The BP Oil Spill and Restitution are irresistible topics for exploration. Just as systems errors combined to cause the disaster in the Gulf of Mexico,\(^1\) that most human of institutions, the law, has struggled to find a proper way to respond. In Part 1, we examine the circumstances surrounding the spill. After the blowout, BP struggled to find a solution to an ongoing disaster of immense proportions.\(^2\) Over the next six months, before BP was finally able to seal the deepwater well, more than four million barrels of oil gushed into the Gulf of Mexico,\(^3\) coating the ocean floor with oil,\(^4\) drenching birds and other wildlife in oil,\(^5\) and

\(^1\) Elkind, Whitford and Burke, An Accident Waiting to Happen, Fortune, 163(2), 105-132 (2011).
\(^2\) See Frank James, *Burning Oil Rig Sinks in Gulf of Mexico; 11 Still Missing*, National Public Radio (April 22, 2010). The article can be found online at: http://www.npr.org/blogs/thetwo-way/2010/04/burning_oil_rig_sinks_in_gulf.html
\(^3\) See Richard Harris, *Scientists Find Thick Layer of Oil on Ocean Sea Floor*, National Public Radio, All Things Considered (Sept. 10, 2010). The article can be found online at: http://www.npr.org/templates/story/story.php?storyId=126475680
\(^4\) See Richard Harris, *supra* note 3.
depositing oil and tar balls on the beaches of Louisiana, Mississippi and Texas. Responding to this unprecedented disaster, the press bayed, victims cried for relief, and the wider American public was galvanized to demand “justice,” “retribution,” and “accountability.” The Federal government, chastened by the pinch of public opinion, as well as the affected states, clamored to satisfy their citizens’ demands and avoid economic imposts. Eventually the well was capped with impressive engineering feats at a depth challenging the limits of technology.

It was in the witches’ brew of fraught politics, environmental policy views, overlapping and complex laws, and uncompromising disputation, that BP and the federal government found themselves across a table attempting to cap the stream of vitriol. The result was the much vaunted BP compensation fund created to compensate those damaged by the spill. Prior to creating the fund, BP had been handling claims in an ad hoc fashion, trying to deliver compensation to victims, to apply resources to spill abatement, and to assist the Coast Guard. BP had also been hemorrhaging from public reactions and missteps that inflamed public opinion, and there was a compelling need for a far-ranging response. The range of potential victims was quite large, with the explosion and leak having caused devastating human and economic loss in the Gulf region, and effects that will undoubtedly ripple through the Gulf economy and the court system for years to come. Those most obviously and directly affected were the fishermen, and those associated with the tourist industry (e.g., hotels, restaurants, stores) in the area closest to the spill. However, many others have been affected, including oil

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7 Elkind et al., supra note 1, reporting on CEO Tony Haywood’s public utterances.
drillers who are precluded from working, and state and federal governments which have incurred both clean-up costs for beaches and estuaries and lost revenue from tourism and fishing.

BP and others have been heavily criticized for their lack of preparedness for a major disaster.\(^8\) Government officials, exhibiting much *sturm und strang*, were, in fact, caught completely flatfooted. As we describe in Part II, the parties were faced with overlapping and contradictory liability regimes. The common law rule inherited from *Robins Dry Dock*\(^9\) precluded a broad recovery of economic losses, and most of the losses caused by the BP oil spill were of that nature. The Oil Pollution Act—that had been enacted by Congress as a result of the Exxon Valdez spill—established a regime that would allow for a slightly broader recovery capped at $75 million from a $1 billion fund from which compensation could be drawn. In the BP situation, politicians knew that something had to be done to “kill” the political carnage, and the $20 billion fund was designed to achieve that objective: to cut the line and fill it with the heavy mud and cement of a huge funnel. Some order had to be salvaged from the chaos of the *ad hoc* system that had been put in place.

The BP fund, which was quite large, was to be administered by Kenneth Feinberg, who had been much admired for his work with the 9/11 Fund. The Gulf Coastal Claims Facility (“GCCF”) was born to assist him. We conclude that the fund created a far from perfect solution to a difficult problem. In the stress of the rush to compensate victims, the fund failed to achieve the benefits that the parties desired. Its confused structure instilled suspicion among

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\(^8\) Elkind et al., *supra* note 1.

claimants who are being wooed by an alternative suitor—a large class action lawsuit—in which more lucrative damages are promised.

We argue that the best chance for the GCCF to efficiently attract claimants, and deliver quick compensation, was lost in the very structure of the fund. The “losers” in that system will be claimants and defendants who will choose to live with the vagaries of the common law system rather than to accept compensation from the trust fund system. The GCCF, despite its structure as a “Trust Fund,” functions as a general pool of money assigned for payment by Mr. Feinberg, under his published protocols, and for BP as it decides to settle claims. From the structure of the arrangement, it appears that Mr. Feinberg is not a true “third-party neutral such as a mediator, arbitrator, or court-appointed special master.”

The Federal District Court that is administering the class action required BP, through its agents Feinberg and GCCF, to advise claimants of this fact. It should be noted, however, that Feinberg may negotiate and settle claims without BP’s assent. This should have been given greater emphasis by Judge Barbier when assessing Feinberg’s independence.

In establishing the BP trust fund, and the GCCF structure, BP failed to hew to a tenet of legal arrangements—the need to consider agency costs. BP’s ability to draw from the fund, and to exercise power over the administrator, exacerbates the fears of claimants that settlements will not be maximally for their benefit. A prime reason, we will see, for the law’s imposition of

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11 See id.

