 8, at 224. The statute excluded compensation for pure mental or emotional distress. *See* Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 22.

120. FEINBERG ET AL., *supra* note 4, at 18–29; Alexander, *supra* note 5, at 684.

121. Alexander, *supra* note 5, at 684.

122. *See* September 11th Victim Compensation Fund of 2001, § 104.4, 66 Fed. Reg. at 66,282; FEINBERG ET AL., *supra* note 4, at 24–29. The regulations rely on state law to determine who could file as a "personal representative."

123. *See* September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,242 (Mar. 13, 2002); FEINBERG ET AL., *supra* note 4, at 19–22.

124. *See* September 11th Victim Compensation Fund of 2001, § 104.2(b), (c)(1)–(2), 66 Fed. Reg. at 66,282; FEINBERG ET AL., *supra* note 4, at 19–22.

125. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(2), 115 Stat. 230, 238 (2001); FEINBERG ET AL., *supra* note 4, at 18–24.

126. Ackerman, *supra* note 8, at 160–61; Alexander, *supra* note 5, at 684–85; *see also* Conk, *supra* note 24, at 198–206 (describing the potential respiratory claims for rescue and other workers at the Ground Zero site); Eggen, *supra* note 15, at 415–16; Rabin, *Indeterminate Future Harm*, *supra* note 15, at 1833–34;

other non-tortious claims were excluded,<sup>127</sup> as well as claims for emotional trauma and distress.<sup>128</sup>

The Fund quickly became enmeshed in several disputes concerning the definition of eligible claimants, focusing on who constituted a legal representative eligible to pursue and recover a claim.<sup>129</sup> Numerous disputes emerged among contending family and non-family members.<sup>130</sup> The legal status of unmarried partners, non-resident aliens, and illegal aliens to recover under the Fund was hotly contested.<sup>131</sup> Furthermore, competing family members argued over allocation of awards among family members.<sup>132</sup> Some people objected to the under-inclusiveness of the Fund in failing to provide for victims of other terrorist acts.<sup>133</sup> As indicated above, despite the existence of promulgated rules that restricted claimant eligibility, Feinberg—on his own authority and in response to public challenges—relaxed these eligibility requirements, most notably for unmarried partners and undocumented aliens.<sup>134</sup>

In contrast, eligibility for making a claim in the Gulf Coast Claims Facility has not been subject to broad authorization by federal statute creating the facility, nor has it received

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Stenson & Sayler, *supra* note 14, at 542. In the ensuing decade, the claims of first-responders and other workers on the World Trade Center sites for exposure-type injuries would lead to heated contention and eventually resulted in federal enactment of an additional compensatory-relief statute in December 2010. See James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623 (2011).

127. Alexander, *supra* note 5, at 686 (“ATSA provided victim compensation only for personal injury and death. In order to file a claim, however, claimants had to waive all claims against anyone other than the terrorists, even property damage claims that were not covered by the Fund.”); Steenson & Sayler, *supra* note 14, at 540.

128. Steenson & Sayler, *supra* note 14, at 542.

129. FEINBERG ET AL., *supra* note 4, at 24–29; Berkowitz, *supra* note 18, at 13; Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 24–25.

130. Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 24–25.

131. Berkowitz, *supra* note 18, at 13; Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 26; see also Chamallas, *supra* note 5, at 63–67 (describing the disparate treatment of unmarried partners and single-sex couples); Steenson & Sayler, *supra* note 14, at 540–41.

132. Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 24–25. Feinberg refused to become enmeshed in intra-family disputes over allocation of Fund awards among family members, instead referring them to state court and applicable state law to resolve such disputes.

133. Ackerman, *supra* note 8, at 156–57; Steenson & Sayler, *supra* note 14, at 541.

134. See FEINBERG ET AL., *supra* note 4, at 29–30.

authorization by way of an Executive Order. Eligibility is only remotely derived from the OPA, which does not by its terms indicate which parties or entities are eligible for compensation after the Coast Guard designates a “responsible party” as the consequence of an oil spill disaster.<sup>135</sup> In this legislative vacuum, Feinberg as the GCCF administrator has arrogated to himself and his staff the power and authority to determine eligibility for compensation.

From the outset, eligibility for compensation from the GCCF has been governed by a combination of published standards<sup>136</sup> and shifting pronouncements from the administrator. Before the formal opening of the GCCF in August 2010, BP handled claims on a walk-in ad hoc basis at various locations on the Gulf Coast.<sup>137</sup> The ad hoc nature of the BP claims processing efforts inspired numerous complaints about the lack of standards and inconsistency in claim processing.<sup>138</sup>

The formal commencement of the GCCF marked an effort to bring order to claims processing, including eligibility criteria. From the outset, and as early as August 16, 2010, Feinberg publicly mulled over eligibility criteria for claimants,<sup>139</sup> with considerable controversy centered on the concept of “proximity.”<sup>140</sup> Initially, Feinberg announced that he was skeptical

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135. See GULF COAST CLAIMS FACILITY, *supra* note 62 (“Whether or not a claim has been presented shall be governed by OPA and applicable law.”).

136. See *id.* The protocol for emergency payments indicated:

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 the OPA and the proximate cause doctrine. Determination of non-OPA claims will be guided by applicable law. The GCCF will take into account, among other things, geographic proximity, nature of industry, and dependence upon injured natural resources.

*Id.*

137. See Kaufman, *supra* note 7 (criticism of BP compensation program and inconsistent awards); *supra* notes 66–67 and accompanying text (discussion of BP’s initial handling of claims from May through August 23).

138. Kaufman, *supra* note 7; see also Mike Tolson, *A Storm Brews in Alabama over BP’s Promise*, HOUS. CHRON. (Dec. 13, 2010), <http://www.chron.com/disp/story.mpl/business/7336204.html> (complaints over pace and extent of compensation payments; inconsistent awards).

139. See John Pacenti, *Plaintiffs Attorneys Knock BP Fund Administrator*, LAW.COM (July 26, 2010), <http://www.law.com/jsp/article.jsp?id=1202463865302&slreturn=1&hbxlogin=1> (Feinberg facing tough decisions on eligibility, claimants who worked on cash basis, and businesses miles from the coast); Snyder, *supra* note 39 (Feinberg reflecting on geographic standards to govern claim eligibility).

140. Snyder, *supra* note 39; see also Cooper, *supra* note 25 (emergency protocols place premium on geographic proximity to spill); Urbina, *supra* note

that remote inland claims would be eligible for compensation from the facility.<sup>141</sup> Indeed, Feinberg reflected that his September 11th Victim Compensation Fund efforts had been simplified by the geographic constraints imposed on eligibility for that fund.<sup>142</sup>

In contrast, the GCCF presented Feinberg with a large universe of claimants spread over an extensive geographic area, including the five Gulf states, but which also potentially extended beyond the Gulf states to more remote quarters.<sup>143</sup> The classic example he summoned to explain his dilemma was whether a restaurant owner in Boston, Massachusetts, who relied on Gulf shrimp supplies, should be eligible for compensation from the GCCF for the increased costs associated with a depleted fish supply.<sup>144</sup> Feinberg repeatedly informed the media that he thought not.<sup>145</sup>

In absence of clear guidelines, the argument over eligibility based on proximity did not abate.<sup>146</sup> Initially, the GCCF appeared to resolve the claims of the most obvious, directly affected Gulf persons and businesses.<sup>147</sup> But as it became apparent that this was not a sufficient response, Feinberg's staff attempted to address the proximity issue with the use of charts and maps delimiting the boundaries of alleged contamination and damage, as it related to

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109 (discussing geographic proximity standards in proposed protocol for emergency payments).

141. Urbina, *supra* note 109 (suggesting that ice cream parlors or golf courses miles from the affected shore would probably not be eligible for compensation); Snyder, *supra* note 39 (suggesting that hotel operators 50 miles inland were unlikely to be compensated for tourism losses).

142. Urbina, *supra* note 109 (noting that a key difference between the GCCF and the September 11th Victim Compensation Fund is the matter of geographic proximity).

143. See Cooper, *supra* note 25; Strassel, *supra* note 3 (reporting that tens of thousands of claimants had potential claims against the fund); Snyder, *supra* note 39.

144. See Anna Fifield, *Mediator Puts Fairness at the Centre of BP Fund*, FIN. TIMES (June 25, 2010), <http://www.ft.com/cms/s/f39cf900-807-d-11-be5a-00144feabdc0>.

145. *Id.*

146. King, *supra* note 107 (proximity issue big in Florida; Florida Attorney General criticizes proximity rules as completely unacceptable); John Schwartz, *Final Settlement Phase Starts for BP Oil Spill*, N.Y. TIMES, Nov. 24, 2010, at A11, available at <http://www.nytimes.com/2010/11/24/us/24fund.html> (Feinberg attempts to resolve proximity issue in new rules).

147. Urbina, *supra* note 109 (proposed protocols give top priority to persons or businesses in communities or municipalities adjacent to beach shoreline, marsh, bay, tributary, or the Gulf where oil or oil residues came ashore or appeared in waters).

claim eligibility.<sup>148</sup> This approach engendered further conflict and animosity, and Feinberg and his staff eventually abandoned the charts.<sup>149</sup>

As was true for the September 11th Victim Compensation Fund, over the course of several weeks Feinberg changed his mind several times about proximity eligibility, still without issuing clear standards or the rationales for those standards.<sup>150</sup> Gulf residents, their lawyers, and local politicians severely criticized Feinberg's proposed eligibility criteria as based on restrictive state law concepts of "zones of eligibility," as opposed to following the OPA.<sup>151</sup>

The initial draft protocols for emergency payments also listed a number of claims that the GCCF would not reimburse.<sup>152</sup> These included claims for loss of property values, persons adversely affected by the Obama Administration's moratorium on deepwater drilling in the Gulf, mental health claims, or lost tourism revenue because of government predictions that the oil slick was headed in the direction of the business.<sup>153</sup> Other potential claimants *excluded* from eligibility included governmental entities, real estate agents and brokers, and businesses or individuals with property damage claims that occurred during the "Vessels of Opportunity" program.<sup>154</sup> In addition, certain non-OPA claims could not be recovered through the GCCF.<sup>155</sup>

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148. King, *supra* note 107 (reporting that Feinberg and staff beginning to sketch in rough boundary lines on maps to help guide decisions).

149. See Snyder, *supra* note 68 (Feinberg to ease proximity requirements).

150. See Marc Caputo, *BP Claims Czar Kenneth Feinberg Drawing Fire from Attorney General Bill McCollum*, TAMPABAY.COM (July 6, 2010), <http://www.tampabay.com/news/environment/bp-claims-czar-kenneth-feinberg-drawing-fire-from-attorney-general-bill/1107277> (noting that Feinberg had yet to provide details about who would receive compensation and who would not; reporting that Feinberg promised to come up with "expansive" eligibility definition in coming weeks); Robertson & Schwartz, *supra* note 113 (Feinberg rethinking his position on proximity rule); Bryan Walsh, *Oil Spill: Kenneth Feinberg Makes the Final Rules for Spill Settlement, but Are They Fair?*, TIME.COM (Nov. 24, 2010, 2:49 PM), <http://ecocentric.blogs.time.com/2010/11/24/oil-spill-kenneth-feinberg-makes-the-final-rules-for-spill-settlements-but-are-they-fair/> (noting that Feinberg had "flip-flopped several times on the proximity issue").

151. Urbina, *supra* note 109. *But see* Snyder, *supra* note 68 (Feinberg to ease proximity requirements).

152. See generally GULF COAST CLAIMS FACILITY, *supra* note 62 (listing among eligible claims: removal and cleanup costs, real or personal property, lost profits and earning capacity, subsistence use of natural resources, physical injury or death). *But see* Urbina, *supra* note 109 (listing proposed claim exclusions).

153. Urbina, *supra* note 109.

154. See GULF COAST CLAIMS FACILITY, *supra* note 62. The "Vessels of Opportunity" program was the BP program that utilized fishing vessels owned

Although eligibility exclusions were gradually layered onto the facility's criteria, Feinberg—similar to the evolution of the September 11th Victim Compensation Fund—pursued a course of increasing claimant appeasement by further extending eligibility, including increasingly remote proximity claims.<sup>156</sup> Moreover, several eligibility claims had absolutely nothing to do with proximity at all. For example, Feinberg eventually capitulated to the interest group lobbying of the professional real estate agents, who initially were excluded from the fund.<sup>157</sup> After considerable pressure, Feinberg—as the result of a political deal—carved out special treatment for the real estate agents who had been pressing claims based on the diminution of their business revenues as a consequence of a downturn in the real estate market.<sup>158</sup> On the other hand, by December 2010, Feinberg, in exasperation,

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by Gulf Coast fishermen to assist in the cleanup efforts. *See also* Ryan DeZemmer, *Safety Net Eludes Some Oil Workers*, WALL ST. J., Oct. 8, 2010, at A6, available at <http://online.wsj.com/article/SB10001424052748703466104575530132869455658.html> (reporting that shallow-water rig workers, unlike deep-water counterparts, were ineligible to receive compensation under the fund). Rig-workers were required to apply through a separate entity, the Rig Worker Assistance Fund, a BP set-aside of \$100 million for workers who lost their jobs after the federal government enacted a six-month moratorium on deep-water drilling.

155. *Id.*

156. *See, e.g., BP Claims Czar: Proximity Has No Role in Payment*, WASH. POST (Oct. 4, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/04/AR2010100402682.html>; *Feinberg Announces Clarification Regarding Geographic Proximity*, GULF COAST CLAIMS FACILITY (Oct. 4, 2010), <http://www.gulfcoastclaimsfacility.com/press7.php> (“After listening to these concerns, I have concluded that a geographic test to determine eligibility regarding economic harm due to the oil spill is unwarranted.”).

157. *See* Snyder, *supra* note 39, which indicates that as early as August 16, 2010, Feinberg had set aside a “modest amount,” which he did not disclose, to compensate Gulf State realtors, whose trade association had met with Feinberg the week before. “The realtors have ‘suffered a great deal’ in lost sales, rent, and commissions, [Feinberg] said.” *See also* Snyder, *supra* note 68 (special deal for realtors).

158. *See* Urbina, *supra* note 109, which reports on a political deal struck with the governors of Alabama and Mississippi, setting aside approximately \$60 million from the fund in a special pool to compensate negatively affected real estate brokers in the Gulf region who were otherwise ineligible for compensation from the fund. This money was not to be distributed by Feinberg, but rather by the National Association of Realtors in Washington, D.C. or local chapters in Alabama, Florida, Louisiana, Mississippi, and Texas. In addition, the National Association—not Feinberg—was to set eligibility requirements, although Feinberg would review those criteria. *See also* Snyder, *supra* note 68.

indicated that he could not and would not find anyone and everyone eligible.<sup>159</sup>

Moreover, eligibility requirements were intricately intertwined with proof of business claims and authentication of alleged business or property losses. The GCCF lacked clearly defined criteria relating to what different types of individuals and entities were entitled to relief and what burden of production was needed to establish a basis for compensation.<sup>160</sup> In numerous town meetings and media interviews, Feinberg reiterated that burdens of production and proof on persons seeking relief were *de minimis*,<sup>161</sup> and he repeatedly stated that in the cash economy of the Gulf states, fishermen, shrimp haulers, and others similarly situated

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159. Tolson, *supra* note 138 (“He said there is no strict policy on what type of claim is being honored, only that his accountants evaluate how the loss was connected to the spill. He did note that lawyers, doctors, dentists and veterinarians are out of luck. ‘I can’t find anyone and everyone eligible,’ Feinberg said. ‘I’m doing what BP and the administration have asked of me.’”).

160. *But see* GULF COAST CLAIMS FACILITY, *supra* note 62 (listing what type of information needed to be submitted as proof of claims). Criticisms of implementation of the GCCF evaluation and award determinations have continued even after the GCCF promulgated protocols for final settlement of claims. *See* Susan Buchanan, *Fishermen Dismayed over Low Payouts in Spill Claims*, HUFFINGTON POST (Jan. 21, 2011, 11:15 AM), [http://www.huffingtonpost.com/susan-buchanan/fishermen-dismayed-over-l\\_b\\_811635.html](http://www.huffingtonpost.com/susan-buchanan/fishermen-dismayed-over-l_b_811635.html).

Kevin Dean, attorney in charge of BP litigation at Motley Rice LLC in Charleston, South Carolina, pointed to similar problems faced by his firm’s clients, which include charter and commercial fishermen from Louisiana and other Gulf states. “Many of them with documented and legitimate claims have had their GCCF claims denied,” he said. On attempts by Motley Rice, which assists clients with their [claims], to contact GCCF, “there’s been no one there to explain why they were rejected, so you are shooting in the dark as to how to correct or supplement the claim.”

Dean said “many of the claims adjusters seem to be temporary contractors,” lacking the will, experience or guidance to handle simple claims. Feinberg changes the rules almost daily, he said. “There’s no consistency as to how claims are processed, and much of it depends on which adjuster your claim was assigned to.”

Claims can be denied because of minor omissions, Dean said. “We did find out that one of our client’s claims—which had been under review for over eight weeks—was rejected because of a simple clerical mistake in the Social Security number. But instead of calling my office for verification or correction, they denied the claim,” he said.

*Id.*

161. Kaufman, *supra* note 7 (Feinberg informing Louisiana town hall participants: “I don’t need reams and reams of stuff. I don’t need a tax return. Do you have something you can show me? Well, the ship captain will vouch for me—fine. Well, my priest will—fine.”).

could establish their claims if their local priests vouched for them.<sup>162</sup>

However, in the same fashion that the GCCF staff abandoned their proximity charts and maps, the staff also resisted actual claims processing based on little more than vouching-in by the parish priest. As it turned out, proof of claims proved difficult for many claimants,<sup>163</sup> and Feinberg repudiated his prior statements about accepting letters from local pastors as sufficient proof of claimants' losses.<sup>164</sup>

In addition, the staff gradually abandoned the ad hoc model of claims processing on an individualized basis. In order to provide at least some consistency across categories of claimants,<sup>165</sup> on September 25, 2010, Feinberg announced that claimants would now be "grouped" by similar businesses or professions to ensure some constancy and reliability across awards.<sup>166</sup> But again, no

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162. John Schwartz, *For Kenneth Feinberg, More Delicate Diplomacy*, N.Y. TIMES, July 17, 2010, at A11, available at <http://www.nytimes.com/2010/07/17/us/17feinberg.html> (Feinberg indicating that the captain of the boat or the local priest could vouch-in a claimant's work history); Kaufman, *supra* note 7.

163. See, e.g., Ylan Q. Mui, *Louisiana Officials Urge BP to Speed Claims Payments*, WASH. POST, July 6, 2010, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/05/AR2010070502763.html> (describing difficulty of claimants in supplying proof of claims); Caputo, *supra* note 150 (same); David A. Fahrenthold & Kimberly Kindly, *Adrift in Oil, Then Money*, WASH. POST, Oct. 20, 2010, at A1, available at <http://washingtonpost.com/wp-dyn/content/article/2010/10/19/AR2010101907468.html> (difficulties in implementing emergency payments); Dionne Searcey, *Bumpy Start to BP Fund Puzzles Gulf*, WALL ST. J., Oct. 20, 2010, at A1, available at <http://online.wsj.com/article/SB10001424052748703673604575549970587948384.html> (documenting many problems and frustration with claims processing); see also *Gulf Coast Claims Facility Marks One-Month Anniversary*, GULF COAST CLAIMS FACILITY (Sept. 23, 2010), <http://www.gulfcoastclaimsfacility.com/press5> (indicating that as of September 23, 2010, approximately 24,000 claims had been submitted with insufficient or no documentation).

164. See Editorial, *About That \$20 Billion . . .*, WASH. POST, Nov. 26, 2010, at A22, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112502704.html> (reporting that 175,000 people had submitted claims with inadequate documentation; Feinberg saying he will not accept letters from local pastors attesting to claimants' losses as proof they deserve payment and will not replace off-the-books income in the Gulf Coast's unofficial cash economy).

165. See Tolson, *supra* note 138 (complaints over inconsistent awards).

166. *Feinberg Announces Faster and More Generous Payments from GCCF*, GULF COAST CLAIMS FACILITY (Sept. 25, 2010), <http://www.gulfcoastclaimsfacility.com/press6.php> (compensation program to cluster claims by industry, such as fishing, tourism, small businesses, large businesses; uniform standard methodologies to be applied to each industry); see also Associated Press, *BP Fund Czar Promises Bigger, Faster Claims*, MSNBC.COM (Sept. 26, 2010),

announcements were forthcoming concerning the structure or administration of these groups in the claims process.

Eligibility for compensation through the GCCF entailed not only definition of eligible claimants but also eligible claims.<sup>167</sup> In this regard, the facility announced that it would handle claims relating to removal and cleanup costs, damage to real or personal property, lost earnings or profits, loss of subsistence use of natural resources,<sup>168</sup> and physical injury or death.<sup>169</sup> The universe of potentially eligible claims, then, was substantially expanded beyond the claims resolved in the September 11th Victim Compensation Fund.

Finally, the eligibility problem had resonance in the arena of fraudulent claims. While Feinberg encouraged any and all claimants to resolve their claims through the enticement of quick and easy payments, he simultaneously began a rear-guard action against the proliferation of fraudulent claims.<sup>170</sup> In administering the Fund, Feinberg involved the Department of Justice to investigate and prosecute fraudulent claims.<sup>171</sup> Indeed, it was a point of pride in his Final Report that only a small percentage of attempted Fund claims were found to be fraudulent.<sup>172</sup> Similarly, with the onset of thousands of GCCF claims, Feinberg initiated outreach to the Justice Department to assist in investigating fraudulent claims.<sup>173</sup> However, in administering the GCCF, the problem of liberalizing eligibility requirements expanded the potential for fraud and as such challenged Feinberg's administration of the GCCF in ways he had not encountered in the Fund.<sup>174</sup>

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msnbc.msn.com/id/39359569/ns/us\_news-environment/ (new procedures for claims processing by industry groups).

167. See GULF COAST CLAIMS FACILITY, *supra* note 62.

168. *Id.* (available for individuals only).

169. *Id.*

170. FEINBERG ET AL., *supra* note 4, at 69.

171. *Id.* at 65–69.

172. *Id.* (documenting extremely small numbers of cases forwarded to the Department of Justice for fraud investigation); see also Cooper, *supra* note 25 (of 7,300 claims processed, only 35 were fraudulent).