12 This is not to say that BP is unaffected by Feinberg’s settlement and compensation actions. It has criticized Feinberg for being too generous. See Catherin Clifford, BP: Feinberg’s Gulf Oil Spill Payments Are Too Generous, CNN Money, Feb. 17, 2011, http://money.cnn.com/2011/02/17/smallbusiness/bp_payments GENEROUS/index.htm. BP was ill-advised to give public voice to its misgivings since the GCCF independence is paramount.
strict fiduciary duties, as well as for the restatement disgorgement provision for opportunistic breach, is to ensure a punctilious respect for the interests of those who are vulnerable in the transactions in question. Thus, under the Restatement, relational contracts are sustained by the rules’ strict bonding mechanisms. Alas, the GCCF fails at the starting gate. This argument is made in the final section where we also argue that a structure giving independence to Mr. Feinberg and tying him to fiduciary obligations and potential restitution claims would be a step forward. The failures of the BP arrangement should serve as a lesson to those seeking to build better structures for the compensation of the widespread injury-producing occurrences that will inevitably dot our futures.\(^{13}\)

**PART I**

No one living in the United States could have easily avoided the daily barrage of news coverage of the oil spill that resulted from the blowout of the Macondo well. The Deepwater Horizon exploded on April 20, 2010, and while the fire was being fought on the platform,

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\(^{13}\) The top 10 spills are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Spill Name</th>
<th>Gallons</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>Exxon Valdez*</td>
<td>11.3 Million</td>
</tr>
<tr>
<td>2010</td>
<td>Deepwater Horizon</td>
<td>206.2</td>
</tr>
<tr>
<td>1979</td>
<td>IXTOC 1</td>
<td>147.8</td>
</tr>
<tr>
<td>1983</td>
<td>Nowruz 4</td>
<td>82.1</td>
</tr>
<tr>
<td>1971</td>
<td>Wodeco 3</td>
<td>18.5</td>
</tr>
<tr>
<td>1978</td>
<td>Escravos</td>
<td>13.9</td>
</tr>
<tr>
<td>1980</td>
<td>Funiwa No. 5</td>
<td>8.6</td>
</tr>
<tr>
<td>1977</td>
<td>Phillips Ekofisk</td>
<td>8.5</td>
</tr>
<tr>
<td>1969</td>
<td>Union Oil Platform</td>
<td>4.2</td>
</tr>
<tr>
<td>1980</td>
<td>Ron Tappmeyer</td>
<td>4.2</td>
</tr>
<tr>
<td>1970</td>
<td>Chevron Main Pass</td>
<td>2.7</td>
</tr>
</tbody>
</table>

*The Valdez spill resulted from a tanker accident. Source: Paul Scherrer Institute.*
Transocean and BP began assessing and attempting to stop the oil flowing from the Macondo well. The well topped a reservoir of some 110 million barrels of oil, more than 13,000 feet below the sea floor. The depth of the Gulf at this point is about 5,000 feet. Oil streamed from the ruptured wellhead for the next 87 days. The final staunching of the flow came as a giant relief, but the lack of planning for a deepwater cataclysm and the insouciance of governmental oversight and regulation remained apparent. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling presents an important case study that one hopes will provide lessons for industry and government. As a staff paper points out, the energy and resources of BP, government and scientists brought to the task over those 87 days were remarkable. Technologies were developed on the fly, and government galvanized to monitor and advise. Despite all these efforts, tremendous destruction was wrought—workers died from the explosion, livelihoods were diminished, the ocean was polluted, wildlife was killed, and commerce disjointed.

Oil spills are not new to the American people. This capacity for environmental destruction is written large in the Exxon Valdez oil spill. That disaster occurred on March 24, 1989, when the Exxon Valdez oil tanker ran aground on Bligh Reef in Prince William Sound, Alaska. Over the next few days, the tanker discharged some 11 million gallons of oil into the Sound, in the process “staining 1,500 miles of coastline, killing hundreds of thousands of seabirds, otters, seals and whales, and devastating local communities.” The effects of the oil


16 Id.
spill linger even today, more than two decades later, with young people unable to pursue careers in fishing, leaving a “jaded” group of residents, along with other ongoing effects: the “mountain views are still stunning but the herring fishery is gone, the king and Dungeness crabs, too. Prawns are coming back, but just barely.”\textsuperscript{17} Although residents ultimately received payments from Exxon, many of the payments have proven to be too low to allow individuals to rebuild their lives.\textsuperscript{18}

As with the BP Oil Spill, the Exxon Valdez incident caused major losses to persons who rely on the natural environment. Although the effects have been broadly felt by those in the vicinity, the economic losses range far beyond, drawing into consideration of when and where in terms of legal policy a limit is reached. Even for gross negligence, as was evident in Exxon Valdez, we must draw a line as does the U.S. Supreme Court in awarding punitive damages that are constrained by a ratio.\textsuperscript{19}

As huge efforts were being made to cap the BP oil well, the drama of multiple claims for loss to those affected by the spill was at full throttle. It soon became apparent that the issue of how to provide compensation for the victims of the oil spill would be every bit as difficult as the technological obstacles encountered in capping the well. Just as engineers struggled and

\textsuperscript{17} \textit{Id.} However, some question whether the loss of herring fishing was due to the spill or to other causes. \textit{Id.}

\textsuperscript{18} \textit{See id.} The article recites the example of one fisherman:

In December, Exxon sent the last of a nearly $500,000 payment to John Platt, but Mr. Platt said he never saw it. Straight to the state and the bank it went, to clear the liens on his boats and his fishing permits, to dig out of the debt he accumulated, some through his own admitted missteps, in the two decades since the wreck of the Valdez.

The payments were initially supposed to be much higher, before Exxon successfully fought, all the way to the Supreme Court, to have them reduced.

“The money was supposed to bring closure,” Mr. Platt said. “Deep down inside I was really banking on it, but it didn’t happen.”

innovated to stem the flow of oil, BP and the government faced a daunting picture in trying to assess liability and provide compensation. As the nation witnessed with the Exxon Valdez incident, and the compensation fund established following the 9/11 Terrorist attacks on the World Trade Center towers, the tort system has proven to provide a poor mechanism for resolving claims and meting out compensation to victims. The establishment of a fund through insurance mechanisms may in addition be an effective deterrence to social ills that cause harm to citizens.

Following the Exxon Valdez incident, Congress enacted the Federal Oil Pollution Act of 1990 (the “OPA”) that extended liability by imposing strict liability on responsible parties for certain economic losses in navigable waters and along shorelines. The legislation involved a consolidation of previous piecemeal legislation, and established the Oil Spill Liability Trust Fund that is authorized to pay out to a maximum of $1 billion per incident. The fund is financed by taxes on crude oil bought by U.S. refineries and on petroleum products imported, consumed, and warehoused in the United States.

The OPA establishes a cap of $75 million per responsible party per incident. Under Section 2704(c)(i), the cap does not apply “if the incident was proximately caused by:

(A) Gross negligence or willful misconduct of, or

(B) The violation of an applicable Federal safety, consultation, or operating regulation, by the responsible party . . . .”

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Absent the legislation, those aggrieved by the BP oil spill would have had some avenues of redress. They could have brought an action under the OPA or under the common law rules applicable in the jurisdiction in which the claim was brought. However, this avenue of redress was deemed insufficient by potential claimants and the various governmental entities. Under a barrage of adverse publicity, BP officials and President Obama met and executed an agreement on January 16, 2010, to create a compensation fund for the victims of the spill. BP pledged a minimum of $20 billion to the fund over 40 months, with security provided. BP’s establishment of the funds, with claims to be processed through the Gulf Coast Claims Facility (“GCCF”), Mr. Kenneth Feinberg as the administrator, staunched, as did the capping of the well, the fierce criticism to which BP was being subjected. But, like the well capping, the trust fund left a myriad of issues to be resolved. Under the fund, Feinberg was not being asked to make compensation payments based on the expected liability of BP, and others who may have responsibility for the oil spill, but rather on the basis of criteria that he established. As a result, claimants continue to have statutory and common law claims against BP or other parties. However, if a claimant accepts a final payment from the GCCF fund, the claimant must waive other rights of action.

Although Mr. Feinberg submits that claims under the GCCF do not depend on enforceable rights in law, the background is important in ascertaining the scope of liability and influencing the criteria for payment that he will make. At Mr. Feinberg’s request, Professor

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John Goldberg of Harvard has provided a closely reasoned and compelling analysis of liability that might accrue based on the OPA and the common law.\textsuperscript{25}

It is not our intention to review exhaustively Professor Goldberg’s analysis, but a brief review is in order. In short, Goldberg concludes that BP’s common law liability depends upon a showing of personal or property loss caused by the spill. If such loss is shown, economic loss consequent to that loss will be recoverable. In addition, the OPA allows for recovery of economic losses that flow from the destruction of resources that the claimant could have exploited to his economic benefit. This confirms the approach of some courts that allow recovery of losses that flow from destruction of fish stocks to which the fisherman had a right or privilege to exploit.\textsuperscript{26} While the fisherman may hold no property interest in the fish stocks, they do hold something approaching a property interest, and they (as a class) are easily distinguishable from the vast class of persons who will suffer economic loss because of the event.\textsuperscript{27}

The Structure of the Fund

In creating the BP trust fund, the challenge for both BP and the government was to provide claimants with confidence that all legitimate claims would be covered. Only a generous gesture, and subsequent confidence-building moves, would be sufficient. BP started by accepting designation as “the responsible party” under the Oil Pollution Act. Once it did, BP

\textsuperscript{25} John Goldberg, Memorandum to Kenneth R. Feinberg with report on liability for economic loss in connection with the Deepwater Horizon oil spill (Nov 22, 2010).

\textsuperscript{26} Union Oil Company v. Oppen, 501 F.2d 558 (9th Cir. 1974).

\textsuperscript{27} Louisiana, ex rel Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985).
was obliged to establish a claims process for legitimate claims. This it did through the GCCF, to which all existing claims were transmitted. The documents establish a $20 billion fund, which moneys are held beyond the control of BP in an irrevocable trust, with patently independent and experienced trustees are named. The appointment of a seasoned and trusted administrator is made, who is to inspire confidence by payment of early emergency claims, and who is accessible and active in informing claimants and offering transparency in performance. All the foregoing is designed to inculcate trust and encourage claimants to forego the torts system for claims as a final resolution.

The design of the BP trust fund, however, suffers from several fatal flaws. The trust, which is subject to Delaware law, establishes the payment scheme. Through the administrator, the trust requires that funds be distributed to claimants, and it refers to the trust’s beneficiaries as the “holders of resolved Damage Claims.” The usual disclosures required of trustees to beneficiaries are excluded in Article IX, Section B, which provides, in particular, for non-disclosure of the amount of distribution to, or identify of, any other beneficiary.\(^\text{28}\) Under the GCCF trust document, the Trustees are required to distribute funds according to the direction of the Claim Administrator—Mr. Feinberg—or of BP itself. The trustees monitor the activities of the Corporate Trustee, Citibank, but do not exercise any oversight over the Administrator. The individual trustees, the Corporate Trustee, and the “Lead Paying Agent” (also Citibank), are held harmless and are exonerated from liability on account of “any honest error of judgment” or for harm caused without “willful misconduct or negligence,” under Art. VI, Section E.4. Trustees likewise are given exoneration for non-negligent or willfully wrongful acts. The

\(^{28}\) Deepwater Horizon Oil Spill Trust, supra note 23.
Administrator, however, is not so indemnified under the Trust Agreement—rather, BP identifies Mr. Feinberg for his actions “relating to or arising from the operation of the GCCF” in his personal contract with BP.\(^\text{29}\)

### Compensation Distribution and Criteria

The Gulf Coast Claims Facility distinguishes between two types of payments that private claimants may seek: Emergency Advance Payments (that were available only through November 23, 2010), and Final Payments (available through August 23, 2013). The Protocol for Emergency Advance Payments, promulgated August 23, 2010, was the initial statement of claim eligibility. In February, 2011, the GCCF posted a Protocol for Final Claims, posted a proposed final payment evaluation methodology. In the latter, the GCCF provides:

All individuals and businesses that incurred losses due to the Oil Spill are entitled to and are encouraged to file a Final or Interim Claim with the GCCF. Neither physical proximity to the Oil Spill nor a particular type of work or business engaged in by the claimant is a prerequisite to eligibility for payment of a claim. But adequate documentation of damage attributable to the Oil Spill is required. Physical proximity to the Oil Spill, and the nature of the business or work engaged in by the claimant, are important factors when it comes to the proof needed to document a claim that the damage was caused by the Oil Spill. The ability of the claimant to link the alleged damage to the Oil Spill—as opposed to other factors such as a general downturn in the Gulf region economy or other financial uncertainty unrelated to the Oil Spill—is required.\(^\text{30}\)

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The legitimacy of claims is guided by conformity to the OPA and applicable common law. Claims require documentation or other evidence of damage for each type of damages claimed. Physical proximity to the spill is not dispositive of proximate causation; Mr. Feinberg reiterated this point in the face of political pressure from potential Floridian claimants. Under both the Emergency Protocol and the Final Payment protocol, the Administrator has stipulated the types of losses for which the claim may be submitted. Included are damages for removal and cleanup costs, real and personal property loss, lost profits and lost earning capacity, subsistence use of natural resources, physical injury and death, and the costs of existing damages. Collateral compensation, including “[a]ny other earnings or profits [the claimant] received from another job or another source of earnings or profits during the period for which [the claimant is] claiming lost earnings or profits,” is deducted from Final Payments.