173. See GULF COAST CLAIMS FACILITY, *supra* note 62 (provision governing false or fraudulent claims); Jim Snyder, *BP Victims' Fund to Fight Bogus Claims, Feinberg Says*, BLOOMBERG (June 25, 2010), <http://www.bloomberg.com/news/2010-06-25/bp-victim-s-fund-to-fight-fraudulent-claims-guard-privacy-feinberg-says.html>; see also Robertson & Schwartz, *supra* note 113 (Feinberg reporting on proliferation of fraudulent claims in the GCCF).

174. See Fahrenthold & Kindly, *supra* note 163 (reporting large number of fraudulent claims).

## 2. Valuation

The standards and metrics for evaluating claims in the Fund and the GCCF stand in marked contrast. Early in the development of the Fund, Feinberg and his staffers created compensation grids largely based on actuarial models used in insurance and tort litigation.<sup>175</sup> These compensation grids were subject to the notice-and-comment rulemaking process and published for review by prospective claimants.<sup>176</sup> Certain measures of damages, such as pain and suffering, were universally excluded from all claims, but the Fund subsequently determined to award a flat \$250,000 non-economic award for each deceased victim, and an additional \$100,000 non-economic award for the spouse and dependents of deceased victims.<sup>177</sup> The proposed grid controversially supplied award valuations only for persons making up to \$250,000; for persons with earnings in excess of that amount (approximately 3% of the eligible pool of claimants), the Fund compensation chart provided no guidance for the determination of a compensation award but imposed a presumed income cap of \$231,000 a year.<sup>178</sup>

The grid valuations formed the basis for an offer from the Fund to claimants, which they either could accept or request an individualized hearing.<sup>179</sup> In assessing the Fund standards for award valuation, one commentator has suggested that not only did the special master not explain the basis for the schedule but that his definition of economic losses lacked an underlying rationale.<sup>180</sup>

As the Fund claims process evolved, and in response to increasing pressure, Feinberg modified the evaluation process to permit claimants to make individualized presentations to hearing

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175. Ackerman, *supra* note 8, at 184 (“What occurred in the frenzy of legislative drafting and the maelstrom of post-September 11th events was a default to familiar language. To the extent it was given any thought at all, a tort-based damages formula was a capitulation to the routine, rather than an embrace of something new and imaginative to address an unprecedented challenge.”); Berkowitz, *supra* note 18, at 11–12.

176. FEINBERG ET AL., *supra* note 4, at 5–9; Ackerman, *supra* note 8; Berkowitz, *supra* note 18, at 11.

177. FEINBERG ET AL., *supra* note 4, at 40–41.

178. *Id.* at 8; Ackerman, *supra* note 8, at 161–65 (describing problems relating to calculation of awards for higher-earners and grievances and criticisms engendered by these claimants); Berkowitz, *supra* note 18, at 11; Chamallas, *supra* note 5, at 67–69.

179. Walker, *supra* note 15, at 610–12 (describing the hearing process).

180. Priest, *supra* note 15, at 540 (“[T]here is no coherent justification for the Fund’s definition of economic loss.”); *id.* at 543–44 (arguing that the awards had no defining or constraining logic, and that the definition of the awards had been placed entirely in the hands of a special master); Rabin, *supra* note 9, at 474 (describing Feinberg’s ultimate compromise rules).

officers based on particular circumstances.<sup>181</sup> Many Fund claimants requested individualized hearings, and as a consequence, Fund claims administrators frequently modified the initial grid value to account for specific circumstances and special pleading.<sup>182</sup> This especially was true for those claimants whose deceased relatives had high earning capacity.<sup>183</sup>

In the final analysis, the Fund valuation process combined a grid-based approach with highly individualized evaluation of numerous particular claims and special pleading.<sup>184</sup> Some have suggested that this process not only yielded some very generous awards, but also some “strikingly inconsistent” sums.<sup>185</sup> In retrospect, special master Feinberg repeatedly stated that if he had to do the Fund experience over again, he would not have allowed for individualized compensation valuations but would have preferred the imposition of a uniform payment for every claimant.<sup>186</sup>

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181. FEINBERG ET AL., *supra* note 4, at 15–16; Rabin & Sugarman, *supra* note 8, at 909 (indicating that Feinberg conducted nearly 1,000 individual hearings); Feinberg, *supra* note 7, at 475 (stating that Feinberg personally conducted 1,500 individual hearings).

182. See FEINBERG ET AL., *supra* note 4, at 17; Ackerman, *supra* note 8, at 218 (“The Fund’s individual determinations lacked several of the formal trappings that many Americans equate with due process.”).

183. See Schneider, *supra* note 19, at 477 (commenting on complaints from the Cantor Fitzgerald families on the unfairness of the discretionary factors that could enter into a determination of awards).

184. See Ackerman, *supra* note 8, at 215 (suggesting that Feinberg’s ad hoc approach “ended up crafting a compromise that had elements of distributive justice (and perhaps practical politics) at the high and low ends, but which for the great majority of claims employed a corrective justice model”); Rabin, *supra* note 11, at 583–84 (describing the compromise the special master reached with regard to calculating economic loss); Rabin, *supra* note 9, at 474 (describing Feinberg’s ultimate compromise rules).

185. Rabin & Sugarman, *supra* note 8, at 909 (“[T]he upshot is that claimants received both extraordinarily large awards and at the same time strikingly different sums: Death benefit awards averaged \$2.1 million, and ranged from \$250,000 to \$7.1 million.”); see also Schneider, *supra* note 19, at 477 (“Feinberg has made the program ‘his,’ and the fact that there is one decision maker with so much discretion increases perceptions of unfairness. Making the program ‘his’ has all sorts of problematic dimensions. It leads to a sense that he will make individualized ‘deals,’ and indeed, he does. Lawyers can claim to trade on ‘insider’ access to, or contact with, him.”).

186. FEINBERG, *supra* note 5, at 183; FEINBERG ET AL., *supra* note 4, at 82; Kenneth R. Feinberg, Insurance Compensation After September 11: A Dialogue with the Special Master of the Victims Compensation Fund, at the Annual Meeting of the Association of American Law Schools (Jan. 5, 2003); see also Chamallas, *supra* note 5, at 79; Rabin & Sugarman, *supra* note 8, at 910 (suggesting that by rewarding families differently when their relatives had very different earning histories, Feinberg moved sharply away from a principle of

Feinberg's insistence that a flat-rate compensation award to Fund claimants would better have accorded with the dual goals of justice and efficiency is interesting in light of his subsequent administration of the GCCF. In essence, Feinberg has had the opportunity to do it again. However, to date, his resolution of Gulf claims has been a hodge-podge of individualized interim emergency payments, combined with a final settlement program that offers claimants three possible options.<sup>187</sup> In addition, even before Feinberg assumed responsibility for administering the GCCF, there was evidence that Feinberg was giving preferential treatment to certain groups of special pleaders, such as Gulf Coast realtors, with whom he met prior to taking over management of the GCCF.<sup>188</sup>

The emergency payment period for initial GCCF claims closed on November 23, 2010. Although there is little information available to assess the nature of these emergency payments, these payments seem to have been accomplished on an individualized, ad hoc basis.<sup>189</sup> In this initial phase of the GCCF, the facility paid out an aggregate \$3.3 billion to approximately 251,000 claimants.<sup>190</sup> However, roughly half of the 484,000 claims filed were denied because of ineligibility of lack of documentation. These claimants received nothing from the GCCF.<sup>191</sup>

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treating each life as of equal value). *But see* Rabin, *supra* note 9, at 479–82 (noting the irony in Feinberg's endorsement of this proposal, when in fact he tailored Fund awards to individual circumstances).

187. *See infra* notes 192–98 and accompanying text (discussion of GCCF final settlement payment option program).

188. *But see* Snyder, *supra* note 39, which indicates that as early as August 16, 2010, Feinberg had set aside a “modest amount,” which he did not disclose, to compensate Gulf State realtors, whose trade association had met with Feinberg the week before. “The realtors have ‘suffered a great deal’ in lost sales, rent, and commissions, [Feinberg] said.”

189. Urbina, *supra* note 109 (Feinberg to determine on a case-by-case basis what qualifies as beach-front property and how payments would be adjusted on a sliding scale based in part on geographic proximity to spill). The emergency protocols provided no information on how awards would be computed. *See* GULF COAST CLAIMS FACILITY, *supra* note 62.

190. Brian Skoloff, *91,000 Gulf Oil Spill Claims, Just 1 Final Payment*, HOUMATODAY.COM (Feb. 1, 2011), <http://www.houmatoday.com/article/20110201/WIRE/110139950>.

191. *Id.*; *see also* John Schwartz, *Administrator of BP Fund Offers Bonuses to Spill Victims Who Bypass Suits*, N.Y. TIMES, Dec. 13, 2010, at A16, *available at* <http://www.nytimes.com/2010/12/13/us/13fund.html> (reporting that more than 200,000 claims were denied because of poor or no documentation).

Feinberg's final payment program includes three options.<sup>192</sup> Thus, claimants may elect to receive a quick, one-time flat cash payment of \$5,000 for individuals and \$25,000 for businesses.<sup>193</sup> As of February 1, 2011, some 80,000 claimants filed and were paid pursuant to this option.<sup>194</sup> Claimants receiving the flat payments gave up their rights to receive any additional money and also released their rights to sue BP or any other responsible party.<sup>195</sup>

Those claimants who do not wish to elect the flat payment option may pursue individualized evaluation of their claims.<sup>196</sup> Based on as yet unspecified procedures and valuation methods, claimants who receive final settlement offers also would release their rights to sue BP and other responsible parties.<sup>197</sup> Finally, residents and business owners who are unwilling to accept the flat payment offer, but who also are unready to make a final settlement claim, may file for interim quarterly payments through August 2013, provided they show proof of continued business losses.<sup>198</sup>

Thus, notwithstanding Feinberg's endorsement of flat, standardized payments to claimants after his experience with the September 11th Victim Compensation Fund, Feinberg chiefly has pursued a course of individualized compensation for the GCCF settlement of claims.

Moreover, in contrast to the Fund, the valuation methods used to determine the emergency or final settlement awards for GCCF

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192. See David Hammer, *New Gulf Oil Spill Claim Rules Announced by Ken Feinberg*, NOLA.COM (Nov. 23, 2010), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/11/new\\_gulf\\_oil\\_spill\\_claim\\_rules.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/11/new_gulf_oil_spill_claim_rules.html) (Gulf Coast attorneys criticizing Feinberg for making process more confusing with release of new payment protocols and a two-page release form); John Schwartz, *Final Settlement Phase Starts for BP Oil Spill*, N.Y. TIMES, Nov. 24, 2010, at A16; Walsh, *supra* note 150.

193. See Schwartz, *supra* note 146 (attorneys critical of general release of all parties); *Feinberg Refuses to Remove Rights Waiver from Quick Pay Option*, BP CLAIM (Jan. 18, 2011), <http://bp-claim.com/feinberg-refuses-to-remove-rights-waiver-from-quick-pay-option/>; *Frequently Asked Questions*, *supra* note 23 (questions 15, 23–24: describing release provisions for quick payment option). There is no appeal from quick payment awards. See Walsh, *supra* note 150.

194. Skoloff, *supra* note 190.

195. See *Frequently Asked Questions*, *supra* note 23 (questions 16–30: describing procedures for quick payment option).

196. See *id.* (questions 31–50: describing procedures for full review of final settlement payments).

197. See Schwartz, *supra* note 146 (attorneys critical of general release of all parties); *Frequently Asked Questions*, *supra* note 23 (questions 44–45, 47: describing release provisions for full settlement payment option).

198. See *Frequently Asked Questions*, *supra* note 23 (questions 51–70: describing procedures for full review of interim settlement payments).

claimants are shrouded in mystery as well as uncertainty.<sup>199</sup> No compensation grid comparable to the Fund has been published to guide GCCF claimants in assessment of their potential recovery for different types of claims.<sup>200</sup> No valuation standards have been published to the public. There is no publicly available information concerning the identity, experience, or training of staff claims administrators, or the methodology by which staff adjusters evaluated emergency payments and will determine final settlement offers.<sup>201</sup> There has been some indication that entities or groups with special access either to BP or Feinberg are able to cut special deals for themselves as a consequence of this special access.<sup>202</sup>

In addition, as indicated above, Feinberg has become aware of the problem of inconsistent awards and has now embarked on a program of grouping claimants by similar business enterprises.<sup>203</sup> However, there is no publicly available information concerning how award determination based on these clusters are to be implemented or the standards by which staff are to determine final settlement awards in the context of these groupings.

On February 1, 2011, the media reported that the GCCF had issued exactly one final settlement payment out of thousands of claimants, for a \$10 million award to a BP business partner.<sup>204</sup> BP acknowledged that it had intervened and lobbied for the settlement

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199. Kaufman, *supra* note 7 (Feinberg promising at Louisiana town hall meeting to quickly reveal basis for his award calculations); see GULF COAST CLAIMS FACILITY, *supra* note 62 (no valuation method indicated). The GCCF's protocol for final settlement payments does include sample calculations for individuals and businesses. See *Gulf Coast Claims Facility Announcement of Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology*, GULF COAST CLAIMS FACILITY (Feb. 2, 2011), <http://www.gulfcoastclaimsfacility.com/METHODOLOGY.%20FEB.2.%20FINAL%20DRAFT.pdf> [hereinafter *Announcement of Payment Options*] (with Attachment A (Sample Calculation for Individual Claimant) and Attachment B (Sample Calculation for a Business Claimant)).

200. Feinberg has made a number of on-the-fly, ad hoc pronouncements. See, e.g., *BP Fund Will Be Generous*, *supra* note 7 (Feinberg indicating that victims could be compensated for lost health insurance or tourism revenue, not solely for direct damage from spilled oil); see also Kaufman, *supra* note 7 (no computation information indicated).

201. *But see* GULF COAST CLAIMS FACILITY, *supra* note 62 (indicating claims to be evaluated by an unspecified claims evaluator).

202. See, for example, Snyder, *supra* note 39, which indicates that as early as August 16, 2010, Feinberg had set aside a "modest amount," which he did not disclose, to compensate Gulf State realtors, whose trade association had met with Feinberg the week before. "The realtors have 'suffered a great deal' in lost sales, rent, and commissions, [Feinberg] said." See *supra* note 158.

203. See *supra* note 166 and accompanying text (discussion of Feinberg changing valuation rules to group claimants by industry).

204. Skoloff, *supra* note 190.

on behalf of the unidentified company and ordered the facility to make the payment.<sup>205</sup> Feinberg reported that BP had struck an outside deal with the business and told the GCCF to make the payment. In addition, Feinberg stated that the GCCF had never reviewed the business's claim for merit.<sup>206</sup>

The \$10 million payment out of GCCF funds to a BP business partner as the result of a private settlement negotiation with BP, without the review and participation of the GCCF, precipitated further questions about the GCCF's lack of transparency and independence from BP, as well as of claims being short-changed and paid too slowly, or not at all.<sup>207</sup>

### 3. Collateral Sources

The application of the "collateral source" rule to compensation awards played a role in the administration of both the Fund and the GCCF. The Air Transportation Safety and System Stabilization Act, which authorized creation of the September 11th Victim Compensation Fund, provided for the reduction of awards by collateral source benefits such as insurance, pension funds, and other government payments.<sup>208</sup> Not surprisingly, Feinberg drew on his experience with the Fund to guide his decisions about the applicability of the collateral source rule in administering the GCCF.

The collateral source rule is a doctrine most commonly used in tort law.<sup>209</sup> Pursuant to this rule, when a person successfully prevails on a tort claim in court, the collateral source rule mandates that any other compensation from other sources should *not* be deducted to diminish the claimant's award. Thus, insurance proceeds and similar benefits that a claimant may receive for the same injury are not subtracted from a prevailing party's award.<sup>210</sup>

The application of the collateral source rule played a highly controversial and much-publicized role in the administration of the

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205. *Id.*

206. *Id.*

207. *Id.*

208. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(6), 115 Stat. 230, 239 (2001); FEINBERG ET AL., *supra* note 4, at 43-44; see Alexander, *supra* note 5, at 675-80; Peck, *supra* note 8, at 224.

209. See RICHARD A. EPSTEIN, TORTS 436 (1999); Katz, *supra* note 20, at 548, 563-66.

210. See *supra* note 209.

Fund.<sup>211</sup> At the outset, Feinberg determined that any monies or benefits that claimants received from collateral sources would be deducted from an award that was determined by the Fund staff.<sup>212</sup> The fact that *any* collateral source funds would be deducted from Fund awards engendered the ire of claimants, who raised an array of fairness arguments concerning application of this rule.<sup>213</sup> For example, claimants protested that the deduction of collateral source benefits penalized those claimants who had worked hard throughout their lives and had accumulated pensions<sup>214</sup> or taken prudent steps to protect their family members by purchasing insurance.<sup>215</sup>

Over the course of administering the Fund, Feinberg waffled on the application of the collateral source rule.<sup>216</sup> Similar to his decisionmaking pattern with regard to other Fund criteria, Feinberg gradually softened his initial absolutist rule.<sup>217</sup> Under increasing protest and pressure, Feinberg repeatedly modified his stance on what “collateral sources” would be deducted from Fund awards and what collateral sources would not.<sup>218</sup>

In the end, Feinberg determined that almost all collateral sources of benefits would be deducted from Fund awards.<sup>219</sup> On the other hand, to appease his critics, Feinberg also determined that collateral source benefits would not be used to reduce any claimant’s award below \$250,000.<sup>220</sup> In addition, Feinberg ultimately determined that charitable donations claimants received from various organizations also would not be deducted from Fund awards.<sup>221</sup>

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211. FEINBERG ET AL., *supra* note 4, at 43–44; Alexander, *supra* note 5, at 676–77; Priest, *supra* note 15, at 543–45; Rabin & Sugarman, *supra* note 8, at 908–09; Steenson & Sayler, *supra* note 14, at 557–58.

212. FEINBERG ET AL., *supra* note 4, at 43–44.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*; Rabin, *supra* note 9, at 473; Rabin, *supra* note 11, at 582–83 (commenting on the special master’s responding to criticism on the collateral source rule and modifying his views; concluding that in the end, Feinberg reached a compromise on what collateral source benefits to deduct and which to allow claimants to retain).

217. FEINBERG ET AL., *supra* note 4, at 45–52; Alexander, *supra* note 5, at 676 (“Though the statutory language appears quite clear, its application has been substantially narrowed in practice.”).

218. FEINBERG ET AL., *supra* note 4, at 45–52.

219. *Id.* at 43–44.

220. *Id.* at 51.

221. *Id.* at 47; Alexander, *supra* note 5, at 676–77; Berkowitz, *supra* note 18, at 13; Katz, *supra* note 20, at 548.

There are two salient points about Feinberg's resolution of the collateral source rule in the context of the Fund. First, the approach used in administering the Fund basically rejected the traditional tort rule: if claimants had pursued tort claims in court, they would not have been subject to reduction of their awards by any insurance, pension, or similar benefits. Second, Feinberg's decisions with regard to the collateral source rule changed over time and typically in response to heated public pressure. Thus, Feinberg engaged in his pattern of on-the-fly rule modification based on claimant pressure, rather than resolving this issue through deliberative rulemaking. As a consequence, at least one critic has suggested that there is no principled rationale for the distinctions that the special master accorded to different collateral source benefits.<sup>222</sup>

With his installment as the GCCF administrator, Feinberg was entirely familiar with the issue of the collateral source rule in the context of fund approaches to victim compensation. Taking a page from the Fund playbook, Feinberg determined that GCCF awards also would be reduced by any monies or benefits that GCCF claimants received from other sources.<sup>223</sup> Again, the imposition of collateral source reduction of awards stirred controversy,<sup>224</sup> in no small part because BP lobbied Feinberg to include a collateral source deduction.<sup>225</sup>

One of the most controversial applications of the collateral source rule in administration of the GCCF was the announcement that claimants' awards would be reduced by any monies that they earned while participating in the Gulf cleanup.<sup>226</sup> Hundreds of

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222. Priest, *supra* note 15, at 542 ("Because the only reason for ignoring collateral benefits is deterrence, there is no rationale whatsoever for the various distinctions now effected under the Fund.").

223. Kaufman, *supra* note 7 (reporting that Feinberg was considering collateral source deductions as early as August 19, prior to his assuming the office of administrator of the GCCF).

224. *Id.* (quoting an irate local resident in regard to the offset: "You have no clue as to what we did, and then you are going to act like we should just be grateful for what we got. . . . Are you kidding me?"); King, *supra* note 107 (fishermen angry about decision to deduct amounts paid by BP in cleanup to boat owners and others who aided in cleanup efforts); Urbina, *supra* note 109 (reporting on emergency payment protocols to deduct collateral source payments, including any earnings or profits people received from another job or other source of income during the period for which they were claiming lost earnings).

225. Urbina, *supra* note 109 (BP's successful lobbying of Feinberg to include collateral source deductions).

226. See GULF COAST CLAIMS FACILITY, *supra* note 62 (deductions of cleanup earnings); Kaufman, *supra* note 7 (Feinberg stating, on August 19, 2010, that he intended to reduce awards by BP payments to those who were

fisherman and boat owners had been hired by BP to assist in the oil spill cleanup and were paid for these efforts. These claimants protested that the oil spill prevented them from engaging in their usual employment, and it was unfair to deduct cleanup earnings from their fund awards, because this would be tantamount to working for BP for free in the cleanup efforts.<sup>227</sup>

In response to these criticisms, and similar to the pattern he followed in supervising the Fund, Feinberg modified his position on the collateral source issue. In regard to the cleanup efforts, Feinberg back-tracked and announced that any monies earned by locals participating in the Gulf cleanup would not be deducted from GCCF awards.<sup>228</sup>

In the absence of publicly available information, it is difficult to ascertain what other collateral sources have been and will be deducted from GCCF awards. The absence of advance notice places claimants in an uncertain universe. Exacerbating this problem, claimants lacking legal representation may be unaware that their awards will be reduced by collateral sources, how those amounts will be determined, and that if they pursued relief in court their awards might not be reduced by collateral sources.

The modification of jury awards by collateral source funds has long been a staple of tort reform advocates, typically corporate defendants.<sup>229</sup> Fund resolution of corporate legal liabilities, therefore, embraces this dimension of tort reform, and favors defendants. As the Fund and now the GCCF demonstrate, in order to receive a quick resolution of the claims, participants must agree to reduce their awards by collateral source funds. Fund resolution of mass tort claims, then, embodies an end run around the collateral source rule that applies in judicially adjudicated tort litigation.