The Protocol references an essential matter in play in our analysis. The “determinations of claims under the OPA will be guided by the OPA. Determinations of physical injury or death

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32 Such is in conformance with the mandates of the OPA, which explicitly contemplates damages recoverable from responsible parties by private claimants:

(B) Real or personal property. Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) Subsistence use. Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources. . .

(E) Profits and earning capacity. Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

claims will be guided . . . by other federal law or pertinent state laws.” The protocol contemplates payments that tightly follow the contours of liability, and the OPA and State common law and statutes. It is supposed that payments will be made along the interpretation of the law rendered by John Goldberg.

As noted, the GCCF posted for public comment a proposal for the final evaluation protocol on February 2, 2011, a document that further explains evidentiary requirements and lays out specific payment policies. The most notable aspect of the proposal was its Final Payment calculus, which provided as follows:

Each claimant’s Final Payment offer will be the larger of: (1) Two times each eligible Claimant’s 2010 Actual Documented Losses (except for claimants with 2010 losses in excess of $500,000); four times each eligible oyster harvester’s 2010 Actual Documented Losses, or (2) The total actual documented losses through the date of the filing of the Final Claim.

The proposal’s appendices contain sample payment calculations (Exhibits A, B), and detailed support for the GCCF’s determination that the Gulf will largely recover by 2012 (Exhibits C, D, E). Such proposition underlies Feinberg’s payment multiplier.

Of general interest may be the public comments themselves, which the GCCF posts daily on its website. If nothing else, the responses give one a sense of the variety of potentially disappointed claimants (including, for example, the full-time student who inquires as to the calculation of compensation for loss of chance in a diminished job market).

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34 See supra note 30.
The Protocol assumes that some false or fraudulent claims will be submitted. The Protocol attempts to deal with this problem, in part, by requiring claimants to declare that the information that the information submitted in support of their claims is “true and accurate,” and seeks to make it clear to them that false or fraudulent statements might be subject to criminal and civil penalties. The latter are not spelt out.

There is no apparent scheme for parceling out the $20 billion corpus equitably between claimants; the trust document provides merely that the Facility must make payments in the order in which Feinberg authorizes them. Though Feinberg would presumably account for limited fund scarcity in exercising his discretion, it seems likely that he will authorize claims—and thus that claims will be paid out—on the basis of first-in-time filing (or rather, of first-in-time perfection under the applicable protocol). BP itself has rejected suggestions that GCCF’s $20 billion will serve as a liability cap, though it is unclear whether excess claims would occasion further BP contributions to the Facility, or be available only through actions against BP. Most recently Feinberg has suggested that he expects to satisfy all claims for about $10 billion, expending half the corpus.  

Terms of Release

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37 Id.
A claim for Emergency Advance Payment does not require waiver or release of any right; a reimbursed claimant may still pursue an action against BP, or file a claim against the federal Oil Spill Liability Trust Fund. To receive a Final Payment, however, a claimant must sign a release—thus, acceptance becomes a critical decision point for claimants.

The Release will waive any rights the Claimant may have against BP and any other potentially liable parties to assert additional claims, to file an individual legal action, to participate in other legal actions associated with the Spill, or to submit any claim for payment by the National Pollution Funds Center. However, except where the Claimant accepts a Final Payment for physical injury or death, the Release will not waive the Claimant’s rights with regard to a physical injury or death claim. If the Claimant elects to accept a Final Payment for a claim for physical injury or death, the Claimant will return to the GCCF a Release specifically waiving the Claimant’s rights with regard to the Claimant’s physical injury or death claim.38

Under the Protocol, the Claimant has a right to appeal the determination of a Final Payment. The appeal is reviewed by a panel appointed by the Claims Administrator who is required to select “one distinguished member of the legal profession . . . who will identify distinguished members of the legal community . . . to serve as impartial GCCF Appeals Judges.”39 A panel of three approved GCCF judges are appointed once an “appeal is certified.” The decision is binding on BP, but a claimant may pursue other remedies at law. It is of note, however, that a claimant who accepts an insufficient Final Payment from the GCCF may still present his claim to the federal Oil Spill Liability Trust Fund.40

38 See supra note 32.
39 Id.
40 See 33 U.S.C.A. § 2713 (“If a claim is presented [first to the responsible party] . . . and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.”). Congress may appropriate up to $1 billion for the Fund.
Compensation in a Sea of Tort

Although the 9/11 Compensation Fund was fraught with human tragedy, and thus required deft and sensitive administration, the road was clear of the conflicting tensions surrounding the BP Oil Spill. Nothing reveals this more strongly than a recent ruling (02/02/2011) by Judge Barbier in the U.S. District Court of the Eastern District of Louisiana who has been charged with administering the class action. The decision declares that BP is not only the OPA “responsible party,” but is also a primary defendant in the MDL and consolidated putative class actions. Under Rule 23, the Court has inherent authority and responsibility to supervise or control communications with class members, particularly when unrepresented by their own counsel in order to ensure that putative class members do not receive inaccurate or misleading communications. At issue was the claim by Mr. Feinberg that he enjoyed independence from BP, and was not its agent in his actions in administering the GCCF. The Court noted that BP’s statutory obligations under the OPA were non-delegable, and thus could not be delegated either to Mr. Feinberg or to the GCCF. In addition, the court found indicia of BP’s control over Mr. Feinberg and the GCCF, all of which tended to undermine their independence: BP’s responsibility for paying Mr. Feinberg’s salary; BP’s right to exercise control under the employment contract; BP’s indemnification of Mr. Feinberg; BP’s authority to terminate Mr. Feinberg for cause; Mr. Feinberg’s covenant to comply with the corporate conduct code; and BP’s right to make a quarterly reevaluation of Mr. Feinberg’s fees. The judge described Mr. Feinberg and the GCCF as performing a hybrid function, which he opined has led

to confusion and misunderstanding by claimants. Pursuant to that reasoning, the court ordered that BP “through its agents” Mr. Feinberg and the GCCF:

(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 OPA;
(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; and
(4) Refrain from giving or purporting to give legal advice to unrepresented claimants [Feinberg had been telling potential claimants to eschew hiring lawyers in favor of submitting GCCF claims].