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hired to assist in the cleanup efforts, contending that although the claimants could not do their regular job, they were paid: "It seems to me eminently fair, and I think that's what any court would do."); King, *supra* note 107 (Feinberg indicating that it was not unusual under state law to deduct such earnings from final damage settlements).

227. Kaufman, *supra* note 7.

228. *Gulf Coast Claims Facility Marks One-Month Anniversary*, *supra* note 163 (GCCF would not deduct earnings from Vessels of Opportunity Program from payments made to claimants); Robertson & Schwartz, *supra* note 113 (Feinberg reconsidering decision to deduct money that fishermen earned as temporary employees in the cleanup operation from their claims payments); Associated Press, *BP Fund Czar: No Deduction for Spill Cleanup Wages*, HOUS. CHRON. (Sept. 20, 2010), <http://www.chron.com/disp/story.mpl/business/7210041.html> (Feinberg announcing he will waive requirement that wages earned by spill cleanup workers be subtracted from their claims of lost revenue).

229. See Priest, *supra* note 15, at 532 n.15.

Against this backdrop, a problematic issue with the application of the collateral source rule in the context of the GCCF—and unlike the Fund experience—is that BP, the responsible party, required that collateral sources be deducted from awards.<sup>230</sup> Although the GCCF website declares that the GCCF is a neutral claims facility<sup>231</sup> and Feinberg has repeatedly stated that he is functioning as an independent administrator,<sup>232</sup> the reduction of awards by collateral source funds is the consequence of BP's insistence. The fact that a “responsible party” has a role in determining a significant criterion in calculating awards is troubling.

#### *D. Appointment of the Special Master/Administrator*

Ken Feinberg has assumed the central role in implementing both the Fund as well as the GCCF. However, these two fund experiences present contrasting examples with regard to the designation of fund manager. In addition, the designation of the fund manager in both situations has implicated important issues regarding authorization of the manager, scope of duties, accountability, and professional ethics.

In comparing the two, then, the GCCF experience suggests a significant, relatively unguided expansion of the role of the fund manager, raising troubling questions about professional ethics and ultimately fund legitimacy. As will be discussed, until recently the appointment of a “special master” was based on legal rules and principles.<sup>233</sup> However, with the advent of the Fund and the GCCF, the concept of a special master has been transformed from a court-appointed surrogate, circumscribed by delegated duties, into an all-powerful, quasi-lawless, free-wheeling demi-god.

##### *1. Appointment Authorization*

The federal statute creating the September 11th Victim Compensation Fund authorized the appointment of a special

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230. See *supra* Part II.C.3 (discussion of BP's role in the development of the collateral source rule in the context of the GCCF).

231. See *Frequently Asked Questions*, *supra* note 23 (question 1: describing the GCCF as a neutral facility and Feinberg as a neutral administrator).

232. See *infra* note 288 and accompanying text (discussion of Feinberg as an independent administrator).

233. See Berkowitz, *supra* note 18, at 19–22; *infra* note 235 and accompanying text (discussion of special master function under Federal Rule of Civil Procedure 53).

master.<sup>234</sup> The concept of a “special master” is well known in federal courts and Federal Rule of Civil Procedure 53<sup>235</sup> authorizes federal judges to appoint special masters to assist the court in the resolution of certain types of cases.<sup>236</sup> Historically, federal judges used Rule 53 sparingly to appoint special masters to assist in complex commercial litigation, where the special master might assist the court in conducting an independent audit of financial records.<sup>237</sup>

In the past 30 years, some federal judges have considerably expanded the use of special masters, particularly in the resolution of mass tort cases.<sup>238</sup> In the mass tort litigation arena, special masters have been appointed to prepare trial plans, organize and evaluate the universe of potential claims, create compensation award grids, and to negotiate and implement settlements, among many functions.<sup>239</sup> As is widely reported, Feinberg began his career as a professional special master assisting Judge Jack Weinstein in the Agent Orange litigation.<sup>240</sup>

Feinberg’s appointment as the special master to oversee the Fund was not made by a federal judge pursuant to the authority of Rule 53. Instead, Attorney General John Ashcroft appointed Feinberg directly pursuant to the federal statute that created the Fund.<sup>241</sup> From the outset, then, as an executive branch appointee,

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234. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 404(a), 115 Stat. 230, 237–38 (2001); FEINBERG ET AL., *supra* note 4, at 3.

235. FED. R. CIV. P. 53. See generally MARGARET G. FARRELL, *THE ROLE OF SPECIAL MASTERS IN FEDERAL LITIGATION* (1993), available at Westlaw, C842 ALI-ABA 931; Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. CHI. L. REV. 394 (1986).

236. Alexander, *supra* note 5, at 663.

237. See David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984).

238. See generally James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 800 (1991); Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WIDENER L. SYMP. J. 235 (1996); Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2138–42 (1989).

239. Alexander, *supra* note 5, at 663.

240. See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 144–45 (1986).

241. Berkowitz, *supra* note 18, at 7; Press Release, Dep’t of Justice, Attorney General Ashcroft Names Special Master to Head September 11th Compensation Program (Nov. 26, 2001), available at <http://www.usdoj.gov/archive/victimcompensation/dojpr2.pdf>.

Feinberg's appointment as "special master" was outside the ordinary judicial understanding of a special master.<sup>242</sup>

Feinberg volunteered for the job and pursued appointment as the special master through Washington, D.C. contacts he acquired while working on Capitol Hill.<sup>243</sup> Attorney General Ashcroft appointed Feinberg based on his experience as a special master in the Agent Orange settlement, his willingness to administer the Fund without pay,<sup>244</sup> and his familiarity with various congressmen and staffers. The appointment did not require congressional approval.<sup>245</sup> As a consequence of the unusual legal basis for his appointment, Feinberg in his role of special master technically was not answerable to any branch of government.<sup>246</sup>

Whereas Feinberg's appointment to oversee the Fund had an ascertainable legal basis in a federal statute, his appointment to administer the GCCF did not. In his supervision of the GCCF, Feinberg is not serving as a "special master" although that label sometimes is misapplied to his efforts. Rather, Feinberg is the designated fund "administrator." His appointment as the fund administrator seems to be result of closed-door negotiations between BP and Feinberg, subsequently endorsed by President

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242. Alexander, *supra* note 5, at 663. Commenting on this unusual arrangement, Professor Alexander observes:

There is no point to calling an administrator within the Justice Department a special master, other than to invoke the authority of special masters within the federal courts in order to lend legitimacy to the adjudicative determinations made by the administrator. If a special master does not derive his or her authority from a court—and in fact the decisions of a special master are not even subject to judicial review—then the title takes on a completely different meaning from its normal usage.

*Id.* In attempting to make some sense out of Feinberg's unique appointment by Attorney General Ashcroft as a "Special Master" to administer the September 11th Victim Compensation Fund, Berkowitz has concluded: "Feinberg simply has no analogue, leaving us once again with the question of how to characterize the position of Special Master." Berkowitz, *supra* note 18, at 22. She additionally opines: "Congress failed to define the Special Master's position." *Id.*

243. Berkowitz, *supra* note 18, at 7. Feinberg reportedly lobbied for the position with his congressional friend, Senator Chuck Hagel.

244. See Ackerman, *supra* note 8, at 197; Feinberg, *Negotiating the Victim Compensation Fund*, *supra* note 9, at 29.

245. Berkowitz, *supra* note 18, at 6.

246. Alexander, *supra* note 5, at 663 ("The Special Master has both legislative and adjudicative functions but operates within no specified procedural or institutional structure."); Berkowitz, *supra* note 18, at 40 ("But it cannot be denied that Congress enacted a statute riddled with litigation inadequacies and constructed a fund controlled by a 'Tsar.'").

Obama.<sup>247</sup> Congress had no role in the creation of the GCCF or Feinberg's appointment as its administrator.<sup>248</sup>

Public records indicate that as early as May 2010, BP summoned Feinberg to Houston for private discussions concerning his possible appointment to take over responsibility for overseeing resolutions of Gulf claims against BP.<sup>249</sup> This arrangement seemed in place by the time that BP met with President Obama in June 2010, when BP agreed to contribute \$20 billion to a compensation fund.<sup>250</sup> Shortly thereafter, the White House quickly agreed to and announced Feinberg as the fund's administrator.<sup>251</sup>

Unlike his appointment to the September 11th Victim Compensation Fund, there is no legal basis for Feinberg's appointment as the GCCF administrator. The appointment was not made by a federal judge pursuant to Rule 53 nor was the appointment made pursuant to federal statute, although Feinberg subsequently would claim authority remotely from the OPA.<sup>252</sup> Feinberg's appointment as administrator was the consequence of a private negotiation and deal with BP, the designated responsible party for the Gulf disaster. There is no public record indicating whether any other actor was considered to undertake the role of fund administrator. In the heat of exponentially expanding public outrage, President Obama quickly rubber stamped BP's preference for Feinberg.

## 2. *Scope of Duties*

A special master who is appointed by a federal judge is subject to duties and responsibilities set forth in Rule 53.<sup>253</sup> Typically, a judge who appoints a special master does so by court order which sets forth a specific task the master is to accomplish, a time period

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247. Schwartz, *supra* note 162 (appointment of Feinberg as administrator).

248. *Id.*

249. *Id.*

250. See Press Release, *supra* note 69. The BP press release announced that Feinberg would administer the ICF, that funds would be available to satisfy "legitimate claims," and that the ICF would adjudicate all OPA claims and tort claims, excluding federal and state claims. BP also indicated that the fund did not cap its liability but that money left over in the fund once all legitimate claims were resolved would revert to BP. Strassel, *supra* note 3.

251. Lee, *supra* note 69. The White House blog indicated that the facility would develop standards for recoverable claims that would be published and that a panel of three judges would be available to hear appeals of the administrator's decisions. See also Strassel, *supra* note 3.

252. See *GCCF Protocol for Interim and Final Claims*, GULF COAST CLAIMS FACILITY (Feb. 8, 2011), [http://www.gulfcoastclaimsfacility.com/proto\\_4](http://www.gulfcoastclaimsfacility.com/proto_4).

253. FED. R. CIV. P. 53.

in which to complete the special master duties, and the scope of the master's authority.

In many instances where a judge contemplates the appointment of a special master, the judge will consult with attorneys involved in the litigation for suggestions regarding possible candidates for the appointment, as well as assistance in delimiting the scope of special master's duties. Counsel may object to the appointment of a special master, the definition of the special master's assigned project, or the scope of the master's authority.<sup>254</sup>

As indicated above, Feinberg's appointment as the special master to oversee the September 11th Victim Compensation Fund was not made by a federal judge pursuant to Rule 53. No judicial order specified the tasks Feinberg was to perform, described the scope of his authority, or limited his discretion. Consequently, Feinberg rapidly assumed expansive supervision, control, and discretion over all matters involved in administering the Fund. As has been discussed above, after an initial round of formal notice-and-comment rulemaking, Feinberg increasingly assumed vast powers to modify and change rules and standards governing administration of the Fund.

Similar to his experience with the Fund, Feinberg's management of the Gulf Coast Claims Facility has not been subject to a Rule 53 court order or any other judicially created mandate. Basically, Feinberg's supervision and control of the GFFC has been a relatively unguided and unbounded exercise of power by a single administrator.<sup>255</sup>

### 3. *Accountability*

Special masters who are judicially appointed pursuant to Rule 53 are accountable to the court that appointed them to undertake some task. In essence, special masters are not free agents. Rule 53 requires that the special master, upon completion of the master's work, submit a report to the court.<sup>256</sup> The judge may then utilize the special master's work product in any fashion the court deems appropriate. Parties involved in the litigation may submit comments or challenges to the special master's findings and

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254. See DeGraw, *supra* note 238, at 811.

255. Berkowitz, *supra* note 18, at 20 ("Despite the independence granted by the expansion of the court-appointed special master's role, special masters are always answerable to the judges who appoint them for a particular case and are further supervised by the rigors of the adversarial process. No such checks exist over the Fund's Special Master, making Feinberg a rare, and tenuous, judicial creature." (footnote omitted)).

256. FED. R. CIV. P. 53(e).

conclusions. The court may accept, modify, or reject a special master's findings, and adopt the master's report in whole or part.<sup>257</sup>

Feinberg was not appointed special master pursuant to Rule 53 and therefore, in administering the Fund, he technically was not subject to the requirements of Rule 53 nor was he answerable to a federal judge for whom he was working. Because of his unusual status as a congressionally authorized, executively appointed special master, Feinberg has been criticized for being uniquely unaccountable in the exercise of his office.<sup>258</sup>

Nonetheless, in implementing and administering the Fund, Feinberg was loosely accountable to various constituencies. Thus, Feinberg was remotely answerable to Attorney General Ashcroft.<sup>259</sup> In addition, because Congress authorized the Fund, Feinberg was accountable to various congressional committees, the Fund claimants, and the public. After the Fund was closed, Feinberg issued a report on his work to Congress.<sup>260</sup>

During his tenure as special master, Feinberg also developed an interesting synergy with federal Judge Alvin Hellerstein, who was assigned the cases of claimants who had elected not to receive

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257. See FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, FOURTH § 11.52 (2004).

258. See Ackerman, *supra* note 8, at 211 ("It is in this particular area where the Fund's most serious procedural shortcoming is apparent. Were we to grade the Fund's accountability on the upstream end, we would give it a 'C' . . . . But with major gaps to fill, some of the most significant rule-making was left to an appointed Special Master with no direct accountability to the electorate. . . . It is on the downstream end, however, where accountability all but disappeared."); Diller, *supra* note 15, at 726 (fund vested too much discretion in the special master with little means of accountability and oversight); Schneider, *supra* note 19, at 477 (vesting so much discretion in one decisionmaker increases perceptions of unfairness); Tyler & Thorisdottir, *supra* note 15, at 384 (large amount of discretionary authority of special master raised suspicions that biases and personal preferences would shape allocation decisions).

Highly critical of Feinberg's role, Professor Diller has concluded:

Feinberg's conduct highlights the central weakness of the Fund as an administrative mechanism—its operation rests on the personal choices of a single individual, with little means of accountability or oversight. As Feinberg has construed his grant of authority, there are few governing legal standards, no real requirement that like claims be treated alike, no obligation to provide reasoned explanations, no limits on the amount that may be spent, and no means of judicial review.

Diller, *supra* note 15, at 767.

259. Alexander, *supra* note 5, at 663 ("The only statutory officer of the Fund is the Special Master, who reports directly to the Attorney General.").

260. FEINBERG ET AL., *supra* note 4.

compensation through the Fund.<sup>261</sup> Feinberg apparently initiated numerous conference calls with Judge Hellerstein, in order to coordinate their efforts and to impart information about the relative risks of seeking compensation either through the Fund or litigation.<sup>262</sup> Judge Hellerstein, acting in concert with Feinberg, required that individuals pursuing judicial relief in the tort system to have first weighed and assessed the alternative remedy of receiving compensation from the Fund.<sup>263</sup> In this fashion, Judge Hellerstein, in concert with Feinberg, pressured claimants not to pursue tort litigation but instead to take an award from the Fund.<sup>264</sup>

In addition, as will be discussed below, Judge Hellerstein otherwise did not oversee or review Feinberg's various decisions relating to implementation and administration of the Fund.<sup>265</sup> Although some claimants challenged the Fund's criteria in court, Judge Hellerstein ruled that while he could review the legality of those criteria, he would not review any individual challenges in the application of those standards and rules.<sup>266</sup> And, Judge Hellerstein upheld the legality of Feinberg's standards for administration of the Fund<sup>267</sup> and decided that Feinberg had not impermissibly created a cap on awards for high-end earners.<sup>268</sup>

In contrast, in implementing and administering the Gulf Coast Claims Facility, Feinberg appears to be accountable to no one,

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261. *In re Sept. 11th Litig.*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003); *see also* Conk, *supra* note 24, at 189 (array of September 11th cases assigned to Judge Hellerstein).

262. See STEVEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 537–38 (2003), which suggests that Feinberg tried to posture this as Judge Hellerstein's idea, "but plaintiffs lawyers immediately saw [Feinberg's] fingerprints on it, and they were outraged. How could he and a judge interfere this way in an attorney–client relationship?" *See also* Berkowitz, *supra* note 18, at 27–28 (describing the relationship of Feinberg and Judge Hellerstein in urging victims to take their relief from the Fund).

263. *See* Milo Geyelin, *Judge Wants Victims of September 11 Who Sue to Know the Risks of Action*, WALL ST. J., Apr. 12, 2002, at B2.

264. Berkowitz, *supra* note 18, at 27–28.

265. FEINBERG ET AL., *supra* note 4, at 12–13.

266. *Id.*; *see supra* note 262 and accompanying text (Judge Hellerstein's decisions in the September 11th litigation).

267. *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 273 (S.D.N.Y. 2003); *see also* *Schneider v. Feinberg*, 345 F.3d 135, 143 (2d Cir. 2003) (upholding Judge Hellerstein's decision); Ackerman, *supra* note 8, at 165–74 (Hellerstein's *Colaio* decision and the Second Circuit affirmation); James P. Kreindler & Brian J. Alexander, *September 11th Aftermath: A Perspective on the VCF and Litigation*, AIR & SPACE LAW., Winter 2004, at 1, 18–19 (commenting favorably on the *Colaio* decision as sending a message to Feinberg not to cap awards).

268. *Colaio*, 262 F. Supp. 2d at 273.

except possibly BP.<sup>269</sup> Because Feinberg is not functioning as a court-appointed special master under Rule 53, he is not accountable to any federal judge or the judicial system. Feinberg's independence from BP has been repeatedly challenged.<sup>270</sup> Similarly, because his work as fund administrator is not derived from specific congressional authorization, Feinberg is not accountable to any legislative oversight, although he voluntarily appeared before House subcommittees shortly after his designation as the GCCF administrator.<sup>271</sup> Finally, because the Attorney General did not appoint Feinberg—as the Attorney General did for the September 11th Victim Compensation Fund—Feinberg is not subject to executive branch oversight, either.

In the context of the GCCF, Feinberg is operating as an entirely free agent, accountable ultimately to no one. He has complete authority to make rules and standards, to change those rules and standards, to issue awards, and to provide or deny whatever procedures he deems appropriate. As will be discussed, claimants have limited opportunities to appeal decisions of the fund administrator.<sup>272</sup> Thus, Feinberg is the original and ultimate arbiter

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269. Feinberg's relationship with BP has raised numerous ethical issues. *See infra* note 276 and accompanying text. As early as June 20th, Feinberg's independence from BP was questioned. *See Lavis, supra* note 13 (noting that Feinberg was being paid by BP); *see also* Robertson, *supra* note 67 (Gulf Coast resident querying Feinberg: "If you're not with BP and you're not with the government, who are you with?"); Urbina, *supra* note 109 (reporting BP's successful lobbying effort with Feinberg to require deduction of collateral benefits from GCCF awards).

270. *See supra* note 116 and accompanying text (discussion of Feinberg's independence from BP). *See also* Kaufman, *supra* note 7, which reports on a town hall meeting in Houma, Louisiana: "I feel that you have a serious conflict of interest," one audience member charged. "The Bible states one man should not serve two masters." *See also* Robertson, *supra* note 67.

271. *See also* Snyder, *supra* note 68 (reporting that Feinberg had testified before four congressional panels on July 22, 2010; Feinberg summoned to meeting with Senator Tom Carper to answer criticisms from Gulf Coast residents about claims process); Jim Snyder, *Carper Says Gulf Claims System Needs Work, Vouches for Feinberg*, BLOOMBERG (Sept. 29, 2010), <http://www.bloomberg.com/news/2010-09-29/carper-says-gulf-claims-system-needs-work-vouches-for-feinberg.html> (describing the Senate Government Affairs Subcommittee monitoring claims process); Statement by Tom Carper on Meeting with Kenneth Feinberg (Sept. 29, 2010), *available at* <http://carper.senate.gov/press/record.cmf?id=328035>.

272. *See infra* notes 324–28 and accompanying text (discussion on appellate review of GCCF award decisions). The protocol for emergency payment provided no means whatsoever for appeal. *See* GULF COAST CLAIMS FACILITY, *supra* note 62.

of both substantive and procedural due process in administering the GCCF.<sup>273</sup>

It remains to be seen what relationship will develop between Feinberg's administration of the GCCF and the Gulf Coast Oil Spill multidistrict litigation (MDL) 2179 created in the Eastern District of Louisiana under the management of federal Judge Carl J. Barbier.<sup>274</sup> Plaintiffs' attorneys filed a motion in that MDL proceeding to enjoin Feinberg from encouraging claimants to seek their compensation solely from the GCCF, which Judge Barbier granted in February 2011.<sup>275</sup> In the context of the September 11th Victim Compensation Fund, Judge Hellerstein appeared to attempt to coordinate his judicial efforts with Feinberg. At this writing, it is unclear what approach the Louisiana federal court will adopt with regard to coordination, interference, or non-interference with Feinberg's parallel efforts.

#### 4. Professional Ethics

Feinberg's continued role as the GCCF administrator, over time, has raised a myriad of controversial and unresolved issues relating to professional ethics. Although in administering the September 11th Victim Compensation Fund Feinberg made a number of contentious decisions, and angered various constituencies, there were few reported ethical challenges to his

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273. *But see* GULF COAST CLAIMS FACILITY, *supra* note 62 (providing for the GCCF to institute periodic audits to evaluate the accuracy of submissions and payments, but seemingly not to monitor the administration or determination of awards).

274. *See* Ashby Jones, *Big Gulf Spill Litigation Gets Sent to the Big Easy*, WSJ BLOGS (Aug. 10, 2010, 2:14 PM), <http://blogs.wsj.com/law/2010/08/10/big-gulf-spill-litigation-gets-sent-to-the-big-easy> (creation of Oil Spill MDL and transfer to federal court in New Orleans; assigned to Federal Judge Carl Barbier; viewed as plaintiffs attorneys' victory); *infra* notes 486–88 and accompanying text (discussion of the Deepwater Horizon Oil Spill MDL case).

275. Order and Reasons, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 323866 (E.D. La. Feb. 2, 2011) (granting plaintiffs' motion to supervise *ex parte* communications with putative class); *see* Tom Hals, *Judge Finds Feinberg Not Independent of BP*, REUTERS (Feb. 3, 2011), <http://www.reuters.com/article/2011/02/03/us-oil-spill-feinberg-independence-idUSTRE7120EG20110203>; *see also* John Schwartz, *Comments by Overseer of BP Fund Irk Lawyer*, N.Y. TIMES, Dec. 22, 2010, at A18 (reporting plaintiffs lawyers' motion to enjoin Feinberg from communicating with putative class claimants); Brian Skoloff & Harry Weber, *Judge to Gulf Claims Czar: Don't Say You're Independent*, MSNBC.COM (Feb. 2, 2011), [http://www.msnbc.msn.com/id/41397181/ns/us\\_news-environment/](http://www.msnbc.msn.com/id/41397181/ns/us_news-environment/).

administration of that Fund.<sup>276</sup> That has not been true in Feinberg's administration of the Gulf Coast Claims Facility.