Judge Barbier found that since claimants who agreed to a final payment must sign a release of all claims, against all defendants, that BP benefited by discharging its liability. The speeches of and information provided by Mr. Feinberg extolling the advantages of the GCCF process were therefore misleading.

Perhaps more damaging to the GCCF’s process, however, was a report on January 31, 2011, headed “91,000 Gulf Oil Spill Claims, Just 1 Final Payment.” The records showed, it was asserted, that the one final payment was for $10 million, and that it was a payment for which BP had lobbied. Moreover, the claim was not reviewed for merit by Mr. Feinberg or the GCCF. The report says: “BP struck an outside deal with the [claimant] and told the fund to make the payment.” The story cites a litany of complaints about the “lack of transparency and

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42 Brian Sokoloff, 91,000 Gulf Oil Spill Claims, Just 1 Final Payment, ASSOCIATED PRESS (Feb. 1, 2011) http://news.yahoo.com/s/ap/20110131/ap_on_bi_ge/us_gulf_oil_spillClaims
independence from BP." However, the image in the minds of claimants is that the GCCF is a slush fund by which BP pays claims subject to its whim and self-interest.

Indeed, the distribution of the trust’s corpus does not fall solely within the bailiwick of Mr. Feinberg: according to the Trust Agreement, the beneficiaries include all “holders of resolved Damage Claims.” Included in the definition of “Damage Claims,” however, are “amounts owed by [BP] pursuant to . . . settlement agreements that are resolved outside of the GCCF process . . . .” With respect to such claims, the GCCF is not empowered to assess “the consistency of the claim with . . . [the] settlement agreement.” BP need merely submit a notice of claim payment to the GCCF’s bank, thereby circumventing Feinberg entirely.

All of this springs from the basic flaw of the trust document: it does not ensure Mr. Feinberg’s independence. This flaw is surprising given that the fund was structured as an irrevocable trust fund and therefore seemed to be an appropriate payment vehicle. However, several factors militated against a clear-eyed argument for independence:

(1) The OPA arrangement, around which the structure needs to be built;
(2) The haste with which the deal was constructed;
(3) The huge interest of aggressive plaintiffs’ lawyers in attracting claimants into their class action;

43 Id.
44 See generally Comments Regarding the Announcement of Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology, available at http://www.gulfcoastclaimsfacility.com/methodology.
45 Trust doc Recital 3
46
An unexamined reliance on Mr. Feinberg’s reassurances, and a neglect of the critical role of the institutional arrangements. [Perhaps this stemmed from the glow of the 9/11 Fund.]; and

An assumption that the very quantum of the fund would exert gravitational pull on claimants to opt for the GCCF and the compensation scheme.

PART II

If one has labored for long enough in the torts vineyard, one recalls that compensation issues were once paramount. The great tort scholars of the day, e.g., Fleming Jones and John Fleming, fine doctrinal scholars that they were, eschewed the role of tort law as delivering effective compensation for the haven of compensation schemes that would deliver more cents on the dollar to the victims of accidents. These were days before economic analysis and deterrence theory loomed large. The most radical scheme was adopted by the New Zealand government in the late 1960s when tort liability for personal injury was abolished and a government compensation scheme brought in, in its stead. At that time, Australia and the U.K. were close to adopting similar schemes. Of course, Workers Compensation, with roots in Bismarck’s Germany, was the grandparent of these schemes.

The times have changed, and certainly strong governmental intervention is unpopular except, under the moniker of tort reform, as it limits the ability of plaintiffs to bring action in

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certain types of litigation. At the same time, the costs of litigation, modern commentators have argued, may be justified by non-monetary benefits resulting from the individualization of claims at common law.

All of this should be conceded, but none of it undermines an argument that in certain types of claims the tying of compensation to a tort claim is baleful. This had led to the non-fault scheme set up under the National Childhood Vaccine Injury Act of 1986. At the time, legislators were concerned that the pursuit of tort remedies would crimp the goal of research, development, and distribution of drugs to the detriment of public health. Though Congress was confident in the energy industry’s ability to persevere in the face of liability, the fund established under the OPA was purposed to similar ends, i.e., to deliver compensation by an industry, through an established fund, and to provide it at a price that would not dampen unduly the business of oil. It is testament to the dimension of the BP spill, and its political impact, that BP was quick to insist that it would not avail itself of the limits of liability.

With GCCF, no claimant is obliged to make a claim through the fund. On the contrary, all are free, and no doubt will be told even more explicitly now, to proceed through class action or otherwise. Although Judge Barbier was concerned about making sure that certain warnings were transmitted to claimants, his order says nothing about providing claimants with

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52 42 U.S.C. §§ 300aa-10.
54 Perhaps it shows that some of the statutory schemes setting caps are not in extremis viable. This would have an impact on the insurability of enterprises involved in these hazardous industries cites on insurability. See Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521 (1987).
information about the hazards of proceeding outside the GCCF. To rely upon the claimants’
counsel, avid to recruit for the class, even though they are ethically restrained to disclose risks
and pitfalls of the litigation, is naïve. Just as Mr. Feinberg or the GCCF may have a bias in favor
of giving an unbalanced appraisal of the advantages of the trust fund, plaintiffs’ lawyers have a
similar bias in favor of their own interests. The Court, in exercise of its powers, ought to
provide a means by which claimants can rationally assess all of the necessary considerations
and interests.

In encouraging BP to establish the trust fund, the Federal Government dipped its hand
in the water to quell the uproar in public opinion. It seems appropriate that, having entered
the fray, it should now help ensure that claimants receive unbiased advice. For example, the
government could enlist a panel of experts to provide an analysis of the advantages and
disadvantages of taking particular courses of action. Such advice would be entirely impartial
and would bear a mark of legitimacy. As a rough gauge, our sense is that claimants with
modest losses and marginal claims would be best served by the GCCF process. Those with large
dollar claims that fall within clear liability boundaries may prosper more in litigation,
particularly if super-compensatory damages could be garnered. But much depends on
claimants’ utility curves and the time value of money. The Exxon Valdez litigation lasted for
many years, and then the U.S. Supreme Court restricted the scope of punitive damage
awards.55

A Model: Fiduciary Obligations

55 Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (limiting damages under maritime law; the accident occurred in
1989).
With the creation of the GCCF as an escrow account for BP’s liabilities, the opportunity was lost to establish a fund that could have more efficiently dealt with the bulk of the claims. The missing ingredient was trust – that has been revealed by Judge Barbier’s findings regarding Mr. Feinberg’s role and obligations, and the publicity around the paying out of claims to date.

The trust structure could have been used to great effect. Essentially, BP should as settlor have given up control of the fund to the Trustees, who could have employed Mr. Feinberg as their agent for the payment of claims. The fund should have been segregated from BP’s efforts to settle other claims. The claimants, once their claims have been paid out, would have been owed fiduciary duties by Mr. Feinberg as an agent of the trustees. If there were to be an indemnity for Mr. Feinberg, it should not come from BP funds, but from trust funds. And the indemnity should not cover fraudulent actions, but only actions taken in good faith exercise of his discretion.

Claimants are attracted to courts of law because, among other things, of the individual attention given to them. However, it is apparent that under the MDL class action, the claims will perforce of their numbers and complexity be bureaucratized. Therefore the comparison for claimants is between two rather impersonal choices, both with a basis to argue legitimately for independence in decision making. The Courts have it by tradition, the GCCF – properly constituted – would have gained legitimacy through patent mechanisms designed to inspire confidence and trust. Victims of the spill would then have before them a meaningful choice

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56 Frank Sloan et al., SUING FOR MEDICAL MALPRACTICE (1993) supra note 51.
about how to proceed. At the same time, the defendants, BP and others, would have had a better prospect of emerging within a reasonable time from the shadow of impending claims.57

PART III

In this final section of the article, we suggest a better design for a compensation fund. Some of the principles could be adopted for the GCCF arrangement. Of course, the ultimate challenge for the designers of the fund and for Mr. Feinberg is how to attract claimants to the GCCF process rather than encouraging them to take their chances outside the fund through representation in court by plaintiffs’ lawyers. In other words, in an economic sense, claimants should be encouraged to consider seriously whether individual claimants are better off working with Mr. Feinberg or the plaintiffs’ lawyers. In other words, claimants should be encourage to think about which system offers claimants lower agency costs, better services, and better compensation. Clearly, the utility curve of different classes of claimants will vary and this makes it challenging to define an efficient system.

In the common law system, small claims tend to be over-compensated since defendants (usually insurance companies) have a strong incentive to purge small “nuisance” claims from their books. For these claims to be processed and settled expeditiously by the GCCF would appear to be advantageous to all. This justifies Mr. Feinberg’s latest option to claimants that reads as follows:

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57 The Court’s assault on the GCCF may have perverse consequences. It is likely that Mr. Feinberg will now want to show his independent plumage whenever possible to counteract perceptions of being in BP’s pocket. This is likely to result in settlements that may in size and generosity disgruntle BP, whose grumbling may undermine the public’s perception of the GCCF’s independence.
There is a separate option for those claimants who want to file a Final Claim and who previously received an Emergency Advance Payment. Such claimants may apply for a Quick Payment Final Claim. This is an expedited procedure which offers a fixed amount of $5,000 for individuals and $25,000 for businesses to finally resolve their Final Claims. Under the Quick Payment Final Claim process, you do not have to document your final claim. Do not elect the Quick Payment Final Claim process unless you are willing to accept the fixed payment of $5,000 for individuals and $25,000 for businesses and to sign a full release of liability. If you sign a release of liability, you will not be able to seek further compensation from the GCCF, the Coast Guard, or in court.

The task in designing an effective system is to give prospective claimants the assurance that their claims will be fairly dealt with by impartial actors/agents. Claimants know that, if they bring their claims in court, they will have the considerable social capital of honest, capable institutions to which persons come for justice. But courts are ponderous, and in a large class action claim, as will be involved in the case of the BP oil spill, the claims will be numerous and varied. The class action mechanism will streamline claims at the cost of uniformity. In this way, the process tracks the GCCF.

The GCCF and Mr. Feinberg will have to exhibit to prospective claimants that they are highly trustworthy. They cannot be seen as tools of BP. Trustworthiness is usually guaranteed through liability rules that at their strictest provide that the agent is a fiduciary. Such a rule, as is well known, prohibits a fiduciary from allowing his duty to conflict with his duties to the beneficiaries. The remedy is powerful, providing for disgorgement of any profits garnered, even though the beneficiary should suffer no harm. Thus, if Feinberg is conceived of as a fiduciary agent of the prospective claimants, the duty will instill confidence of selfless deciding. (He is entitled to his fee, of course, and this is explicitly disclosed on the trust document at the
core of the GCCF. The fee however should not come from BP but rather be payable by the Fund at the behest of the Trustees.)

A major issue for claimants is to have confidence that they will be dealt with fairly and equitably. As presently constituted, especially in relation to the confidentiality of settlements, the fund does not inspire trust. Full disclosure of settlements might discourage and delay the settlement process because claimants might delay hoping for better information on which to press their claims. An ignorance of the identity of claimants will tend to encourage a rush to settle. An independent government auditor may provide the necessary assurance of fair dealing. Government auditing is a well recognized mechanism for providing direct monitoring arrangements, and this can be accomplished by audits and pre-established performance standard, as well as by “indirect” monitoring mechanisms that create incentives for due performance.  

The theory was first forcefully articulated by Jensen and Meckling. We have discussed fiduciary obligations, but agency costs may also be reduced by pre-commitments to performance, capital contributions that would be forfeited in the case of breach, covenants not to compete, self-imposed ethical standards and termination clauses.