The most trenchant ethical challenge asserted against Feinberg's management of the GCCF centers on Feinberg's perceived conflict of interest.<sup>277</sup> In addition, others have questioned BP's continued intervention and interference with various aspects of the GCCF's operations.<sup>278</sup> Critics repeatedly have pointed out that BP selected Feinberg to administer the Fund and that BP is paying Feinberg and his law firm. Furthermore, BP has influenced a number of decisions relating to the GCCF's implementation and administration, such as the deduction of collateral source funds and releases for final claims awards.<sup>279</sup>

Moreover, Feinberg was appointed as administrator after private negotiations with BP, well in advance of creation of the GCCF, and seemingly without the consultation of any other affected parties.<sup>280</sup> Feinberg has reportedly traveled around the Gulf Coast states in BP private jets and met with BP executives.<sup>281</sup> In addition, for several months Feinberg resisted disclosure of BP's compensation to him, repeatedly telling the press that this information would be forthcoming.<sup>282</sup> To date, Feinberg has not

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276. *But see* Diller, *supra* note 15, at 759–61 (raising ethical issues about Feinberg's judgment).

277. *See* Kaufman, *supra* note 7 (town hall meeting participants challenge Feinberg's independence and note conflict of interest).

278. Skoloff, *supra* note 190; Daniel Fisher & Asher Hawkins, *BP's Legal Blowout*, FORBES.COM (July 14, 2010), <http://www.forbes.com/2010/07/14/bp-oil-spill-settlement-business-energy-lawsuits.html> (reporting that Feinberg asked BP to draft releases that exempt BP from any future liability for the spill but not to include other defendants); *see also* King, *supra* note 107 (criticism from Alabama Attorney General Troy King, accusing Feinberg of acting as a "corporate shill").

279. Fisher & Hawkins, *supra* note 278 (reporting that Feinberg asked BP to draft releases that exempt BP from any future liability for the spill but not to include other defendants); Urbina, *supra* note 109 (reporting BP's successful lobbying of Feinberg to include collateral source deductions from GCCF awards); *see also* Dionne Searcey, *In Advance of Hearing, Parties in BP Litigation Already Feuding*, WSJ BLOGS (Sept. 14, 2010, 4:15 PM), <http://blogs.wsj.com/law/2010/09/14/in-advance-of-hearing-parties-in-bp-litigation-already-feuding/> (plaintiffs attorneys' motions in MDL seeking all contracts and communications between BP and Feinberg Rozen, Feinberg's firm administering the \$20 million fund).

280. Schwartz, *supra* note 162 (appointment of Feinberg); Pacenti, *supra* note 139 (Feinberg picked by BP).

281. *See* King, *supra* note 76 (Feinberg's meetings with BP executives); Schwartz, *supra* note 162 (Feinberg flying around Gulf Coast states on BP jets); Pacenti, *supra* note 139 (same).

282. Fisher & Hawkins, *supra* note 278 (Feinberg not disclosing salary from BP); Schwartz, *supra* note 162 (Feinberg's refusal to disclose salary compensation from BP to him); Pacenti, *supra* note 139 (same); Byron G. Stier, *Feinberg to*

disclosed his BP compensation (other than information relating to an alleged \$850,000 monthly payment to Feinberg's law firm).<sup>283</sup>

Further enflaming and exacerbating the conflict-of-interest debate, on February 1, 2011, the media reported that the GCCF had made its first final settlement award to a BP business partner in the amount of \$10 million.<sup>284</sup> The payment of this final settlement moved BP's business partner to the head of the queue of approximately 91,000 other individuals and businesses that have filed for final settlement payments.<sup>285</sup> BP acknowledged that this payment was privately negotiated between BP and its partner and that BP had ordered the GCCF to make the payment.<sup>286</sup> In response to questions about this arrangement, Feinberg indicated that BP had struck an outside deal, had told the fund to make the payment, and that the claims facility had never made its own independent review of the merits of the claim.<sup>287</sup> These events clearly belie repeated assertions from both BP and Feinberg that BP has been and is acting independently from the GCCF.

In response to his critics, Feinberg repeatedly has avowed that he functions as an impartial administrator,<sup>288</sup> and the GCCF website declares that the facility is a "neutral" fund and that Feinberg is a neutral fund administrator.<sup>289</sup> He has repeatedly

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*Disclose Compensation for Administering BP Fund*, MASS TORT LITIG. BLOG (July 29, 2010), [http://www.lawprofessors.typepad.com/mass\\_tort\\_litigation/2010/07/feinberg-to-disclose-compensation-for-administering-bp-fund.html](http://www.lawprofessors.typepad.com/mass_tort_litigation/2010/07/feinberg-to-disclose-compensation-for-administering-bp-fund.html) (AP reporting Feinberg's announcement that he will disclose BP's compensation to him, despite previously stating that such information would be confidential and "between him and BP"); Kaufman, *supra* note 7 (town hall meeting participants challenging Feinberg's independence while he is being paid by BP; Feinberg suggesting he will reveal salary next month (September 2010)); Urbina, *supra* note 109 (Feinberg's earnings from BP unknown).

283. See Lavis, *supra* note 13 (noting that Feinberg was being paid by BP).

284. Skoloff, *supra* note 190.

285. *Id.*

286. *Id.*

287. *Id.*

288. See, e.g., King, *supra* note 76 (reporting that Feinberg repeatedly indicated that he would not take orders from BP or the White House); Robertson, *supra* note 67 (Feinberg vowing that his decisions were strictly his own); Schwartz, *supra* note 162 (Feinberg: "I am not beholden to the Obama administration, I am not beholden to BP—I am an independent administrator, calling the shots as I see them.").

289. See *Frequently Asked Questions*, *supra* note 23 (section 1).

indicated that he was promised total independence from both BP and the White House.<sup>290</sup>

As questions about Feinberg's conflict of interest and other ethical issues have continued unabated, Feinberg retained Professor Stephen Gillers of New York University Law School to render an expert opinion regarding various ethical challenges.<sup>291</sup> In late December 2010, Professor Gillers issued an expert report concluding that Feinberg was not violating any professional responsibility standards.<sup>292</sup> Professor Gillers was paid for this work out of BP funds, at the rate of \$950.00 an hour, raising further questions about the independence of Feinberg, Gillers, and BP.<sup>293</sup>

The issues relating to Feinberg's independence and neutrality in implementing the GCCF are intricately interwoven with questions concerning the capacity in which Feinberg and his law firm are serving. Professor Gillers' ethical analysis is grounded in his conclusion that Feinberg is not functioning as an attorney, within the bounds of an ordinary attorney-client relationship.<sup>294</sup> Simply, Feinberg and his law firm, and the GCCF facility it is managing, are not acting as a "lawyer for BP," and consequently BP is not Feinberg's client.<sup>295</sup> By defining the threshold capacity question in this fashion, Professor Gillers effectively has insulated Feinberg from all professional standards, rules, and accountability.

As indicated above, the plaintiffs' bar has sought, in the MDL 2179 proceedings, to enjoin Feinberg from various actions in

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290. See Strassel, *supra* note 3, which reports that Feinberg was promised total independence and which quotes Feinberg as saying that neither BP nor the administration "want to get near this. And that's appropriate."

291. Harry R. Weber, *Ken Feinberg Paying Stephen Gillers*, NYU Professor, with Money from BP Oil Spill Claims Fund for Legal Ethics Advice, HUFFINGTON POST (Dec. 30, 2010), [http://huffingtonpost.com/2010/12/30/ken-feinberg-paying-steph\\_n\\_802703.html](http://huffingtonpost.com/2010/12/30/ken-feinberg-paying-steph_n_802703.html).

292. Stephen Gillers, N.Y. Univ. Sch. of Law, Letter Report to Kenneth Feinberg (Dec. 28, 2010) (on file with author); *Expert on Legal Ethics: Feinberg and the Gulf Coast Claims Facility Are Independent and Meet All Appropriate Ethical Standards*, GULF COAST CLAIMS FACILITY (Dec. 30, 2010), <http://www.gulfcoastclaimsfacility.com/press11.php>.

293. Weber, *supra* note 291.

294. Gillers, *supra* note 292, at 4 ("You are not in an attorney-client relationship with BP. You are an independent administrator and owe none of the attributes of the attorney-client relationship (e.g., loyalty, confidentiality) to BP.").

295. *Id.* ("By 'independent' I mean (and I think the context is clear) that you are independent of BP. You are not subject to its direction or control."); see Jim Snyder & Carol Massar, *Feinberg Says Half of \$20 Billion BP Fund Should Cover Claims*, BLOOMBERG (Dec. 31, 2010), <http://www.bloomberg.com/news/2010-12-31/feinberg-says-half-of-20-billion-bp-fund-may-be-enough-to-cover-claims.html> (Gillers's conclusions on Feinberg's independence).

administering the GCCF, particularly seeking judicial supervision over communications by Feinberg with potential civil litigants.<sup>296</sup> Professor Geoffrey Hazard submitted an expert declaration in support of this request,<sup>297</sup> opining that Feinberg's law firm either is acting as a lawyer for BP, or if not, then as an agent for BP.<sup>298</sup> In contrast to Professor Giller's conclusions, Professor Hazard suggests the GCCF is not an entirely independent facility, because its substantial operating expenses are being paid by BP.<sup>299</sup> Professor Hazard points out that the attorneys hired to assist in the GCCF claims process are not working pro bono (as they did in administering the September 11th Victim Compensation Fund), but are being paid by BP. As such, Professor Hazard suggests that they are ethically bound to inform any claimant that they may assist in the GCCF process of that compensation arrangement.<sup>300</sup> In addition, Professor Hazard suggests that the GCCF is not functioning as a mediation enterprise, because it was established unilaterally by BP and not with the agreement of opposing claimants.<sup>301</sup>

In contrast to Professor Giller's expert opinion, Professor Hazard further concludes that Feinberg is an attorney representing the GCCF and that his actions and statements may properly be evaluated under the Louisiana Rules of Professional Conduct and the counterpart professional rules of other jurisdictions.<sup>302</sup> Subject to this scrutiny, Professor Hazard suggests that many of Feinberg's actions and statements might be considered professionally improper under the codes of professional responsibility.<sup>303</sup>

On February 2, 2011, Judge Barbier issued his opinion enjoining Feinberg.<sup>304</sup> Judge Barbier's order required that the defendant BP, through its agents Ken Feinberg, Feinberg Rozen, LLP, and the Gulf Coast Claims Facility, and any of their

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296. Order and Reasons, *supra* note 275 (granting plaintiffs' motion to supervise ex parte communications with putative class); *see* Hals, *supra* note 275; Skoloff & Weber, *supra* note 275.

297. Declaration of Geoffrey C. Hazard Jr., *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. Jan. 15, 2011).

298. *Id.* ¶ 11.

299. *Id.* ¶ 7c.

300. *Id.* ¶ 7f.

301. *Id.* ¶ 7c.

302. *Id.* ¶ 10a; *see* Pacenti, *supra* note 139 (reporting that Feinberg may have violated Florida Bar rules by giving legal advice to those affected by spill without being licensed in the Gulf states).

303. Declaration of Geoffrey C. Hazard Jr., *supra* note 297.

304. Order and Reasons, *supra* note 275 (granting plaintiffs' motion to supervise ex parte communications with putative class).

representatives, in any of their oral or written communications with claimants, shall:

(1) Refrain from contacting directly any claimant that they know or reasonably should know is represented by counsel, whether or not said claimant has filed a lawsuit or formal claim; (2) Refrain from referring to the GCCF, Ken Feinberg, or Feinberg Rozen, LLP (or their representatives), as “neutral” or completely “independent” from BP. It should be clearly disclosed in all communications, whether written or oral, that said parties are acting for and on behalf of BP in fulfilling its statutory obligations as the “responsible party” under the Oil Pollution Act of 1990. (3) Begin any communication with a putative class member with the statement that the individual has a right to consult with an attorney of his/her own choosing prior to accepting any settlement or signing a release of legal rights. (4) Refrain from giving or purporting to give legal advice to unrepresented claimants, including advising that claimants should not hire a lawyer. (5) Fully disclose to claimants their options under OPA if they do not accept a final payment, including filing a claim in the pending MDL 2179 litigation. (6) Advise claimants that the “pro bono” attorneys and “community representatives” retained to assist GCCF claimants are being compensated directly or indirectly by BP.<sup>305</sup>

In addition to the conflicts-of-interest issue, Feinberg also has come under heated attack for urging potential Gulf Coast claimants to seek remediation through the GCCF, rather than the judicial system.<sup>306</sup> In this regard, Feinberg has repeated the course he followed in administering the September 11th Victim Compensation Fund. Then, Feinberg created controversy by his public admonitions that claimants take their relief exclusively through his Fund, famously declaring at one point that the Fund “was the only game in town.”<sup>307</sup> Although Fund claimants criticized Feinberg for his often-blunt demeanor in urging them to act quickly, Feinberg did not raise many objections from the practicing bar. In the context of the GCCF, however, Feinberg has

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305. *Id.*

306. *See, e.g.,* Strassel, *supra* note 3 (Feinberg’s urging potential claimants to sign up with the GCCF riles tort-law community; tort bar and state Attorneys General raise very legitimate policy issues about releasing BP from liability before all damage from the spill is known).

307. Berkowitz, *supra* note 18, at 27; Carter, *supra* note 2, at 37.

engendered the considerable ire of the plaintiffs' bar, which attorneys have successfully enjoined Feinberg from his repeated public urgings that claimants take their exclusive relief through the GCCF.<sup>308</sup>

In contrast to Professor Giller's over-arching conclusion, Feinberg's critics believe that he is an attorney subject to professional responsibility standards and that he is accountable as an attorney for his actions.<sup>309</sup> Hence, Feinberg's critics have contended that Feinberg's repeated statements urging Gulf Coast claimants to take their exclusive remedies in the GCCF constitute providing legal advice, notwithstanding Feinberg's protestations to the contrary.<sup>310</sup> In this regard some commentators have argued that Feinberg is not authorized to practice in the Gulf Coast states, and as a consequence Feinberg is engaged in the unauthorized practice of law.<sup>311</sup> In this vein, some have questioned what code of professional conduct governs Feinberg's actions in administering the GCCF.<sup>312</sup> In his declaration in support of an injunction Professor Hazard has opined that under the Louisiana Code of Professional Responsibility, many of Feinberg's public pronouncements convey inaccurate and misleading statements, constituting further breaches of professional ethics.

The swirling professional responsibility issues relating to Feinberg's capacity and ethical duties are yet unresolved. Nonetheless, Feinberg's unusual appointment status and his controversial administration of the GCCF have exposed novel ethical fault lines in the administration of such funds. If Feinberg is deemed as acting as an attorney, then he is subject to as-yet-determined rules of professional responsibility. However, if Feinberg is not acting in the capacity of an attorney, then legitimate questions exist regarding the capacity in which he functions and what standards constrain his actions. It is worth noting that attorneys, mediators, arbitrators, and even accountants are all subject to professional codes of conduct.<sup>313</sup> Feinberg's

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308. Order and Reasons, *supra* note 275 (granting plaintiffs' motion to supervise ex parte communications with putative class); *see* Hals, *supra* note 275; Skoloff & Weber, *supra* note 275.

309. *See* Pacenti, *supra* note 139 (Feinberg violating Florida Bar rules by giving legal advice to those affected by the spill without being licensed in the Gulf states).

310. *Id.*

311. *Id.*

312. *Id.*

313. *See, e.g., Model Rules of Professional Conduct*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) (last visited Apr. 8, 2011) (attorneys); *Model Standards of Conduct for*

administration of the GCCF raises problematic questions whether he is in any way bound by any professional standards.

Finally, it is worth noting that, as a matter of common sense, Feinberg cannot be the final judge and arbiter of his own neutrality, impartiality, and independence. His repeated self-serving statements to this effect should be accorded little weight. It might be added, moreover, that Feinberg's often tone-deaf responses to ethical challenges in the context of his administration of the GCCF have not served him well in addressing these serious issues.

#### *E. Reviewability of the Special Master's/Administrator's Decisions*

An enterprise's legitimacy may be measured, in part, by the degree to which its decisions are subject to independent appeal and review. Both the September 11th Victim Compensation Fund and Gulf Coast Claims Facility have, in similar fashion, permitted limited review of its standards and award decisions. Arguably, the GCCF has provided even more circumscribed review of the facility's administrative decisions than did the Fund.

As indicated above, Feinberg's management of the Fund was accountable in several ways, including the notice-and-comment period accompanying the development of standards at the outset of the Fund.<sup>314</sup> On the other hand, substantial aspects of Feinberg's administration of the Fund were subject to only limited, independent judicial review.<sup>315</sup> For example, several claimants brought a challenge in federal court to the Fund's promulgated criteria.<sup>316</sup> Judge Hellerstein held that he had jurisdiction to entertain these legal challenges,<sup>317</sup> and he upheld the constitutionality of the rules.<sup>318</sup> Nevertheless, Judge Hellerstein additionally held that he did not have authority to consider judicial

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*Mediators*, A.B.A., [http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf) (last visited Apr. 8, 2011) (mediators); *Code of Professional Responsibility*, NAT'L ACAD. ARB., <http://www.naarb.org/code.html> (last visited Apr. 8, 2011) (arbitrators); *Code of Professional Conduct*, AM. INST. CPAS, <http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/default.aspx> (last visited Apr. 8, 2011) (accountants).

314. See *supra* Part II.C (discussion of notice-and-comment rulemaking).

315. Alexander, *supra* note 5, at 683–84 (ATSA expressly provides that the special master's decisions on claims to the Fund are not subject to judicial review); Steenson & Sayler, *supra* note 14, at 546–47.

316. Alexander, *supra* note 5, at 683–84.

317. *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 285 (S.D.N.Y. 2003).

318. *Id.* at 286, 288, 300–01.

challenges to Feinberg's awards made pursuant to the Fund standards.<sup>319</sup> Thus, after the court determined the constitutionality of the standards, claimants had no further recourse in federal court to challenge Feinberg's administrative awards.<sup>320</sup>

Instead, in managing the Fund, Feinberg instituted an internal hearing process for so-called "Track B" claimants.<sup>321</sup> Thus, claimants who did not wish to accept the offer of a Fund award could request an individualized hearing before a Fund staff member and could present particularized information in support of an increased award.<sup>322</sup> The decision of the Fund staff was final, and a claimant had no further recourse to any judicial or non-judicial review.<sup>323</sup>

In developing plans for the GCCF, Feinberg considered an appeals process early on, indicating that he intended to provide for review by appointing three judges to oversee this process.<sup>324</sup> During ensuing months, with an appeals process still not in place, Feinberg modified his earlier pronouncements and indicated that he would appoint a three-person panel, not necessarily consisting of judges, but persons of similar professional credentials, such as law professors or local, knowledgeable wise men.<sup>325</sup>

The entire GCCF appeals process and the mechanisms for appellate review are unclear. The protocol for emergency payments made no provision for appeal of awards.<sup>326</sup> Feinberg's publication of rules for final awards indicate the opportunity for an appeal before a three-person review panel,<sup>327</sup> but implementation

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319. *Id.* at 286.

320. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(3), 115 Stat. 230, 239 (2001) (stating that all decisions reached by the special master are final and not subject to review); *see* Steenson & Saylor, *supra* note 14, at 546-47.

321. FEINBERG ET AL., *supra* note 4, at 15-17; Feinberg, *The Building Blocks*, *supra* note 9, at 275 ("If you don't like your award that has been computed by some green eye-shade person, you have the right to appeal administratively within the program and see the Special Master or his designee.").

322. FEINBERG ET AL., *supra* note 4, at 15-17.

323. *Id.*

324. *See infra* note 327 and accompanying text (discussion of Feinberg's early representation that GCCF claims would involve three-judge appeal panels).

325. *See* Hammer, *supra* note 192 (Feinberg adds limited appeals process for applicants who dispute interim or final determinations; possibility of appeal to Coast Guard; Feinberg to select distinguished retired judge or law professor to appoint several appeal judges).

326. GULF COAST CLAIMS FACILITY, *supra* note 62.

327. Editorial, *supra* note 164 (appeal to Coast Guard or three-judge panel). The representation that Feinberg's decisions would be subject to a three-judge

of this process has remained vague. There has been no public disclosure of the creation or identity of Feinberg's panels of three wise reviewers. However, the guidelines for final settlement awards permit dissatisfied claimants to reject offered awards and bring suit in court or seek remediation from the National Pollution Funds Center.<sup>328</sup>

The lack of a review mechanism for GCCF awards gained the attention of the Department of Justice, which urged Feinberg to put such a mechanism in place.<sup>329</sup> In this vacuum, Feinberg also endorsed an appeals process through the auspices of the United States Coast Guard, presumably operating under the authority of the OPA. To date, the Coast Guard has processed 264 out of 507 appeals and in every case has agreed with the GCCF.<sup>330</sup>

The mechanisms available for review of Fund and GCCF decisions raise a number of legitimacy questions. To begin, the Fund did not provide for independent *judicial* review of awards, and this made the Fund the ultimate arbiter of its own compensation decisions. In a similar vein, Coast Guard appellate review of GCCF awards also does not constitute a judicial review, and to date the Coast Guard has validated every GCCF decision. Second, the provision for internal staff review of the Fund and GCCF awards effectively makes the fund the auditor its own decisions—a questionable source for independent review. Third, although the GCCF's webpage indicates that claimants may seek a panel review of awards, the reality of this avenue for appellate

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panel appeared as early as June 17, 2010, on a White House blog reporting Feinberg's appointment. Lee, *supra* note 69 (indicating that the facility would develop standards for recoverable claims that would be published, and that a panel of three judges would be available to hear appeals of the administrator's decisions).

328. See *GCCF Protocol for Interim and Final Claims*, *supra* note 252, which indicates (in Section V.D and V.E) that a claimant could elect or reject an interim final payment determination and, as permitted by law, either send a claim to the National Pollution Funds Center or commence an action in court. Claims for physical injury or death are not claims under the OPA and therefore cannot be presented to the National Pollution Funds Center. In addition, if an interim or final payment is denied, the claimant may either present a claim to the National Pollution Funds Center or institute a suit in court.