Tort liability such as bad faith breach of contract, inducement to breach of contract, extended tort-like damages for breach of contract,  are all ways in which relationships of agency may be sustained. 

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60 The English cases now are well established. See, e.g., Farley v. Skinner [2002] 2 A.C. 732 (H.L.). American courts have been slower to countenance non-economic damages.
Let us provide an example springing from the tort of inducement to breach of contract. For the London Opera season of 1852, two impresarios, Lumley and Gye, old rivals, vied for supremacy. After much pursuit, Lumley persuaded Wagner, a cantatrice to the King of Prussia and niece of Richard, to sing at his theatre, Her Majesty’s Drury Lane in London, during the 1852 opera season. Gye, knowing of the contract offered Ms. Wagner a better deal at Covent Garden. Note that the contract for personal services entered into by Johanna Wagner could not be specifically enforced for a variety of reasons. However, she could be prevented from supplying her services under the contract with Gye because of the negative clause that she would not sing for anyone else was included in her contract. But more, the tort of inducement to breach of contract allowed Lumley tort damages for the loss of her services. In the face of the tort, artists in the position of Ms. Wagner will be inveigled away only at a considerable premium. A person wanting to destroy the contract will be sure to take account of his possibility liability in tort, and will in negotiations pay for immunity from suit. The original relationship will accordingly be both protected. The tort also tends to discourage free-riding by persons like rival impresarios. To discover talent and contract with a fine artist for her talents is a delicate, expensive, and risky venture, as it was for Lumley. If artists can be inveigled away by rivals, the investments in discovery and promotion will be lost. Therefore the tort encourages investment by overcoming the free rider problem. The same line of reasoning supports the

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63 Id., at 820-821 (describing the premium extracted from Sony Corporation when it sought to contract with Peters & Guber, who had a contract with Warner Brothers to produce movies. Under threat of a tort action, Sony agreed
new Restatement of Restitution disgorgement for breach of contract remedy.\textsuperscript{64} For parties vulnerable to exploitation the remedy with its teeth gives an assurance against advantage taken as opportunistic behavior in a world of bounded rationality.\textsuperscript{65} That would otherwise infect relational contracts where one party invests faith in due carriage of the contractual understandings.

The significant agency cost problem with the GCCF and the MDL is that claimants will have different and perhaps vying interests, as economists say “heterogeneous preferences.” Accordingly the barriers to their collective action will cause them to delegate more discretion to the agent, and it will be more difficult to ensure that the agent does the “right” thing.\textsuperscript{66} The principals, the claimants, will be unable to directly monitor the agents’ behavior, and a bond by way of liability for opportunistic or negligent behavior would benefit principle and agent alike. In the face of coordination costs, regulatory strategies are often invoked. A court or regulatory body has the role of determining compliance. This explains the Federal Courts’ function in the class action context, in the corporate setting.\textsuperscript{67} Armour, Hansmann, and Kraakman suggest the following heuristic:

to give over substantial assets in order to procure the services of Peters and Guber, then renowned for their Batman movie success, after Peters had been Barbra Streisand’s hairdresser. It was a poor investment.\textsuperscript{.}

\textsuperscript{64} See discussions by Roberts and others.

\textsuperscript{65} See Oliver Williamson, \textit{The Economic Institution of Capitalism} 47-9 (1985).


### Strategies for Protecting Principals

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- **Ex Ante** RULES ENTRY SELECTION INITIATION TRUSTEESHIP
- **Ex Post** STANDARDS EXIT REMOVAL VETO REWARD

Although the heuristic is designed to understand the geometry of corporate governance and regulation, its structure helps to perceive strengths and weaknesses of the GCCF and class actions. If one takes “agent incentives,” the Ex Post reward structure reveals that payment by BP and control by BP over the fate of Mr. Feinberg is corrosive, but so too is the incentive structure rewarding plaintiffs’ lawyers. On the ex ante axis it would seem that Mr. Feinberg’s firm structure is ideal. His firm has come to specialize in this work and he expends much effort in shoring up its reputation for reliability and faithful dealing; his firm’s future depends upon a faithful and competent performance. His future stock in the business of running compensation schemes is enhanced by building on his performance in the past, burnishing his reputation, and offering legitimately and convincingly his services next time around. The trusteeship element for attorneys in the class action is supplied by their ethical constraints, court oversight, and reputational jeopardy. This has been seen by commentators as a rather naïve and weak reed.

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69 Id.

70 Feinberg’s voluntary services in 9/11 Fund serves this function.
Given the money at stake and the disparity of power Congress has moved to strengthen oversight by courts of class action plaintiffs. 71

Market mechanisms have also been suggested. 72 Rival groups of plaintiffs’ lawyers could promise a better performance or a reduced cost. Informational asymmetries plague this approach, however. It may be seen that this equation of the compensation Fund is a way of introducing a competitive monitor so that the monopoly rents of the attorneys can be bid down to the benefit of claimants. It is this competition that has inspired at this early date an assault on the GCCF. Another variant is the judicial creation of a temporary administrative agency to monitor more closely, even take an active role, in the settlement of complex class actions. 73

Modalities of enforcement can be critical, and they include public enforcement, private enforcement, and gatekeeper control. Thus, the GCCF could be subject to regulatory agency enforcement of standards, to legal or non-legal private norms, or to actors like auditors retained to check on agents’ behavior. In the case of the GCCF, to date at least, media scrutiny flowing from the moment of the event has acted to reduce agency costs. The concern is that this scrutiny may fade over time and is subject to distortion. The public is fickle as new events crowd out the old.


A full discussion of agency cost concerns would be lengthy. It is plain that where large class actions are permitted the possibility that plaintiff’s lawyers may take advantage of the system by reaching settlements that suit their self interest rather than the interests of their clients is apparent. Given the advantages of class actions, the task has been to ameliorate the agency costs. The operation of one mechanism can be seen at work in the BP Spill in the order of the Federal Court for the GCCF to clarify its status. The Court is given the task of monitoring the process in order to ensure fairness. Others methods can also control costs, including mechanisms designed to create economic incentives by way of auctions for representative services to diffuse monopoly rents and to help ensure that plaintiffs are not disadvantaged by lawyers feathering their own nests.\(^74\)

The concerns of claimants will be difficult to define \textit{ex ante} as they are like long-term contracts where conditions may change. With the obstacles of monitoring for such requirements or standards as “fair-dealing” between claimants, a regulatory solution may make sense. For example, Congress could establish a legislative framework for voluntary compensation schemes by appointing a public auditor, or private auditors publically appointed and licensed, who are charged with the task of assuring the parties of due compliance. Such a legislative structure would encourage the establishment of compensation schemes.