329. Letter from Thomas J. Perrelli, Office of Assoc. Attorney Gen., U.S. Dep't of Justice, to Kenneth Feinberg (Nov. 19, 2010) (on file with author) [hereinafter Perrelli Letter]; see also Schwartz, *supra* note 146; *Mr. Feinberg and the Spill*, GULF COAST CLAIMS FACILITY (Nov. 25, 2010), <http://www.gulfcoastclaimsfacility.com/press8.php> (Feinberg agrees to set up appeals process).

330. Skoloff, *supra* note 190; Editorial, *supra* note 164 (referencing possibility of appeal to Coast Guard as well as to three-member appeals panel).

review may be illusory. Finally, Feinberg's sweeping declaration of his authority to appoint judges to review GCCF awards is an unsettling assertion of power, and Feinberg's subsequent decision to appoint persons of various, unspecified credentials as appellate reviewers is equally questionable.

#### *F. Transparency*

Feinberg's management of the Fund afforded a relatively high degree of transparency in the creation and administration of the Fund.<sup>331</sup> This transparency was due, in no small measure, to the fact that Feinberg was answerable to numerous constituencies. Thus, the Fund was created by federal statute, subject to federal rulemaking processes, under the jurisdiction of both the Attorney General of the United States, the Justice Department, and several congressional committees. Feinberg had a reporting duty to Congress and was answerable to several influential legislators with affected constituencies. In addition, the highly public and traumatic nature of the events giving rise to the creation of the Fund, as well as the heightened emotional volatility of the claimants, all converged to impel maximum transparency in the Fund's implementation.<sup>332</sup>

Transparency was manifested in several ways throughout the administration of the Fund.<sup>333</sup> Both the enabling statute authorizing creation of the Fund and the rulemaking process it triggered were open and publicly available to any interested person. Feinberg and his staff read and responded to thousands of comments and proposals during the rulemaking process<sup>334</sup> and continued to respond to constituent questions and demands throughout the life of the Fund.<sup>335</sup>

The Fund staff created an extensive website with information and posted data concerning claims processing.<sup>336</sup> Famously, Feinberg held numerous town meetings in several locations to

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331. See Ackerman, *supra* note 8, at 214 ("The Special Master did provide a degree of transparency on a cumulative basis."); Rooks, *supra* note 9 ("Despite its imperfections, the victim compensation fund was a model of economy and transparency.").

332. FEINBERG ET AL., *supra* note 4, at 64–65. In commenting on his experience in administering the Fund, Feinberg noted the importance of transparency: "Process. Openness. Sunshine. Sunlight. All very important." Feinberg, *The Building Blocks*, *supra* note 9, at 275.

333. See Feinberg, *supra* note 7, at 475–78.

334. *Id.*

335. *Id.*

336. FEINBERG ET AL., *supra* note 4, at 14–15 (describing outreach efforts).

directly respond to prospective claimant's concerns.<sup>337</sup> Feinberg's staff also undertook extensive initiatives to contact every potential claimant to the Fund, to provide advice and encouragement to participate in the Fund.<sup>338</sup> Feinberg himself participated in numerous public appearances and media interviews to explain and defend the ongoing fund actions.<sup>339</sup> When the Fund effectively closed, Feinberg prepared and presented a Final Report to Congress, setting forth in significant detail the creation, implementation, and closure of the Fund.<sup>340</sup>

Although the implementation of the Fund accorded a high degree of transparency, in other respects the operation of the Fund was opaque.<sup>341</sup> Thus, in making award determinations, Feinberg relied on the staff analysis and recommendations supplied by the accounting firm Price Waterhouse.<sup>342</sup> Feinberg refused to provide claimants with the expert reports prepared by his office as part of the claims evaluation process,<sup>343</sup> and therefore claimants were denied access to critical information concerning how their awards were determined.<sup>344</sup> In addition, claimants were not supplied with written decisions or a hearing record.<sup>345</sup>

In contrast to the operation of the Fund, the administration of the GCCF has been shadowed by multiple public charges of a lack of transparency as well as delay.<sup>346</sup> The Department of Justice, cognizant of these charges, contacted Feinberg to request that he take immediate measures to improve transparency in the

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337. *Id.*

338. *Id.*

339. Diller, *supra* note 15, at 757–60 (describing Feinberg's outreach efforts, comparing these to the role of mediator or arbitrator).

340. *See* FEINBERG ET AL., *supra* note 4.

341. *Id.* at 64–65 (balancing transparency and confidentiality concerns).

342. *Id.*

343. Diller, *supra* note 15, at 761 (failure to provide expert reports to claimants is “troubling”); *see also id.* at 767 (“Because the [award] resolution in each case occurs in a confidential proceeding that generates no written decision and is not subject to review, it has no means of filtering back up the system through a process of oversight or accountability.”); Schneider, *supra* note 19, at 477–78.

344. Diller, *supra* note 15, at 761, 767.

345. *Id.* at 761 (suggesting that these omissions may be analogized to arbitration procedures but critically noting that Fund claimants were not engaged in arbitration and had not waived their due process rights by electing a remedy through the Fund).

346. *See, e.g.,* Mui, *supra* note 163. But see Snyder, *supra* note 39, which indicates that as early as August 16, 2010, Feinberg had set aside a “modest amount,” which he did not disclose, to compensate Gulf state realtors, whose trade association had met with Feinberg the week before. “The realtors have ‘suffered a great deal’ in lost sales, rent, and commissions, [Feinberg] said.”

implementation of the GCCF.<sup>347</sup> Feinberg responded to the Justice Department, indicating that he would undertake such additional measures, and defensively arguing that his administration of the GCCF already was transparent.<sup>348</sup> It is difficult to ascertain what additional measures Feinberg has pursued, in response to the Justice Department request, to enhance transparency in his administration of the GCCF.

On balance, at least some events surrounding administration of the GCCF have been transparent, similar to the Fund. For example—and drawing on his Fund experience—Feinberg has made a number of well-publicized trips throughout the Gulf Coast region and held a number of “town meetings.”<sup>349</sup> On the other hand, far from satisfying local potential claimants, many have objected to the window-dressing nature of such meetings, which locals characterized as lacking in substance to address their questions and needs.<sup>350</sup> Similar to the Fund experience, Feinberg’s staff has created and posted an informational website to assist potential claimants,<sup>351</sup> with daily updates supplying claims data.<sup>352</sup>

Notwithstanding these outward manifestations of transparency, much information about the creation and the operation of the GCCF remains opaque. Feinberg’s designation and appointment as the fund’s administrator was completely non-transparent. His selection of staff to run the numerous regional claims offices—their identities, numbers, credentials, training, and

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347. See Perrelli Letter, *supra* note 329.

348. See Letter from Kenneth R. Feinberg, Adm’r, Gulf Coast Claims Facility, to The Hon. Thomas J. Perrelli (Nov. 30, 2010) (on file with author); see also Schwartz, *supra* note 146 (attorneys critical of general release of all parties). Feinberg has endorsed the important value of transparency in accomplishing his work. Feinberg, *supra* note 7. Thus, in discussing his administration of the Fund, Feinberg has indicated: “Transparency—giving people in this case due process . . .—I think was extremely valuable.” *Id.* at 475.

349. See Brian Baxter, *Feinberg Talks of Criteria for Gulf Claims, Says Lawyers Not Needed*, AMLAW DAILY (June 21, 2010, 12:38 PM), <http://amlawdaily.typepad.com/amlawdaily/2010/06/ken-feinberg-bp-claims.html> (reporting on Feinberg’s self-proclaimed representation that the GCCF process would be a very transparent process); Snyder, *supra* note 173 (comparison to Fund experience in providing transparency and privacy; discussion with House Judiciary Chairman John Conyers with regard to release of information); Strassel, *supra* note 3.

350. See *supra* notes 110–12 and accompanying text (various criticisms of town hall meeting attendees).

351. See generally *Frequently Asked Questions*, *supra* note 23.

352. *GCCF Program Statistics*, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/reports> (last visited Mar. 25, 2011).

experience—is unknown and unavailable.<sup>353</sup> The process of developing rules, standards, and guidelines for compensation awards was accomplished without formal contributions from interested parties and was largely consummated in private by Feinberg and his staff, with the selected input from some attorneys, BP, or other lobbyists on behalf of special interests.<sup>354</sup>

In addition, although the GCCF website provides data on the numbers and types of claims processed, it fails to provide any information specifying the value of individual awards.<sup>355</sup> In contrast to the Fund and its publicly available compensation grid, claimants to the GCCF have scant information upon which to make a reasoned estimate concerning the amounts they might be expected to receive as an emergency payment or final settlement award. Information relating to the review of awards has not been available, nor is there any publicly available information about the nature and identity of Feinberg's review panels. If three-person panels have been appointed, there has been no public disclosure of these entities.

Moreover, Feinberg's interactions with BP officials and executives have not been transparent, nor has the funding of Feinberg's firm, the GCCF, experts, other law firms, local officials, and entities retained by Feinberg.<sup>356</sup> The revelation in early February 2011 that BP had secretly negotiated a \$10 million final settlement with one of BP's business partners, without the participation of GCCF staffers or Feinberg, raised further questions about the facility's lack of transparency, particularly regarding BP's intervention into GCCF decisionmaking.<sup>357</sup> In essence, with the exception of his town hall meetings, virtually all of Feinberg's actions have been non-transparent. If any BP or GCCF actions have been disclosed, they have been so only after-the-fact and as accomplished reality.<sup>358</sup>

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353. See King, *supra* note 76 (referring to a team of nearly 1,000 clerks and adjusters processing claims in 33 field offices from Louisiana to Florida).

354. See Urbina, *supra* note 109 (documenting changes in proposed protocols for emergency payments as a consequence of lobbying by BP, plaintiffs' attorneys, and state Attorneys General on behalf of real estate agents).

355. See GULF COAST CLAIMS FACILITY, *supra* note 62 (privacy provision).

356. See Feinberg, *supra* note 7, at 477 ("The defendant does not want transparency. The defendant wants ninety-nine percent of everybody to participate, but, again, we're counting on the plaintiff lawyer to make sure everybody is on board."); see also Urbina, *supra* note 109 (BP's lobbying for application of the collateral source rule to GCCF payments).

357. Skoloff, *supra* note 190; see Urbina, *supra* note 109.

358. Skoloff, *supra* note 190; Urbina, *supra* note 109; see also Hammer, *supra* note 192.

A final note about transparency and fund approaches to resolving mass tort claims: Although the September 11th Victim Compensation Fund was characterized by an unusual level of public transparency in its creation and implementation, in the final analysis the Fund experience failed to impart perhaps the most useful data this experiment could have provided for future claims resolution.<sup>359</sup> Because the statute pushed claimants to an election of remedies between the Fund and the tort litigation system, the Fund accidentally created a naturally-occurring empirical experiment concerning whether claimants would be better off pursuing remediation through a fund or the tort system.<sup>360</sup>

As Feinberg repeatedly boasted in the aftermath of the Fund, only 3% of eligible claimants eschewed the Fund and instead chose to hire attorneys, file lawsuits, and pursue litigation in federal court.<sup>361</sup> To date, all those claims have been settled; the final remaining lawsuit arising out of the September 11th events is scheduled for a jury trial in June 2011.<sup>362</sup>

Against this statistical backdrop, both the Fund<sup>363</sup> and the federal court overseeing the independent lawsuits have refused to disclose any information concerning individual awards to claimants through the Fund or judicial settlement, citing privacy concerns.<sup>364</sup> Although the claimants' privacy concerns are well grounded, this resulting lack of transparency has impeded the assessment of the fundamental question whether resolving a claim through a fund mechanism is preferable to an adjudicated claim in the legal system. Because of the lack of transparency in disclosing actual award and settlement amounts, commentators will never be

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359. Although Feinberg purports to support the values of transparency, he apparently believes in only limited transparency. Thus: "On the other hand, query, can you even get the deal done if the public has a right to know? Or does that cloud the opportunity to even get the deal done, if I know it's going to be in the newspapers the next day?" Feinberg, *supra* note 7, at 478.

360. See Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315, 1317 (2004) (suggesting that the Fund provided such a natural empirical experiment).

361. See FEINBERG ET AL., *supra* note 4, at 1.

362. Colin Moynihan, *Timetable Is Set for the Only Civil Trial in a 9/11 Death*, N.Y. TIMES, Oct. 21, 2010, at A32.

363. Feinberg, *supra* note 7, at 477 ("We announced ranges so that the New York Times couldn't figure out who received what: 'Last week ten people received a total of twelve million,' and we fudged it all up so that there's some information available, total amount spent of the taxpayer's money, but not so much transparency and sunshine so that the New York Times can knock on the lady's door and print an article the next day.")

364. See FEINBERG ET AL., *supra* note 4, at 65 (balancing transparency and confidentiality concerns).

able to meaningfully evaluate the competing arguments of whether fund approaches are superior to the litigation system. Nonetheless, as GCCF administrator, Feinberg persists in urging claimants to seek compensation through the GCCF as a better means for resolving their claims.

### *G. Election of Remedies, Waiver, and Release*

The Fund statute famously required that claimants to the Fund relinquish their rights to pursue relief through litigation in the tort system.<sup>365</sup> In the aftermath of the Fund, commentators have variously debated whether this election of remedies requirement constituted a benign paternalism on the part of Congress or rather embodied a stealthy tort reform initiative designed to protect corporate defendants from thousands of tort claims.<sup>366</sup> Without addressing or resolving this debate, it is sufficient for the purpose of comparison to simply note that claimants to the Fund had to elect their remedies.

Several problems arose in the context of the Fund experience regarding the election of remedies. At first, claimants became concerned that the mere filing of a potential claim with the Fund would effectuate election of the Fund remedy and would foreclose a subsequent decision to pursue litigation.<sup>367</sup> Consequently, many potential claimants delayed filing with the Fund out of fear that the

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365. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(c)(2)(A)(ii), (3)(B)(ii), 115 Stat. 230, 239–40 (2001). The Fund compensated only for personal injury and death but required claimants to waive their right to sue for all damages, including property damages. *See* Alexander, *supra* note 5, at 671–72. In discussing the election of remedies feature of ATSA, Professor Ackerman has suggested:

Had the Fund simply been an option that the victims and their families could pursue, it would have been hard to complain about its legal consequences. Instead, the Act forced victims and their families to choose between the Fund and what appeared to be a whittled down tort remedy, thereby adding strength to arguments that the Fund was inadequate in substance or deficient in procedural protections.

Ackerman, *supra* note 8, at 183.

366. *See* Alexander, *supra* note 5, at 672 (“Waiver of tort claims was an essential part of the statutory purpose of protecting the airlines from massive tort liability. . . . [T]he necessity of shielding the airlines from tort liability in excess of their insurance coverage was deemed more important than preserving victims’ right to sue.”).

367. *See In re Sept. 11th Litig.*, No. 21 MC 97 (AKH), 2003 WL 23145579 (S.D.N.Y. Dec. 19, 2003) (mere filing of a preliminary application with the Fund would not constitute an election of remedies or a defense to a claimant’s right to proceed with litigation).

decision might preclude the ability to file a lawsuit.<sup>368</sup> To deal with this problem, Feinberg announced that the mere filing of a claim with the Fund would not preclude a subsequent decision to abandon the Fund claim.<sup>369</sup>

Instead, Feinberg developed a standard by which a Fund award would have to be “substantially complete” in order to trigger the exclusive remedy provision.<sup>370</sup> In this fashion, claimants could decide whether to elect the fund remedy, armed with particularized information concerning the amount of their award. In accepting and finalizing an award, claimants released any and all claims for future compensation as a consequence of the events surrounding the September 11th disaster.<sup>371</sup>

In addition, the Fund’s election of remedies provision also raised statute of limitations problems for Feinberg. Relying on state law statutes of limitation,<sup>372</sup> Feinberg discovered that some local statutes of limitations might expire before potential Fund claimants could decide whether to file a claim with the Fund or with relevant jurisdictions.<sup>373</sup> To avoid the possibility that some claimants might elect judicial remedies in the face of expiring statutes of limitations, Feinberg sought judicial relief from such statutes in order to encourage claimants to participate in the Fund rather than pursue litigation.<sup>374</sup>

In administering the GCCF, Feinberg from the outset made clear that the GCCF would operate in the same fashion as the Fund and require claimants to waive their rights to litigate in the judicial arena.<sup>375</sup> In promoting the GCCF, Feinberg repeatedly has urged claimants to participate in the fund and to forego filing lawsuits in

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368. *Id.*

369. *Id.* at \*2.

370. *Id.*

371. FEINBERG ET AL., *supra* note 4, at 85 (“The Act provides that “[u]pon submission of a claim to the Fund, a claimant waives the right to file a civil action (or to be a party to the action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11th, 2001.”); see Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(c)(3)(B)(i), 115 Stat. 230, 240 (2001).

372. See, e.g., *In re Sept. 11th Litig.*, No. 21 MC 97 (AKH), 2004 WL 1320897 (S.D.N.Y. June 10, 2004) (statute of limitations decision); *In re September 11th Litig.*, 2003 WL 23145579 (same).

373. See *supra* note 372; see also Schneider, *supra* note 19, at 475–76, 480–84 (discussion of problem of statutes of limitation and approaches taken in Fund and litigation).

374. See *supra* note 373.

375. See Lavis, *supra* note 13 (Feinberg implying that claimants will be required to give up their rights to sue to receive full compensation).

the courts,<sup>376</sup> much to the irritation of the plaintiffs' bar.<sup>377</sup> However, a Gulf Coast claimant's waiver of the right to litigate does not apply to emergency payments in the first phase of the GCCF.<sup>378</sup> The waiver is a requirement of a final settlement award.<sup>379</sup>

The GCCF has published a sample of the waiver and release form for final settlement of claims.<sup>380</sup> The GCCF waiver is more far-reaching and extensive than the release used in the Fund; the GCCF release extends to any and all claims arising out of the Deepwater Horizon explosion, spill, and consequent contamination.<sup>381</sup> Public reports have suggested that BP had a hand in drafting and reviewing the nature and scope of the GCCF release,<sup>382</sup> thereby contradicting assertions that BP has played no role in the GCCF's administration.

Although the GCCF release has not yet been subjected to judicial scrutiny, the release would seem to apply to waive claims under an expansive array of statutory and common law causes of action.<sup>383</sup> In addition, the GCCF release includes an Attachment A listing an astonishing number of corporate entities, individuals, and business associations who are released from liability, in addition to BP.<sup>384</sup> As in yet another problem relating to the lack of transparency in implementation of the GCCF, this long list of

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376. See, e.g., Strassel, *supra* note 3 (Feinberg's urging potential claimants to sign up with the GCCF riles tort-law community; tort bar and state Attorneys General raise very legitimate policy issues about releasing BP from liability before all damage from the spill is known).

377. *Id.*

378. See Urbina, *supra* note 109 (discussion of BP's involvement with drafting the settlement waiver and release as early as August 20, 2010).

379. See Dionne Searcey, *Want Part of the BP Fund? Better Be Prepared to Drop Claims*, WSJ BLOGS (Aug. 20, 2010, 2:50 PM), <http://blogs.wsj.com/law/2010/08/20/want-part-of-the-bp-fund-better-be-prepared-to-drop-claims/> (oil spill victims compensated from the fund will have to waive all legal claims against not only BP but other defendants such as rig-owner Transocean; critics howl about how other companies besides BP can be shielded from suit when they are not contributing to the fund).

380. See *GCCF Sample Release and Covenant Not to Sue*, GULF COAST CLAIMS FACILITY, [http://www.gulfcoastclaimsfacility.com/sample\\_release.pdf](http://www.gulfcoastclaimsfacility.com/sample_release.pdf) (last visited Mar. 19, 2011); see also Hammer, *supra* note 192 (harsh criticism of proposed release); Walsh, *supra* note 150 (attorney criticisms of release).

381. See *supra* note 380.

382. Fisher & Hawkins, *supra* note 278 (reporting that Feinberg asked BP to draft releases that exempt BP from any future liability for the spill but not to include other defendants); see Urbina, *supra* note 109.

383. See *Sample Release and Covenant Not to Sue*, *supra* note 380 (Attachment A).

384. See Urbina, *supra* note 109 (reporting on extensive scope of defendants' waiver and release of claims in future litigation).

released entities raises questions concerning why non-parties to the GCCF are included in the release, as well as how these entities came to be included.

Feinberg has yet to address the intersection of federal and local statutes of limitations on various causes of action with the GCCF's final deadlines for filing a final settlement claim with the facility. In addition, the facility's website seems to suggest that claimants may withdraw their claims at any time from the GCCF facility and seek a remedy in the judicial system.<sup>385</sup>

#### *H. The Future Claimant Problem*

Both the Fund and the GCCF have implicated issues relating to future claimants: that is, persons exposed to toxic substances who have not yet manifested injury but may do so in the future. The resolution of future claims has been a central problem in resolving mass tort litigation.<sup>386</sup> Generally, defendants involved in mass tort litigation desire "global peace" or the complete resolution of all current and potential future claims that might be asserted against them.<sup>387</sup> The estimation and valuation of future claims, representation for future claimants, and waiver issues have complicated the resolution of many latent injury mass torts.<sup>388</sup>

The September 11th Victim Compensation Fund made no provision for future claimants.<sup>389</sup> Hence, the only claimants eligible to pursue relief through the Fund consisted of the legal representatives of people who died or were injured in the 24-hour period after the Twin Towers were struck<sup>390</sup> or within 96 hours after the crashes for rescue workers who assisted in efforts to search for and recover victims,<sup>391</sup> including victims at the Pennsylvania and Pentagon sites. Moreover, for the most part, the Fund compensated eligible claimants only for physical injury and

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385. See *GCCF Protocol for Interim and Final Claims*, *supra* note 252 (Section V.D and V.E).

386. See, e.g., George Rutherglen, *Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity*, 88 VA. L. REV. (2002); Rabin, *Indeterminate Future Harm*, *supra* note 15, at 1861–65 (surveying case law on latent injury claims).

387. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

388. See, e.g., *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001).

389. Alexander, *supra* note 5, at 684–85; Eggen, *supra* note 15, at 415–16; Rabin, *Indeterminate Future Harm*, *supra* note 15, at 1850–53.

390. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,242 (Mar. 13, 2002); Rabin, *Indeterminate Future Harm*, *supra* note 15, at 1850–53.

391. 28 C.F.R. § 104.2(b) (2010).

death; the Fund did not compensate for claims of psychological injury or trauma.<sup>392</sup> The Fund also made no provision for the future claims of first responders to the disasters or persons who worked at the disaster sites during the extensive cleanup operations afterwards.<sup>393</sup>

After closure of the Fund, various individuals came forward with classic latent injury claims, chiefly consisting of an array of respiratory impairments alleged as a consequence of exposure to the toxic soup of substances generated when the Twin Towers collapsed and in the months of ensuing site cleanup. Included among these claimants were first responders, construction workers, and individuals who were present in lower Manhattan on September 11th.<sup>394</sup>

Several commentators criticized the Fund for its failure to address the future claimant problem,<sup>395</sup> and the increasing public demands of various affected constituent groups eventually caused Congress to address these claims through legislation enacted in December 2010.<sup>396</sup> Similar to the stated rationale for the original Fund, the 2010 legislation was predicated on the unique events that gave rise to September 11th calamity, coupled with the stated need for a national response to the claims of these affected parties.<sup>397</sup>

The GCCF also has not addressed the issue of future claimants and how future claimants either may be compensated for latent injuries or precluded from seeking recovery for latent injuries because of a waiver and release in a final settlement through the GCCF.<sup>398</sup> Many Gulf Coast workers—especially fisherman and

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392. Alexander, *supra* note 5, at 685 (“There may be other types of injuries that should be compensated as well—people who were held hostage but not physically injured, or persons who were not physically injured but suffered emotional trauma.”); Eggen, *supra* note 15, at 415–16.

393. Alexander, *supra* note 5, at 685; Rabin, *supra* note 15, at 1850–53.

394. See *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 360 (S.D.N.Y. 2003); see also Eggen, *supra* note 15, at 417. See generally Rabin, *Indeterminate Future Harm*, *supra* note 15.

395. Alexander, *supra* note 5, at 685; Eggen, *supra* note 15, at 453–59 (proposing alternative options to address the concerns of victims exposed to toxic substances and dust in similar scenarios to the September 11th events).

396. James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623 (2011) (providing medical monitoring and treatment to responders, residents, building occupants, and area workers who were directly impacted and adversely affected by the September 11th attacks); see also Eggen, *supra* note 15, at 457 (possible legislation to compensate persons exposed to toxic substances).

397. James Zadroga 9/11 Health and Compensation Act of 2010, 124 Stat. 3623.

398. See Cooper, *supra* note 25 (noting long-term effects of spill might be much worse than anticipated, creating problems in the future); Robertson, *supra*

boat owners who were idled after the oil spill—were hired by BP to assist in various cleanup efforts in the Gulf waters and on land.<sup>399</sup> During the cleanup, numerous media stories documented insufficient health and protective measures afforded many cleanup workers.<sup>400</sup> Similar to the claims by September 11th first responders and construction workers, many Gulf Coast cleanup workers complained that they were not supplied with sufficient respirator equipment and other protective gear to insulate against toxic fumes and substances.<sup>401</sup>

Consequently, it is entirely possible that some Gulf Coast claimants who file claims with the GCCF for property and business loss compensation may subsequently manifest future illnesses or disease from exposure to toxic substances because of these claimants' participation in the cleanup efforts. In seeking a final settlement of their claims, GCCF participants are required to sign an all-encompassing waiver and release, which presumably embraces any future personal injury claims.<sup>402</sup> Hence, participation in a final settlement with the GCCF may preclude these claimants from subsequently seeking further recovery.

Gulf Coast claimants, then, are put to a hard choice, as is always the problem with latent injury mass torts. Claimants must choose between accepting current compensation and waiving future recovery or declining immediate payment and preserving the right to pursue relief for future manifestation of injury. Because potential Gulf Coast claimants must file with the GCCF before August 2013, many may not have manifested any latent injury or know the extent of their damages before this deadline. Hence many claimants in desperate need for immediate compensation may

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note 67 (skeptical crowd at bingo hall expresses concern over August 2013 deadline for final settlement of claims; deadline may fall before true extent of damage is known); Schwartz, *supra* note 162 (Feinberg indicating he plans to work with experts to project long-term effects, but noting that most people will accept lump-sum payment once it is offered).

399. Fisher & Hawkins, *supra* note 278 (commenting on potential future claimants).

400. See Dionne Searcey, *Round Two of BP Litigation: The Clean-Up Suits Begin*, WSJ BLOGS (July 20, 2010), <http://blogs.wsj.com/law/2010/07/20/round-two-of-bp-litigation-the-clean-up-suits-begin/> (state suit seeking medical monitoring for volunteers and workers).

401. *Id.* (noting lack of proper gear and respirators for cleanup workers).

402. See, e.g., Strassel, *supra* note 3 (Feinberg's urging potential claimants to sign up with the GCCF riles tort-law community; tort bar and state Attorneys General raise very legitimate policy issues about releasing BP from liability before all damage from the spill is known).

forego relief for future claims, while others may opt out of the process and sue.<sup>403</sup>

Finally, the problem of future latent injury relief is further complicated by notice and due process issues.<sup>404</sup> It is entirely unclear the extent to which GCCF claimants are advised, either by GCCF staffers or by independent attorneys, of the potential waiver of their claims for future latent injury if they seek final settlement of their current claims. The GCCF website is unclear on this issue,<sup>405</sup> and to date, many Gulf Coast claimants have not received independent counsel in seeking interim emergency relief.<sup>406</sup> Again, lack of transparency frustrates efforts to determine whether adequate due process measures are in place to educate Gulf Coast claimants to the full consequences of their election of remedies through the GCCF and the possible forfeiture of future latent injury claims.

### *I. Applicable Law*

The September 11th events as well as the Deepwater Horizon explosion and Gulf oil spill involved claimants from multiple jurisdictions. Consequently, both incidents implicated complicated questions relating to the law that might apply to the victims' subsequent claims. The Fund provided one template for dealing with choice-of-law issues.<sup>407</sup> And, to a somewhat similar extent, in administering the GCCF, Feinberg has loosely followed the choice-of-law decisions he applied in managing the Fund. On the other hand, applicable law problems relating to the Gulf oil spill are much more complicated than for the Fund, and to date, these applicable law problems have not been resolved with any consistent approach.

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403. Robertson, *supra* note 67 (claimants may opt out and sue due to uncertain nature of extent of damage).

404. See Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001).

405. See *Information Regarding Free Legal Assistance*, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/legalassistance> (last visited Mar. 19, 2011).

406. Dionne Searcey, *Oil-Spill Claims Get Fast Track*, WALL ST. J., Dec. 13, 2010, at A2 (Feinberg to announce that "anyone who wants a lawyer to help them sort through new options can have one for free"; "Feinberg plans to hire a firm to offer free legal services"); Dominic Massa, *Feinberg Hires Gulf Coast Law Firms to Assist BP Claims Process*, WWLTV (Dec. 28, 2010), <http://www.wwltv.com/news/local/Feinberg-hires-Gulf-Coast-law-firms-to-assist-BP-claims-process-112554284.html>.

407. See Eggen, *supra* note 15, at 440–43 (citing Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230, 241 (2001)).

The statute authorizing creation of the Fund embodied two different approaches to the choice-of-law problems inherent in the September 11th events, with one choice-of-law regime for persons who elected compensation through the Fund and another for claimants who elected to seek relief through litigation in the court system.<sup>408</sup> Persons who died or were injured in the World Trade Center Towers, the Pentagon, or the United Airlines crash in Pennsylvania came from a number of different states and countries.<sup>409</sup> A large number of victims who died in the World Trade Center building collapses came from the New York, New Jersey, and Connecticut metropolitan area.<sup>410</sup> Similarly, victims of the Pentagon attack were concentrated in the Washington, D.C. metropolitan area, embracing claimants from Virginia, Maryland, and the District of Columbia.

In administering the Fund, then, Feinberg conceivably faced the resolution of personal injury and wrongful death claims pursuant to the laws of many jurisdictions.<sup>411</sup> The Fund enabling legislation did not mandate any choice-of-law principles to guide Feinberg's implementation of the Fund.<sup>412</sup> Because the overriding purpose of the Fund was to remove victims' claims from the tort litigation system and provide expeditious resolution, it made no sense to complicate the administration of the Fund by the application of different legal standards depending on where claimants were from or the happenstance of their presence at a particular disaster site. Therefore, Feinberg was given relatively free rein to design a compensation model without being tethered to any state's legal principles.

During Feinberg's administration of the Fund, commentators and claimants frequently raised the issue of what law would apply to resolve various issues relating to the design and implementation of the Fund,<sup>413</sup> including but not limited to eligibility criteria, statutes of limitation,<sup>414</sup> claim valuation, collateral sources, and award allocation among competing claimants. In response to these various challenges, Feinberg responded that he would be guided

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408. See Air Transportation Safety and System Stabilization Act § 408(b)(2), 115 Stat. at 241; FEINBERG ET AL., *supra* note 4, at 3–13.

409. FEINBERG ET AL., *supra* note 4, at 1–2, 54–55.

410. *Id.* at 55; Alexander, *supra* note 5, at 630 n.7; Eggen, *supra* note 15, at 387–89.

411. See, e.g., Chamallas, *supra* note 5, at 63–67 (describing the varying states' laws relating to the status of unmarried and same-sex couples).

412. See Air Transportation Safety and System Stabilization Act § 408(b)(1), 115 Stat. at 240–41; FEINBERG ET AL., *supra* note 4, at 3–4.

413. See Schneider, *supra* note 19, at 480–84 (statutes of limitation issues).

414. *Id.*

by, but not bound by, state law principles.<sup>415</sup> In some instances—for example with regard to award allocation issues—Feinberg refused to resolve the problem at all but instead admonished Fund recipients to litigate such disputes in state court pursuant to state legal standards.<sup>416</sup>

During the course of Fund proceedings, Feinberg never clearly indicated which states' laws he relied on in making his various decisions affecting the Fund's standards and administration.<sup>417</sup> In the end, in an exercise not unlike the creation of federal common law, Feinberg essentially created his own common law standards to govern implementation of the Fund, based loosely on unidentified principles and precedents.<sup>418</sup>

The Fund's enabling statute more clearly resolved the applicable law issue for those persons who chose litigation in the court system.<sup>419</sup> Hence, the enabling statute mandated that any lawsuits arising out of the September 11th events were required to be brought in the U.S. District Court for the Southern District of New York<sup>420</sup> and further mandated that applicable law would be the law of the state in which the crash occurred, unless it was inconsistent with or preempted by federal law.<sup>421</sup> Although providing clarity to prospective claimants, the statutory limitation of litigants' choice of venue and law also cabined conventional litigation strategy and served as an additional deterrent to electing

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415. See, e.g., Feinberg, *supra* note 9, at 22 (referring to the fact that in calculating economic loss he vaguely would look to general principles of state tort law: "That is simply tort law, a surrogate for what juries in St. Louis do every day.").

416. For example, Feinberg refused to decide allocation issues among contending family members, instead telling them that they would have to resolve such disputes in state court. See FEINBERG ET AL., *supra* note 4, at 56–57.

417. See, e.g., Chamallas, *supra* note 5, at 75–76 (noting that the availability of survival damages differs among states); Conk, *supra* note 24, at 186 ("Rather there was a sense of rough equity, informed by tort and by legislative reference points . . ."); Walker, *supra* note 15, at 602–03 (describing how Feinberg departed from state law in defining who was an eligible personal representative to receive an award from the fund: "Unlike the states, the Fund combined the roles of the Personal Representative and beneficiary.").

418. See Chamallas, *supra* note 5, at 59.

419. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230, 241 (2001); see Alexander, *supra* note 5, at 673–74; Eggen, *supra* note 15, at 440–43; Kreindler & Alexander, *supra* note 267.

420. Air Transportation Safety and System Stabilization Act § 408(b)(2), 115 Stat. at 241.

421. *Id.*; see also Eggen, *supra* note 15, at 440–43.

the litigation option.<sup>422</sup> Pursuant to this statutory mandate, the lawsuits of the claimants who elected the litigation option were consolidated in the Southern District of New York, subject to the case management of Judge Alvin Hellerstein under New York law.<sup>423</sup>

In contrast, the GCCF was created pursuant to only vague and ambiguous statutory authority under the OPA—questionably if at all—and therefore which federal or state legal rules apply in the administration of the GCCF fund has been equally murky.<sup>424</sup> Relying on a page from his Fund playbook, however, Feinberg has indicated in media interviews that the standards and criteria governing implementation of the GCCF would be derived with reference to state law.<sup>425</sup> The protocol for emergency advance payments merely stated that the GCCF would evaluate all claims “guided by applicable law.”<sup>426</sup> And, similar to his administration of the Fund, Feinberg has not yet clarified what state law, if any, he is applying in his administration of the GCCF.

The applicable law problem in the context of the Gulf Coast disaster, moreover, is much more complicated than the legal landscape presented by the September 11th events. Unlike the September 11th claims, no statute determines applicable law for those Gulf Coast claimants who elect litigation remedies, and therefore applicable law in the litigated cases will be determined by an MDL court presiding over the consolidated lawsuits.<sup>427</sup> Moreover, the Gulf Coast disaster implicates a broader array of possible federal and state statutory claims, including claims under

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422. See Berkowitz, *supra* note 18, at 24–26, 29 (analyzing how ATSA served as a deterrent to litigation).

423. See Conk, *supra* note 24, at 188–89 (describing array of September 11th cases assigned to Judge Hellerstein).

424. GULF COAST CLAIMS FACILITY, *supra* note 62.

425. See Baxter, *supra* note 349 (citing his 9/11 experience, stating that he would look to state law where a claimant lives to determine applicable law); King, *supra* note 76 (indicating that Feinberg stated that he would turn to state law for guidance on which types of claims to honor and which to dismiss); Fifield, *supra* note 144 (citing September 11th experience; indicating that Feinberg would look to state law to recognize claims; commenting on how he might deal with different states’ laws); Fisher & Hawkins, *supra* note 278 (Feinberg indicating he plans to rely on state tort principles); see, e.g., King, *supra* note 107 (Feinberg suggesting that deductions for BP cleanup payments were not unusual under state law); Strassel, *supra* note 3 (suggesting that payout rules would be broadly based on federal oil-spill law and Gulf state tort law).

426. GULF COAST CLAIMS FACILITY, *supra* note 62.

427. The MDL court determines applicable law for the cases transferred and consolidated before it. See, e.g., *Menowitz v. Brown*, 991 F.2d 36 (2d Cir. 1993); *In re Lou Levy & Sons Fashions, Inc.*, 988 F.2d 311 (2d Cir. 1993).

the OPA,<sup>428</sup> securities laws,<sup>429</sup> the Jones Act,<sup>430</sup> various federal environmental statutes,<sup>431</sup> general maritime law, as well as state common law causes of action.<sup>432</sup>

The breadth of potential bases for recovery in the Gulf Coast disaster, then, has bearing on a claimant's evaluation of the election of remedies. Unlike the Fund, which involved only personal injury and death claims, Gulf Coast victims conceivably have multiple theories of recovery for an assortment of personal, property, business, contract, tort, and environmental injuries. Several securities lawsuits also have been filed as a consequence of the BP disaster.<sup>433</sup> There are compelling reasons, then, why Gulf Coast claimants might sensibly choose to litigate their claims rather than seek an award from the GCCF.<sup>434</sup>

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428. Feinberg sought the expert advice of Professor John C.P. Goldberg concerning limitations of recovery under the OPA and parallel state laws. *See* John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill* 3, 48 (Nov. 22, 2010), *available at* <http://dash.harvard.edu/handle/1/4595438>. Professor Goldberg concluded that under the OPA and parallel state laws, only some economic losses were recoverable from those responsible for the spill. *Id.* at 48. Thus, to recover under the OPA for economic losses caused by the spill, a claimant must establish that his or her loss was due to damage or loss of property or resources, which damage or loss prevents the claimant from exercising the right to put that property or those resources to commercial use. *Id.* *But see* Walsh, *supra* note 150 (noting that hotel groups might attempt to "sue BP rather than go through the claims process," but that Feinberg believed they "[would not] have much luck," relying on the expert opinion of Professor John C.P. Goldberg of Harvard Law School regarding applicable law).

429. *See In re BP, PLC Sec. Litig.*, No. 10-md-2185, 2010 WL 5343465 (S.D. Tex. Dec. 28, 2010); Fisher & Hawkins, *supra* note 278 (commenting on securities cases).

430. 46 U.S.C. § 30104 (Supp. 2009); *see* Christopher Bauer, *Injured Deepwater Horizon Oil Rig Workers and Widow File Jones Act Personal Injury and Wrongful Death Lawsuit Against BP in Galveston*, LEXISNEXIS COMMUNITIES (May 6, 2010), [http://www.lexisnexis.com/Community/emerging\\_issues/blogs/gulf\\_oil\\_spill/archive/2010/05/06/injured-deepwater-horizon-oil-rig-workers-and-widow-file-jones-act-personal-injury-and-wrongful-death-lawsuit-against-bp-in-galveston.aspx](http://www.lexisnexis.com/Community/emerging_issues/blogs/gulf_oil_spill/archive/2010/05/06/injured-deepwater-horizon-oil-rig-workers-and-widow-file-jones-act-personal-injury-and-wrongful-death-lawsuit-against-bp-in-galveston.aspx).

431. *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006).

432. *See* Paul H. Rubin, *A Gulf Spill Tort Primer*, WALL ST. J., Aug. 2, 2010, at A11 (analyzing possibly applicable tort law; arguing little justification for limiting economic or punitive damages).

433. *In re BP, PLC Sec. Litig.*, 2010 WL 5343465; Fisher & Hawkins, *supra* note 278 (securities cases).

434. *But see* Walsh, *supra* note 150 (noting that hotel groups might attempt to sue BP rather than go through the claims process, but that Feinberg believed they would not have much luck, relying on the expert opinion of Professor John C.P. Goldberg of Harvard Law School regarding applicable law).

Finally, the embedded applicable law problems in relation to the GCCF raise important questions concerning the adequacy of notice that GCCF claimants receive about applicable law in making an informed decision about their election of remedies, as well as implications in agreeing to a comprehensive release upon a GCCF final settlement.

### *J. Assistance of Counsel*

A much-noted and admired attribute of the Fund was the reaction of the plaintiffs' bar to the September 11th events.<sup>435</sup> In the immediate aftermath of the disaster, the leading organization of the plaintiffs' bar, the Association of Trial Lawyers of America (ATLA), notified its membership and requested that plaintiffs' attorneys not exploit the tragic events as an opportunity to solicit potential clients.<sup>436</sup> One day after the disaster, ATLA issued a call for a moratorium on all lawsuits.<sup>437</sup> This organizational self-restraint by ATLA stood in marked contrast to the reaction of the plaintiffs' bar in the aftermath of the mass toxic disaster at the Union Carbide plant in India,<sup>438</sup> when hundreds of American lawyers descended on the scene in an attempt to retain as many clients as possible—which solicitation brought considerable worldwide disrepute on the American bar.<sup>439</sup>

Not only did ATLA immediately counsel restraint among its membership after September 11th, but ATLA also sponsored an enormous effort to organize the voluntary participation of hundreds of attorneys in providing legal assistance to claimants who wished to pursue compensation through the Fund.<sup>440</sup> ATLA incorporated the "Trial Lawyers Care" (TLC) program to provide pro bono

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435. See FEINBERG ET AL., *supra* note 4, at 70–73.

436. Peck, *supra* note 8, at 214–25.

437. *Id.* at 214; see also Carrie Johnson, *Lawyers Group Wants Moratorium on Attack Lawsuits*, WASH. POST, Sept. 14, 2001, at E3; Abdon M. Pallasch, *For Once, Lawyers Reluctant to Sue: Victims' Relatives Seek Legal Action, but Moratorium Urged*, CHI. SUN-TIMES, Sept. 17, 2001, at 22. Robert Peck notes that the moratorium held for a long time and was only breached by a handful of lawsuits. See Peck, *supra* note 8, at 215.

438. See generally DAVID WEIR, *THE BHOPAL SYNDROME: PESTICIDES, ENVIRONMENT, AND HEALTH* (1987).

439. See David T. Austern, *Is Lawyer Solicitation of Bhopal Clients Ethical?*, LEGAL TIMES, Jan. 21, 1985, at 16; Deborah L. Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 322 (1986) (California trial lawyers vote to censure attorneys who solicited clients in the wake of the Bhopal disaster).

440. Peck, *supra* note 8, at 225–26.

representation to victims before the Fund.<sup>441</sup> The TLC opened offices in New York and trained hundreds of volunteer attorneys to represent victims.<sup>442</sup>

Feinberg welcomed the participation of these voluntary attorneys, who assisted any claimant who desired an attorney to help prepare the paperwork necessary in filing a claim.<sup>443</sup> From the outset of his efforts, Feinberg widely publicized the availability of free counsel to any potential Fund claimant who desired an attorney. Feinberg stressed the fact that no potential claimant would go without counsel if they desired an attorney.<sup>444</sup> Feinberg's Final Report to Congress documented the thousands of hours of pro bono work performed by voluntary attorneys in assisting Fund claimants.<sup>445</sup> In addition to the ATLA attorneys, Feinberg worked pro bono and also contributed the assistance of the attorneys at his firm, which recouped only its expenses in implementing the Fund.<sup>446</sup>

Apart from the attorneys who acted pro bono on behalf of claimants, at least some plaintiffs' attorneys undertook representation of claimants who rejected compensation through the Fund and instead decided to pursue litigation. The role of the assistance of counsel, as well as the outcomes in the litigated cases, is discussed below. However, it is significant to note that, for the most part, the plaintiffs' bar eschewed a campaign to discourage victims from pursuing relief through the Fund. Very few plaintiffs' attorneys attempted to dissuade claimants from filing with the Fund, or attempted to persuade claimants to file lawsuits in the civil justice system instead.<sup>447</sup>

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441. See FEINBERG ET AL., *supra* note 4, at 71; Peck, *supra* note 8, at 225; see also Steenson & Saylor, *supra* note 14, at 548–49.

442. See FEINBERG ET AL., *supra* note 4, at 5.

443. But see Diller, *supra* note 15, at 762–65, which analyzes the role of pro bono and non-pro bono attorneys in assisting claimants in the Fund, critically suggesting that Feinberg's controversial role in administering the Fund created a "market for expertise" in the operation of the Fund, which benefitted some claimants but not others. In addition, Diller critically notes that attorneys with personal relationships to Feinberg were able to trade on those connections favorably for the persons they represented. See also Schneider, *supra* note 19, at 477 (Feinberg's unbridled discretion lead to perceptions of unfairness: "It leads to a sense that he will make individualized 'deals,' and indeed, he does. Lawyers can claim to trade on 'insider' access to, or contact with, him.").

444. But see Schneider, *supra* note 19, at 479 (suggesting that the Fund's processes actually were very complex and intimidating, requiring not only lawyers to assist them, but also economists in many cases).

445. FEINBERG ET AL., *supra* note 4, at 71.

446. *Id.*

447. See *supra* notes 435–36 and accompanying text (discussion of plaintiffs' attorneys' role in aftermath of September 11th events).

The Deepwater Horizon explosion presents a striking contrast regarding the role of attorneys in pursuing relief for the victims of the Gulf Coast disaster. First, the organized plaintiffs' bar did not issue any communiqué counseling restraint in the aftermath of the oil spill events, similar to ATLA's public pronouncement after September 11th. Second, the plaintiffs' bar did not organize to provide voluntary, pro bono assistance to any claimant requesting legal advice in navigating the requirements to seek emergency or final awards in the GCCF. And third, the plaintiff's bar has, since June 2010, publicly protested various actions by the GCCF and Feinberg in implementing the facility.<sup>448</sup>

In addition, in the early days of the GCCF, Feinberg publically stated that claimants would not need lawyers to help them navigate the claims process<sup>449</sup> and consistently has urged potential claimants to seek awards from the GCCF.<sup>450</sup> In response to Feinberg's seeming discouragement of retaining counsel, and in contrast to the Fund experience, many plaintiffs' attorneys have publicly advocated that Gulf Coast victims not seek relief through the GCCF.<sup>451</sup> In addition, as discussed above, attorneys involved in the

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448. See Dionne Searcey, *The Gulf Oil Spill: BP Claims Pool Is Frustrating Lawyers*, WALL ST. J., July 1, 2010, at A8; Pacenti, *supra* note 139 (various complaints about Feinberg); cf. Editorial, *Mr. Feinberg and the Gulf Settlement*, N.Y. TIMES, Aug. 30, 2010, at A18, available at <http://nytimes.com/2010/08/30/opinion/30mon1.html> (critical of private attorneys' actions as against the GCCF); *Gulf Claims Piñata*, WALL ST. J., Nov. 26, 2010, available at <http://online.wsj.com/article/SB10001424052748704243904575631010234155400.html> (plaintiffs' attorneys' criticism of Feinberg and his administration of the GCCF).

449. Baxter, *supra* note 349 (Feinberg indicating that "this will be a very transparent process where you will walk into one of numerous offices strewn throughout the gulf, file a claim, even electronically online if you want, and we will immediately be able to process that claim."); *BP Fund Will Be Generous*, *supra* note 7 (Feinberg indicating it would not be necessary to hire an attorney because his office will have attorneys on staff to provide free legal services).

450. Schwartz, *supra* note 162 (reporting Feinberg's urging claimants to sign up: "It's my opinion you are crazy if you don't participate."; discouraging potential claimants from litigation because of years of uncertainty in the courts and "big cut for the lawyers"); see also *BP Creates Special Team*, *supra* note 64 (reporting that BP was encouraging businesses to contact their adjuster or BP to process claims); Strassel, *supra* note 3 (Feinberg stating that the overall message is this: "If we're not going to pay, nobody's going to pay. That's my philosophy on this thing."); Robertson & Schwartz, *supra* note 113 (Feinberg announcing that lawyers around the country can play an important role in the GCCF by helping claimants package their claims).

451. See Amanda Bronstad, *Plaintiffs Lawyers Say Oil Spill Fund Unlikely to Deter Litigation*, LAW.COM (Aug. 30, 2010), [http://www.law.com/jsp/article.jsp?id=1202471227241&Plaintiffs\\_Lawyers\\_Say\\_Oil\\_Spill\\_Fund\\_Unlikely\\_to\\_](http://www.law.com/jsp/article.jsp?id=1202471227241&Plaintiffs_Lawyers_Say_Oil_Spill_Fund_Unlikely_to_)

parallel Gulf Coast multidistrict litigation successfully enjoined Feinberg from advocating that victims of the Gulf Coast oil spill seek relief exclusively through the GCCF.<sup>452</sup> No similar efforts were made to enjoin Feinberg in his administration of the Fund.

Building on his experience in administering the Fund, Feinberg has made several efforts to enlist the assistance of voluntary attorneys to assist claimants who wish to file with the GCCF.<sup>453</sup> Unlike the Fund experience, though, few attorneys have been enlisted to supply pro bono legal assistance to Gulf claimants.<sup>454</sup> Against the backdrop of this failure, Feinberg has made repeated public announcements that the GCCF would provide counsel to any person needing legal assistance.<sup>455</sup> It is uncertain the extent to which this promise has been fulfilled,<sup>456</sup> and media reports indicate that many claimants have filed for benefits without the assistance of counsel, because many victims cannot afford to hire an attorney, and the GCCF has not made counsel available to them.<sup>457</sup> In late Fall 2010, Feinberg announced that the GCCF would be retaining the assistance of several private law firms to assist claimants,

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Deter Litigation (describing plaintiffs' attorneys' views on the GCCF versus the litigation option).

452. Order and Reasons, *supra* note 275 (granting plaintiffs' motion to supervise ex parte communications with putative class); see Hals, *supra* note 275; Schwartz, *supra* note 275; Skoloff & Weber, *supra* note 275.

453. See Hammer, *supra* note 192 (Feinberg's desire for network of national attorneys to assist claimants).

454. *Id.* (Feinberg stating that "national legal organizations have not stepped up to the plate").

455. *BP Fund Will Be Generous*, *supra* note 7 (Feinberg indicating it would not be necessary to hire an attorney because his office will have attorneys on staff to provide free legal services); see also Schwartz, *supra* note 191 (reporting that Feinberg's team would make free legal advice available and would add staff at local centers for the fund to help people fill out their forms for final claims).

456. See *Gulf Coast Claims Facility Announces Next Phase of the Compensation Program for Victims of the BP Oil Spill*, GULF COAST CLAIMS FACILITY (Dec. 13, 2010), <http://www.gulfcoastclaimsfacility.com/pressB.php> [hereinafter *Next Phase*] (announcing program for free legal assistance would be made available soon and made available to any claimant seeking help).

457. See David Hammer, *Most BP Oil Spill Claimants Opt for One-Time 'Quick Payment'*, NOLA.COM (Jan. 26, 2011), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/most\\_bp\\_oil\\_spill\\_claimants\\_op.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/most_bp_oil_spill_claimants_op.html) (fewer than 3% of those filing claims had attorneys); Moira Herbst, *BP Claims Process Enters New, Uncertain Phase*, REUTERS (Feb. 10, 2011), <http://www.reuters.com/article/2011/02/10/us-oilspill-feinberg-idUSTRE71933X20110210> (same); Tracy X. Miguel, *Naples Business Owner Says She'll Have to Live in Truck After BP Denies Her Claim*, NAPLESNEWS.COM (Dec. 14, 2010), <http://www.naplesnews.com/news/2010/dec/14/naples-business-live-truck-bp-denies-claim-candi/>.

presumably on a paid basis. However, the details of these arrangements with private firms to supply assistance of counsel to claimants have not been publicly disclosed, signifying yet another aspect of GCCF administration that is lacking in transparency.<sup>458</sup>

One of the major factors justifying the September 11th Victim Compensation Fund as a preferable means for resolving mass tort claims was the fact that a claimant's compensation would not be diminished by a sizeable attorney-fee award.<sup>459</sup> This rationale justifying the preference for a fund solution to mass disaster remediation has been undermined by developments in the GCCF. Thus, in late January 2011, several plaintiffs' attorneys in the Gulf region broke ranks with the MDL plaintiffs' attorneys and changed course, publicly urging Gulf Coast claimants to seek compensation through the GCCF.<sup>460</sup>

These attorneys have indicated their willingness to represent residents and businesses in seeking GCCF awards, based on contingent fee arrangements for this representation.<sup>461</sup> This has pitted one segment of the plaintiffs' bar against the MDL attorneys. And, in contrast to the Fund where plaintiffs' attorneys worked pro bono and did not charge the claimants fees for assistance with making a Fund claim, the Gulf attorneys undertaking representation for GCCF awards will charge a percentage of a claimants' recovery from their GCCF award. Hence, at least one major justification for the superiority of fund resolution of claims is not present for the GCCF claimants who elect such representation.

#### *K. The Litigation Option*

Although 97% of eligible claimants elected compensation relief through the Fund, 3% of claimants retained private counsel

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458. See *Next Phase*, *supra* note 456.

459. Diller, *supra* note 15, at 764; Steenson & Sayler, *supra* note 14, at 937–38; see also September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,280 (Dec. 21, 2001) (indicating that contingency fee arrangements for attorneys representing claimants before the Fund, “exceeding 5% of a claimant’s recovery from the Fund would not be in the best interest of the claimants”).

460. Dionne Searcey, *Oil-Spill Lawyers Urge Clients to Settle*, WALL ST. J. (Jan. 28, 2011), <http://online.wsj.com/article/SB10001424052748703399204576108383134596432.html> (group of lawyers redirect dozens of claimants to BP Fund).

461. *Id.*; Dionne Searcey, *Alliance of Lawyers to Feinberg: We'll Take It*, WSJ BLOGS (Jan. 28, 2011, 11:53 AM), <http://blogs.wsj.com/law/2011/01/28/alliance-of-lawyers-to-feinberg-well-take-it/>.

and pursued litigation arising out of the September 11th events.<sup>462</sup> In all, 95 suits were filed, seeking recoveries for 96 claimants. The suits were filed in the Southern District of New York and were consolidated before Judge Alvin K. Hellerstein.<sup>463</sup> Seventy-six of these cases ultimately settled; only one unresolved September 11th lawsuit remains and is scheduled go to trial in June 2011.<sup>464</sup> Thirteen lawsuits settled quickly,<sup>465</sup> and the remaining 82 cases were settled through the auspices of experienced mass tort litigator Sheila Birnbaum, who Judge Hellerstein appointed to serve as a mediator to resolve these remaining suits.<sup>466</sup> In order to spur settlement of the lawsuits, Judge Hellerstein ordered bifurcated bellwether trials.<sup>467</sup>

In his administration of the September 11th cases, Judge Hellerstein kept a fairly tight rein over the advocacy efforts of the plaintiffs' lawyers. In concert with Feinberg, and as a condition of continuing litigation, Judge Hellerstein required that all individual plaintiffs discuss with their attorneys the alternative remedy in the Fund and to weigh the risks and transaction costs of proceeding in the litigation process.<sup>468</sup>

The victims who elected the litigation option had some advantages in comparison to pursuing relief through the Fund option.<sup>469</sup> For example, in filing their lawsuits, the plaintiffs' attorneys were able to identify a universe of defendants not relevant to the Fund's settlement of claims. Thus, the plaintiffs' attorneys named as defendants the security firms at the airports where the terrorists had boarded the aircraft, the building architects and firms involved in the design and construction of the World

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462. See FEINBERG ET AL., *supra* note 4, at 1.

463. *In re Sept. 11th Litig.*, 600 F. Supp. 2d 549 (S.D.N.Y. 2009) (upholding exclusive jurisdiction of Southern District of New York as remedy for damages arising out of September 11th terrorist attacks). For a description of the array of types of cases consolidated in Judge Hellerstein's court, see Conk, *supra* note 24, at 189.

464. Moynihan, *supra* note 362.

465. *In re Sept. 11th Litig.*, 600 F. Supp. 2d at 553; *id.* at 555–63 (mediator's report).

466. See *id.* at 553; *id.* at 555–63 (mediator's report); see also Mark Hamblett, *9/11 Mediator Wraps Up Work; Only 3 Cases Left Unsettled*, LAW.COM (Mar. 6, 2009), <http://www.law.com/jsp/article.jsp?id=1202428837458&slreturn=1&hbxlogin=1>.

467. *In re Sept. 11th Litig.*, No. 21 MC 97 (AKH), 2007 WL 1965559 (S.D.N.Y. July 5, 2007).

468. BRILL, *supra* note 262, at 537; Berkowitz, *supra* note 18, at 27; Geyelin, *supra* note 263.

469. Ackerman, *supra* note 8, at 186–88; Rabin, *supra* note 11, at 586–87 (weighing the relative risks and benefits of the litigation option, including no collateral source offsets and the possibility of punitive damage recovery).

Trade Center Towers, the Port Authority, the owners of the World Trade Center Towers, and numerous other defendants.<sup>470</sup> In an interim MDL ruling, Judge Hellerstein upheld the designation of these entities as legitimate defendants, thereby strengthening the plaintiffs' litigation posture.<sup>471</sup> Judge Hellerstein also issued an interim order to enable discovery from the Transportation Security Administration.<sup>472</sup> Judge Hellerstein's orders also spurred the settlement of several lawsuits on his September 11th docket.<sup>473</sup>

In addition, the collateral source rule did not apply to reduce claimants' awards by the amount provided through these benefits. In theory, then, victims who chose the litigation option received both a settlement award and were able to retain their collateral source benefits.

On the other hand, the claimants who elected civil litigation were constrained by certain factors that had no relevance to those who elected compensation through the Fund and that also would not ordinarily constrain civil tort litigation.<sup>474</sup> Thus, the Fund enabling statute limited the litigation plaintiffs' choice of venue to the federal district court in New York City and also limited the applicable law.<sup>475</sup> In addition, the litigation plaintiffs had to pay attorneys' fees, and thus their settlement awards were reduced by this transaction cost, which was not a factor for Fund claimants. Finally, the resolution of the civil litigation plaintiffs' lawsuits took longer to resolve by settlement than if they had elected to receive compensation from the Fund.<sup>476</sup>

In addition, Judge Hellerstein reviewed the individual proposed settlements, to assure consistency with previous awards.<sup>477</sup> In at least four holdout cases, Judge Hellerstein rejected agreed-upon

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470. *But see* Ackerman, *supra* note 8, at 185–86 (suggesting that a finding of negligence on the part of the airlines, security firms, airports, or aircraft manufacturers was anything but certain in the private litigation).

471. *In re* Sept. 11th Litig., 280 F. Supp. 2d 279, 289 (S.D.N.Y. 2003); *see also* *In re* Sept. 11th Litig., No. 21 MC 97 (AKH), 2004 WL 1320897 (S.D.N.Y. June 10, 2004) (denying defendants' motions to dismiss pursuant to the waiver provision of ATSA); Ackerman, *supra* note 8, at 188 (“Still, by surviving the motions to dismiss, the plaintiffs had surmounted a significant hurdle in the [section] 408 litigation.”); Conk, *supra* note 24, at 212.

472. *In re* Sept. 11th Litig., 236 F.R.D. 164 (S.D.N.Y. 2006).

473. Conk, *supra* note 24, at 213; *see also* *In re* Sept. 11th Litig., 600 F. Supp. 2d 549 (S.D.N.Y. 2009).

474. Ackerman, *supra* note 8, at 183.

475. *In re* Sept. 11th Litig., 600 F. Supp. 2d 549 (upholding exclusive jurisdiction of Southern District of New York as remedy for damages arising out of September 11th terrorist attacks).

476. The last mediated case was resolved in March 2009; the remaining jury trial case is scheduled for June 2011.

477. *See* *In re* Sept. 11th Litig., 600 F. Supp. 2d 549.

settlements that he believed provided for excessive awards and attorneys' fees that were inconsistent with previous awards and settlements.<sup>478</sup> The parties involved in these rejected settlements renegotiated and reduced the settlements terms to Judge Hellerstein's final satisfaction.<sup>479</sup>

As indicated above, Judge Hellerstein in his court opinions<sup>480</sup> and mediator Birnbaum in her report to the court<sup>481</sup>—citing privacy concerns—both declined to divulge any information relating to the valuation of individual settlement awards.<sup>482</sup> Also citing privacy concerns, Feinberg's Final Report to Congress only indicates aggregate settlement valuations, rather than individual awards.<sup>483</sup> Consequently, there is no available data to evaluate whether claimants who elected to retain counsel and pursue litigation in the aftermath of the September 11th disaster received a financially more favorable outcome than claimants who elected relief through the Fund.<sup>484</sup>

At this writing, the alternative litigation options for Gulf Coast claimants who choose not to seek remediation through the GCCF are relatively immature and undeveloped. The litigation landscape, however, is much more complicated than the single litigation track that developed after the September 11th events. In turn, Feinberg has actively discouraged potential claimants from pursuing litigation.<sup>485</sup>

With regard to the Gulf Coast explosion and oil spill, there are at least three simultaneous litigation tracks underway. The Judicial Panel on Multidistrict Litigation finally approved a Gulf Oil Spill

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478. *In re Sept. 11th Litig.*, 567 F. Supp. 2d 611 (S.D.N.Y. 2008) (rejecting \$28.5 million settlement and disapproving \$7,125,000 in contingent attorney fees).

479. *See In re Sept. 11th Litig.*, 600 F. Supp. 2d 549.

480. *See id.*; *In re Sept. 11th Litig.*, 567 F. Supp. 2d 611; *In re Sept. 11th Litig.*, No. 21 MC 97 (AKH), 2007 WL 1965559 (S.D.N.Y. July 5, 2007); *In re Sept. 11th Litig.*, 236 F.R.D. 164 (S.D.N.Y. 2006); *In re Sept. 11th Litig.*, No. 21 MC 97 (AKH), 2004 WL 1320897 (S.D.N.Y. June 10, 2004); *In re Sept. 11th Litig.*, 280 F. Supp. 2d 279, 289 (S.D.N.Y. 2003).

481. *In re Sept. 11th Litig.*, 600 F. Supp. 2d at 555–63 (mediator's report).

482. *See id.* at 553; *id.* at 555–63 (mediator's report).

483. *See FEINBERG ET AL.*, *supra* note 4, at 64–65.

484. In spite of the absence of comparative data, one commentator nonetheless maintains that the option of electing the Fund remedy was preferable to pursuing litigation in the tort system. *See Ackerman, supra* note 8, at 190–91 (“Even so, measured against the likely (rather than theoretical) outcome of a conventional tort action, even absent the constraints of [the MDL litigation], the Fund looks like an excellent option for the overwhelming majority of eligible claimants.”).

485. Schwartz, *supra* note 162 (discouraging claimants from litigation because of uncertainty, delay, and attorney's fees).

MDL and transferred and consolidated all oil spill-related cases in federal district court in Louisiana.<sup>486</sup> In January 2011, presiding Judge Barbier selected the lead counsel's committee to represent and develop the litigation.<sup>487</sup> The Louisiana MDL does not include securities class actions, which have been transferred to the federal district court in Houston, Texas, for adjudication.<sup>488</sup> In addition to these lawsuits, the Gulf State Attorneys General anticipate filing litigation asserting governmental claims for various damage to the Gulf States, pursuant to an array of environmental statutes and common law theories.<sup>489</sup> In addition, the federal government has under consideration its own legal actions, including the possibility for criminal violations arising from the Deepwater Horizon explosion and oil spill.<sup>490</sup>

In addition to the collection of different pending litigation, the lawsuits relating to the Deepwater Horizon events implicate complicated federalism issues, a significant array of federal and state statutory and common law claims,<sup>491</sup> multiple defendants, and complicated choice-of-law problems. Unlike the September 11th experience, the litigation arising out of the Gulf Coast events is not statutorily cabined to one venue and one applicable law. Nor is it likely that one federal judge will oversee resolution of all pieces of Gulf Coast litigation relating to these claims, as Judge Hellerstein

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486. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, 731 F. Supp. 2d 1352 (J.P.M.L. 2010) (transfer order). BP's choice of forum was Houston. See John Schwartz, *U.S. Judge in New Orleans Will Hear Gulf Spill Cases*, N.Y. TIMES, Aug. 11, 2010, at A11, available at <http://www.nytimes.com/2010/08/11/us/11liability.html> (creation of MDL and transfer to New Orleans); Jones, *supra* note 274 (creation of Oil Spill MDL and transfer to federal court in New Orleans; assigned to Federal Judge Carl Barbier; viewed as plaintiffs' attorneys' victory).

487. See Dionne Searcey, *Modesty Is Out as Lawyers Vie for Key Spots in BP Suit*, WALL ST. J., Sept. 28, 2010, at A9 (hundreds of attorneys competing for selection for leadership posts in the MDL and its steering committees); Brian Baxter, *David Boies Seeks BP Litigation Role*, AMLAW DAILY (Sept. 28, 2010, 5:57 PM), <http://amlawdaily.typepad.com/amlawdaily/2010/09/david-boies-bp.html>.

488. *In re BP PLC Sec. Litig.*, 734 F. Supp. 2d 1376 (J.P.M.L. 2010) (transfer order).

489. Evan Perez & Dionne Searcey, *New Party to Suits in Gulf Spill: The U.S.*, WALL ST. J., Dec. 15, 2010, at A18 (commenting on state Attorneys General's suits); see also Dionne Searcy, *New Alabama AG Boots Oil-Spill Lawyers, Will Handle on His Own*, WALL ST. J., Jan. 27, 2010.

490. Perez & Searcey, *supra* note 489 (Justice Department expected lawsuits under environmental protection statutes); John Schwartz, *U.S. Sues BP and Others for Damages in Gulf Spill*, N.Y. TIMES, Dec. 16, 2010, at A30 (Department of Justice criminal investigation).

491. See Meier, *supra* note 40 (commenting on plaintiffs' attorneys turning down compelling potential cases because of statutory limitations on recovery).

did in managing the September 11th litigation. Indeed, Judge Barbier has signaled his willingness to rein in Feinberg and his staff when appropriate, as manifested in Judge Barbier's February 2, 2011 order enjoining Feinberg and his law firm.<sup>492</sup>

Finally, at this immature stage of the litigation, it is already clear that a fissure has developed in the plaintiffs' bar, with some attorneys seeking resolution of claims through the MDL auspices, others aligned to pursue securities violations through the class action mechanism, and a third group seeking to represent clients in the GCCF in return for percentage-based fees.<sup>493</sup> Clearly, the MDL attorneys seeking to enjoin Feinberg in his GCCF efforts are not aligned with the plaintiffs' attorneys who are advocating claimant relief through this facility.

#### *L. Defendants*

As indicated at the outset of this Article, one important characteristic that distinguishes the Deepwater Horizon events from the September 11th disaster is that in the Gulf Coast case, it is readily apparent that there are likely culpable defendants. The Coast Guard's immediate identification of BP as a responsible party under the OPA supports this contention.<sup>494</sup> As suggested above, several scholars have commented that one factor that made the Fund an attractive alternative to the tort litigation system was the problem—especially in the early weeks following the September 11th events—of identifying potential defendants to sue in litigation.<sup>495</sup>

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492. Order and Reasons, *supra* note 275 (granting plaintiffs' motion to supervise ex parte communications with putative class).

493. See Tom Hais, *Gulf Coast Attorneys to Lead U.S. Oil Spill Lawsuits*, REUTERS (Oct. 10, 2010), <http://www.reuters.com/article/2010/10/09/us-oil-spill-lawyers-idUSTRE6980A820101009>; Brian Baxter, *Steering Committee Members Selected for Gulf Coast Oil Spill Suits*, AMLAW DAILY (Oct. 11, 2010, 12:24 PM), <http://amlawdaily.typepad.com/amlawdaily/2010/10/gulfsuitssteering.html>; Searcey, *supra* note 460.

494. The Coast Guard almost immediately designated BP as a "responsible party" under the Oil Pollution Act of 1990, Pub. L. No. 101-380, § 102, 104 Stat. 484, 489 (codified at 33 U.S.C. § 2702 (2006)).

495. Alexander, *supra* note 5, at 637 ("Although all the victims of September 11th appeared as 'deserving' of large recoveries as anyone could possibly be, they could not recover damages from the real culprits, the hijackers and their accomplices, who were either dead or out of reach."). As it turned out, the plaintiffs who pursued litigation in federal court were able to identify and name numerous defendants, and Judge Hellerstein upheld their potential liability in the litigation. See *supra* notes 470–71 and accompanying text.

Hence, the problematic nature of identifying culpable defendants, coupled with the difficulty of establishing legal liability for tort claims as against any of these potential defendants, was used to persuade victims that their better remedy was through the Fund. Although this argument proved persuasive for many in the context of the Fund, several commentators subsequently have argued that the Fund was unique in this regard, and the fund approach should not be replicated in situations where there are known, identifiable defendants allegedly responsible for a mass tort disaster.<sup>496</sup>

In addition, as the subsequent parallel September 11th litigation demonstrated, the plaintiffs who chose to litigate their claims were able to identify an array of defendants in their lawsuits, including the private airport security firms (denominated the “Aviation defendants”), building architects and construction firms, the Port Authority, and other entities.<sup>497</sup> In a challenge brought by the Aviation defendants, Judge Hellerstein denied their motions to dismiss on the grounds that they owed no duties to the plaintiffs and that the defendants could not reasonably have anticipated that several terrorists would hijack and then crash jumbo jet aircraft killing passengers, crew, and others on the ground.<sup>498</sup>

In contrast to the September 11th events, an array of potentially culpable defendants exist for the Deepwater Horizon disaster, including but certainly not limited to BP. Indeed, the GCCF final waiver form includes an Appendix listing several dozen entities seeking release from litigation as a consequence of settling with the GCCF.<sup>499</sup> Moreover, not only is there a substantial list of potentially liable parties, but the legal theories that might support such claims are less attenuated than in the September 11th litigation. Hence, the “problematic defendant” argument, in support of a fund resolution of mass tort claims, has scant relevance in the context of the GCCF.

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496. See, e.g., Rabin, *supra* note 8, at 780–81, 798–803 (suggesting that responsible defendants ought to be charged with the losses reflecting what is required to make a deserving plaintiff whole).

497. See Eggen, *supra* note 15, at 411, 432.

498. *In re* Sept. 11th Litig., 280 F. Supp. 2d 279, 287, 289 (S.D.N.Y. 2003); see Ackerman, *supra* note 8, at 188 (“Still, by surviving the motions to dismiss, the plaintiffs had surmounted a significant hurdle in the 408 litigation.”); Kreindler & Alexander, *supra* note 267 (commenting on defendants in the September 11th litigated cases).

499. See *GCCF Sample Release and Covenant Not to Sue*, *supra* note 380 (Attachment A: listing all potential defendants released from liability and lawsuit under the settlement agreement).

### III. THE EVOLUTION OF MODELS OF FUND APPROACHES TO THE RESOLUTION OF MASS CLAIMS

Historically, European and other Western, industrialized countries have relied on fund resolutions of claims in resolving mass tort events.<sup>500</sup> Thus, for example, Germany, Japan, and the United Kingdom quickly resolved the claims of the so-called “thalidomide babies” in the 1960s by providing compensation and lifetime support for children born with severe birth defects as a result of their mother’s ingestion of the pharmaceutical thalidomide in this era.<sup>501</sup> These various funds were the product of the combined efforts of the respective governments and the culpable drug manufacturer, who jointly contributed to compensation funds to provide relief for these claimants.<sup>502</sup> In this fashion, government and industry combined to provide claimants with expeditious relief without the necessity for litigation, findings of causation, liability, and damages.

In the United States, by contrast, the use of funds to resolve mass tort litigation has never gained comparable traction. There are many reasons for this, not the least of which is the embedded American legal culture of adversarial justice and right to trial by jury. Nevertheless, a few historical examples of American experiments with compensation funds include the Black Lung Program pursuant to the Black Lung Benefits Act,<sup>503</sup> the National Vaccine Injury Compensation Program,<sup>504</sup> and the Price–Anderson Act, which provides for strict statutory liability in the case of nuclear plant disaster.<sup>505</sup> In addition, Congress enacted the National Swine Flu Act in 1976, creating a fund to compensate victims who died or were injured from inoculations administered by a government-mandated program.<sup>506</sup>

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500. See Rabin, *supra* note 8, at 793–96 (foreign compensation models for mass tort and terrorist events).

501. See Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2158 (1997).

502. *Id.*

503. 30 U.S.C. §§ 901–945 (2006); see also Peck, *supra* note 8, at 217–18 (discussing the Black Lung program).

504. 42 U.S.C. § 300aa-11(a). The National Childhood Vaccine Injury Act of 1986 established a program to compensate children injured by exposure to vaccines; it is internally funded by a tax imposed on the sale of each dose of vaccine sold. Berkowitz, *supra* note 18, at 30 (describing the implementation of this program).

505. 42 U.S.C. § 2210; see Peck, *supra* note 8, at 218 (commenting that ATLA considered the Price–Anderson Act as a promising model for creation of a fund for September 11th victims).

506. 42 U.S.C. § 247(j)–(l); Berkowitz, *supra* note 18, at 31.

Of the American historical funds, the Black Lung program often has been cited as an ineffectual mechanism for compensating coal miner claimants.<sup>507</sup> Notably, all these funds are authorized by federal statute; moreover, the childhood vaccine program and the Price–Anderson Act authorize funds that financially are supported by the industries engaged in the potentially hazardous activity that might give rise to liability.<sup>508</sup>

Specifically, the Price–Anderson Act requires that entities engaged in the production of nuclear energy contribute to a fund in case of a prospective disaster that might require remediation to victims of a nuclear plant disaster.<sup>509</sup> The Price–Anderson Act limits plants’ liability to \$560 million for all claims arising from a single nuclear accident.<sup>510</sup> To be eligible to participate in this fund mechanism, nuclear licensees must maintain at least \$160 million in private insurance and contribute up to \$10 million annually to a pool of funds designed to total \$47 billion dollars.<sup>511</sup> In the case of disaster, the Nuclear Regulatory Commission declares an extraordinary nuclear occurrence, and the Price–Anderson Act sets up a system of strict liability in which all defenses are waived. In order to receive compensation, claimants must only show that their injuries result from a nuclear power plant accident.<sup>512</sup>

The September 11th events and the creation of the Fund marked the first significant American experiment with a fund approach to compensating large numbers of claimants for tortious injury, and the GCCF represents the second such large-scale compensation effort outside the judicial system. As indicated above, because the Fund and the GCCF share a common administrator, the GCCF has mimicked the Fund in many aspects of its creation and implementation. On the other hand, the GCCF represents a radical departure from the Fund, and the ways in which the GCCF differ from the Fund are cause for great concern.

The arc of Feinberg’s career neatly demonstrates the evolution of at least three different fund models, progressing from arguably the most legitimate to arguably the least legitimate (and most lawless). This evolution illustrates a seamless progression from (1)

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507. See Peck, *supra* note 8, at 218 (describing paltry compensation benefits paid pursuant to the program); William S. Mattingly, *Black Lung Update: The Evolution of the Current Regulations and the Proposed Revolution*, 100 W. VA. L. REV. 601, 601 (1998); Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025 (2002).

508. Berkowitz, *supra* note 18, at 30.

509. See *id.* at 32–34; see also Peck, *supra* note 8, at 218.

510. Peck, *supra* note 8, at 219.

511. *Id.*

512. *Id.* at 218.

a judicially approved and managed class action fund to (2) a congressionally mandated and supervised fund to (3) a defendant-created and directed fund. In the haste to embrace the fund approach to mass claim resolution, little attention has focused on how these “funds” have evolved from entities governed by the rule of law to a model essentially unconstrained by law.

Feinberg’s initial experience with the use of a fund to resolve mass claims involved his participation as a special master in the Agent Orange litigation in the late 1970s and early 1980s.<sup>513</sup> Feinberg himself frequently refers to this formative experience as the basis for techniques he engrafted onto his management of the Fund and the GCCF, such as the use of town hall meetings to address the victims’ concerns and to make the claims process more personal for its participants.<sup>514</sup>

However, the Agent Orange fund model is, jurisprudentially, light years removed from the GCCF. The Agent Orange fund was created to implement a negotiated class action settlement.<sup>515</sup> The Agent Orange litigation began with hundreds of lawsuits filed in state and federal courts.<sup>516</sup> Many years of contested litigation preceded the adversaries’ ultimate agreement to settle a class action and create the Agent Orange fund.<sup>517</sup>

The Agent Orange litigation was managed under the close supervision of Judge Jack Weinstein,<sup>518</sup> and the Agent Orange fund was a creature of a Rule 23 class action settlement.<sup>519</sup> Whatever role Feinberg may have played in the resolution of the Agent Orange litigation, he was appointed as a special master in that litigation under the authority of Federal Rule of Civil Procedure 53.<sup>520</sup> Feinberg’s authority and powers in the Agent Orange fund were limited and circumscribed by law, and he was answerable to the federal court.<sup>521</sup>

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513. See SCHUCK, *supra* note 240, at 144–45.

514. For a discussion of Feinberg’s town hall meetings to address claimants’ concerns in his implementation of the GCCF facility, see *supra* notes 106–12 and accompanying text.

515. SCHUCK, *supra* note 240, at 149–65.

516. *In re* “Agent Orange” Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987).

517. *Id.*

518. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986).

519. See *In re* “Agent Orange” Prod. Liab. Litig., 818 F.2d 145 (upholding class action settlement).

520. See *supra* notes 253–72 and accompanying text (discussion of Rule 53); see also SCHUCK, *supra* note 240, at 144–45.

521. SCHUCK, *supra* note 240, at 144–45.

Moreover, it is important to *emphasize* that the Agent Orange fund was the creature of a *class action settlement*.<sup>522</sup> As such, before this fund mechanism could begin operation to provide compensation to Vietnam veterans, the Agent Orange settlement had to be judicially reviewed and approved by Judge Weinstein pursuant to Federal Rule Civil Procedure 23(e).<sup>523</sup> The Agent Orange fund, then, was subject to an array of substantive and procedural due process constraints, not the least of which was the requirement that Judge Weinstein find that class claimants had been accorded adequate representation in settlement of their claims through the fund.<sup>524</sup>

Hence, the Agent Orange fund was created subject to an array of legal constraints, and Feinberg, in his role as special master, did not function as a freewheeling, unbounded law-giver. Moreover, in the largely uncritical commentary lauding the Agent Orange fund,<sup>525</sup> it is frequently overlooked that the Agent Orange settlement was successfully challenged nearly 25 years after Judge Weinstein's approval of the Agent Orange fund.<sup>526</sup> If the Agent Orange fund is the best example of a fund resolution of mass claims, then it is important to note that the binding effect of the Agent Orange settlement was successfully challenged on due process grounds for the failure to provide future claimants with adequate representation.<sup>527</sup>

Feinberg's second experience with a fund approach to resolving mass claims was his administration of the September 11th Victim Compensation Fund. The Fund represented an innovative approach to resolving mass tort claims against the backdrop of national tragedy. In terms of both substance and procedure, the Fund drew loosely from its class action cousins. But, as has been described at length above, the Fund was not the result of class litigation or the close judicial supervision entailed in settling class litigation.

Thus, the Fund represents a fund archetype that is once removed from the class action model, although not without legal constraints. Hence, the Fund was a creature of federal statute, was subject to congressional oversight, and had a "special master"

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522. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (upholding class action settlement).

523. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

524. *Id.*

525. See, e.g., Martha L. Minow, *The Judge for the Situation: Judge Jack Weinstein*, 97 COLUM. L. REV. 2010 (1997).

526. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001).

527. *Id.*

appointed by the executive branch who remotely was accountable to Congress and the Department of Justice. In addition, the Fund incorporated several features of the rule of law, including public notice-and-comment rulemaking and significant transparency.

Although the Fund was undergirded with legal authorization, it signaled an expansive progression from the class action fund model. The Fund was not created within the scope of authority of the federal judiciary, nor was the Fund subject to judicial oversight and management by a federal judge. Unlike the class action context, decisions relating to the Fund were not subject to review for substantive or procedural due process. Moreover, as indicated above, the Fund special master had liberal rulemaking and other authority, which he increasingly exercised in an ad hoc fashion during the course of the Fund's history. And the special master's award determinations were subjected to limited appellate review.

The GCCF represents the third fund model and illustrates an extreme and seemingly lawless expansion of the fund approach to resolving mass claims. To begin, it is difficult to discern the legal authorization for the fund, other than vague references to the OPA. The GCCF was not created as a mechanism to implement a contested class action settlement, nor did Congress authorize creation of this fund. Thus, the GCCF has not been subject to the scrutiny that would have accompanied a class action settlement or congressional oversight.

Moreover, it is difficult to characterize exactly what the GCCF is and what legal status this entity has, if any. Feinberg has described the GCCF as a "compact,"<sup>528</sup> while federal Judge Barbier has described the GCCF as a "hybrid."<sup>529</sup> The GCCF is a largely private claims-adjusting facility acting in ad hoc fashion, run by a culpable party's retained autocrat. It is not functioning as a mediation or arbitration center, with claims resolution through the auspices of professional mediators or arbitrators. The persons administering claims have not been designated or selected through adversarial processes, and the GCCF is functioning outside judicial scrutiny and seemingly not subject to any professional rules of conduct.

Instead, the GCCF was the result of private, behind-closed-door negotiations with unidentified participants. The fund was created and funded by the primary malefactor, who picked the fund's administrator. The relationship between BP and Feinberg

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528. See, e.g., *Recovery in the Gulf*, *supra* note 61, at 4 (statement of Kenneth Feinberg).

529. Order and Reasons, *supra* note 275 (granting plaintiffs' motion to supervise ex parte communications with putative class).

has raised numerous significant ethical issues, centrally relating to the administrator's independence. The administrator and his law firm are financially profiting from their administration of the fund. There are numerous indicia that BP has not been operating independently of the fund, but rather has intervened in several crucial decisions relating to the fund's implementation that favor BP's interests.

The GCCF has engaged in no public rulemaking and virtually all its decisions have been cloaked in secrecy, including its criteria and personnel. The fund has operated largely in a non-transparent fashion, with limited avenues for independent appellate review. There has been a significant lack of information upon which Gulf Coast victims might determine the possible valuation of their claims, and whether it makes sense to seek remediation through the GCCF. In spite of promises to provide legal assistance to Gulf Coast claimants, such provision of counsel has been non-existent or slow in being provided. Claims administration has been exceedingly protracted and multiple claims have been delayed or denied. Claimants have complained about inconsistent awards. The waiver required as a condition for the final settlement of claims releases a very large array of potential claims, as well as dozens of potential defendants in addition to BP. Against this chaotic background, the GCCF's administrator has repeatedly urged Gulf Coast residents and businesses to seek compensation in the GCCF as the best means for receiving compensation, for which actions the federal court in Louisiana finally enjoined Feinberg.<sup>530</sup>

Hence, almost every hallmark supporting the legitimacy of an alternative dispute resolution facility, including important due process protections for claimants, have been lacking in implementation of the GCCF.<sup>531</sup>

#### IV. CONCLUSION: THE GCCF—A FUND TOO FAR

Not all fund approaches to resolving mass claims are the same, and not all funds are fungible. Nonetheless, "funds" are now invoked with almost talismanic approval, as a preferred means for providing compensation to disaster victims outside the litigation system.<sup>532</sup> Moreover, the Gulf Coast Claims Facility provides a

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530. *Id.*

531. Ironically, Feinberg himself has stated that an excellent alternative dispute resolution facility must satisfy three design variables: substantive criteria, due process protections, and mechanics. Feinberg, *The Building Blocks*, *supra* note 9, at 275; *see also supra* note 460.

532. One critic perceives the trend towards fund solutions to mass tort claims as eroding fundamental justice:

stellar example of the unseemly pressure exerted on disaster victims to quickly seek relief through a fund mechanism, rather than retaining counsel and filing a lawsuit. With the advent of the GCCF, commentators ought to ask probing questions concerning who benefits from these mechanisms and whether the GCCF model in particular serves the interests of justice and for whom.<sup>533</sup>

The greatest justifications for fund resolution of mass claims are grounded in values of efficiency and economy.<sup>534</sup> The theory underlying fund resolution of claims is that by avoiding the litigation system, claimants receive quick, easy payment of claims and eliminate the risks, transaction costs, and delays inherent in litigation. These themes have pervaded Feinberg's repeated appeals to claimants to settle with both the September 11th Victim Compensation Fund and the Gulf Coast Claims Facility.

However, one may legitimately question whether efficiency and economy ought to be the bellwether metrics of a successful compensation program. In contrast, other commentators have suggested that compensation programs ought to be evaluated by the core substantive values of democratic governance, which include the values of participation, accountability, transparency, rationality, personal autonomy, equality, due process, and other social capital values necessary to promote civil society.<sup>535</sup> Other commentators have suggested that four elements of procedural justice include: (1) whether procedures allow people an opportunity to state their case; (2) whether authorities are viewed as neutral, unbiased, honest, and principled in their

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Yet, tort law will continue to be eroded by attrition, by lopping off remedies—especially by limiting damages and expanding immunities—unless we are able to grab hold of the public's conscience and consciousness to bring home the point that liability in tort is not some form of punishment, erratically inflicted.

Conk, *supra* note 24, at 177.

533. See generally Alexander, *supra* note 5 (enumerating factors to consider in the future design of compensation funds for victims of disaster and terrorist attacks).

534. See Ackerman, *supra* note 8, at 220 (“Efficiency was a major reason for the Fund, and because of both the manner in which it was tailored and the laudable, professional efforts of the Special Master and his staff, the efficiency goal was met.”).

535. See *id.* at 206 (citing Reuben, *supra* note 19, at 285–86); see also Priest, *supra* note 15, at 545 (“The September 11th Fund will remain controversial because the source of the definition of its awards—however able and committed—is not in any sense democratic. Coupled with the lack of an internal rationale or constraint, the awards granted by the Fund will continue to remain problematic.”). Other commentators have suggested that the Fund signaled the beginning of a “broad regressive trend.” See Conk, *supra* note 24, at 253.

decisionmaking; (3) whether the authorities are seen as benevolent, caring, and trustworthy; and (4) whether the people involved are treated with dignity and respect.<sup>536</sup>

Against the backdrop of tragic events, Ken Feinberg has emerged as the heroic figure in bringing expeditious and uncomplicated justice to thousands of disaster victims. In this repeated narrative, Feinberg is portrayed as the selfless, self-sacrificing benefactor bringing compassionate relief to thousands of claimants.<sup>537</sup> Because Feinberg's heroic narrative has so pervasively dominated discussions of both the Fund and the GCCF, less critical attention has been directed to evaluating whether these funds have achieved justice for their recipients or what justice entails.<sup>538</sup> And, because of Feinberg's media-created persona, many commentators tactfully have refrained from questioning Feinberg's actions, lest his critics seem ungracious.

It is impossible to evaluate the Fund and the GCCF without discussion of Feinberg, because Feinberg has made himself synonymous with these funds.<sup>539</sup> In his defensive response to his critics, Feinberg typically defaults to the retort that "no good deed

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536. Tyler & Thorisdottir, *supra* note 15, at 380, 384 (concluding that "none of the aforementioned ways of creating perceptions of procedural fairness were utilized when the Fund was initially established").

537. Diller, *supra* note 15, at 755.

The issue of procedural fairness centers on whether Feinberg has structured an adjudicatory system that bolsters rather than undermines confidence in the fairness of the results it produces. One way or another, the question returns to Feinberg himself because the procedures are all focused on his decision-making process. On this score, Feinberg has handled himself in a manner that is not likely to promote a perception of the Fund as a fair administrative mechanism. Feinberg has adopted a high profile approach with the media and the public. His tendencies to philosophize, argue, console, and offer predictions and advice about the Fund all emphasize his own personal role in making decisions. As a result, awards appear as the product of Feinberg's personal choices and preferences rather than as the product of dispassionate principled application of legal standards to facts.

*Id.*

538. One critic has opined: "While the Fund creates the Special Master, the Special Master commands the fund. If the role of Special Master lacks legitimacy, then the Fund lacks credibility." Berkowitz, *supra* note 18, at 40.

539. See Ackerman, *supra* note 8, at 197 ("In large part due to his public availability, Feinberg came to personify the Fund, and some of the responses to the Fund reflected people's reactions to him."); Diller, *supra* note 15, at 726, 755 ("In both the substantive standards and the procedural model, the spotlight remains focused on the personal choices and values of Special Master Feinberg himself. Regardless of how capable and well-intentioned the Special Master, the Fund vests too much discretion in a single individual with little means of accountability and oversight.").

goes unpunished”—a self-serving response that deflects approbation onto his critics. Although it may be true that no good deed goes unpunished, it is perhaps relevant to question whether Feinberg—especially in his administration of the GCCF—has been performing good deeds for thousands of grieving and often desperate people.

We conclude by noting that in the myth of Prometheus, things turned out very well for both Prometheus and Hercules, but not necessarily so for mankind. While Prometheus and Hercules went on to greater glory, the gods continued to punish mankind for receiving the gift of fire.

As other mass torts have taught us, BP will survive and prosper in the wake of the Deepwater Horizon disaster, as will Ken Feinberg. Feinberg will continue, in the future, to administer new disaster funds as the need arises and be lauded for his heroic efforts in administering these massive funds. However, with the GCCF, the precedent has now been set for corporate malefactors who are caught up in the maelstrom of massive liability to discharge their legal responsibilities on their own terms and favorable to their own interests.