What of liability rules that will enforce compliance? These would be established \textit{ex ante} to allow \textit{ex post} aggrieved parties to enforce the standards. If the claims administrator owes fiduciary obligations, the duty of loyalty will place claimants’ interests above those of the

settlor, BP. Moreover the claims administrator will be prohibited from arbitrarily promoting the interests of some claimants over those of others.

Clear priority rules will encourage claimants to “invest.” But the present fuzzy indicators of the way in which claims will be resolved and paid and the confidentiality cloak on settlements will cause claimant to shy away. It is here that accountability for allocative decisions will be aided by resort to restitution rights.

As suggested earlier, one agency cost mechanism would be for the GCCF to be structured to ensure that Mr. Feinberg would owe clear duties as a fiduciary to those persons who have agreed to a final payment. The duties are well defined and will guard against any non-disclosed interest that would clash with his duty to the claimant. Such arrangement would differ markedly from the present structure of the GCCF, whereby Mr. Feinberg is neither a trustee of the fund nor an agent of the claimants, and, in any event, is personally indemnified by BP by an instrument external to the Trust Agreement. Owing fiduciary duties, Mr. Feinberg would be required to deal fairly and equitably with the claimants, subject to the various strictures of either the law of agency (were the Administrator considered the claimants’ agent in their dealings with the fund), or the law of trusts (were the Administrator repurposed as a trustee of the fund). He could not distribute funds except on a rational and reasonable basis pursuant to the duty of loyalty, a requirement that drives toward a clearer articulation of the

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75 See Restatement (Third) of Agency §§8.01-8.06 (concerning the agent’s role as fiduciary, his duty of loyalty, and his duty of performance).
76 See Restatement (Third) of Trusts §§76–84. The duty imposed by §78, for instance—a duty to communicate all material facts to the beneficiaries—would have obviated the Louisiana order requiring more complete disclosure on the part of the GCCF. Restatement (Third) of Agency §§8.02–8.06
basis by which payments are to be made. The law of restitution would create a basis for the fiduciary-Administrator’s liability to claimants for the benefit of any breach.\textsuperscript{77}

In addition to such rights against the Administrator, claimants would have restitution claims where they could claim an equitable right to a payment in priority to other claimants. The Restatement of the Law (Third) of Restitution & Unjust Enrichment § 48 considers the existence of equitable priorities between independent obliges, where both parties have an independent right to payment from a third-party obligor.\textsuperscript{78} Take the example of the Claimants who have received Final Payment and have forfeited their rights to sue at Common Law. Here, the priorities of Claimant A and Claimant B could be judged \textit{inter se}, as where Claimant A’s underlying entitlement to payment is paramount to that of Claimant B’s. Where there is no statute or recognized rule concerning priority of payments from the GCCF, “the priority of one entitlement over another can only be determined by comparing the relative equities of the particular claimants.”\textsuperscript{79} The question then becomes how to rank the competing interests of the claimants: is the stronger claim to the trust’s corpus founded upon the directness of proximate causation? The date of a claimant’s application to the trust? The date of the application’s perfection with respect to Mr. Feinberg’s evidentiary requirements? The size of the claim? The type of damages claimed?

As the structure of the fund now stands, no priorities are established to give rise to equities between GCCF claimants. However, if priorities were established, Claimant A taking funds as a final settlement out of the order stipulation would be liable to a restitution claim by

\textsuperscript{77} See infra note 81 and accompanying text (discussing Restatement (Third) of Restitution § 43).
\textsuperscript{78} See Restatement (Third) of Restitution § 48.
\textsuperscript{79} See id., cmt. d.
Claimant B who had priority. Say, for example, that required proximate cause is not demanded for A, while it is used to limit B’s recovery. Let us hasten to add that if the Administrator has funds to make all Claimants whole in a final distribution of funds according to the priorities that claims under §48 will not be pursued. But such largess will be rare.

If either a restitution or trust matter, the next issue is whether the funds so marshaled have found their way to the hands of the claimants who have less priority or no claim at all. If they have, then the Restatement might allow recovery against either the claims administrator, as fiduciary, or the claimant him/herself. In particular, § 43 provides as follows:

(1) A person who obtains a benefit
   (a) in breach of a fiduciary duty,
   (b) in breach of an equivalent duty imposed by a relation of trust and confidence, or
   (c) in consequence of another's breach of such a duty, is accountable for the benefit so obtained to the person to whom the duty is owed.

(2) The extent of recovery depends on the blameworthiness of the defendant's conduct. As a general rule:
   (a) A defaulting fiduciary, a person who breaches a duty of confidence, or a person who profits from another's breach of duty with notice of the wrong will be required to disgorge all gains (including consequential gains) derived from the wrongful transaction.
   (b) An unwitting recipient of benefit from another's breach of duty will be liable only for the direct benefit derived from the wrongful transaction.  

There are two possible scenarios in which restitutionary claims might arise. The first is the situation in which a claimant has filed a false or fraudulent claim, and the Administrator pays the claim without realizing the fraud. This situation could arise in an array of contexts. For

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80 Restatement (Third) of Restitution § 43 (tentative draft no. 4); see David Campbell, “A Relational Critique of the 3rd Restatement of Restitution,” and Caprice Roberts, “The Restitution Revival and the Ghosts of Equity.”
example, suppose that a shrimper claims a dramatic loss in revenue attributable to the BP Oil Spill. In particular, the shrimper claims that he was not allowed to fish for a considerable period of time, and therefore was unable to support himself or to make a living. In support of his claim, the shrimper submits records to the Trustee showing revenue for the years before the oil spill, as well as records showing the dramatic decline in revenue. As a result, the Administrator compensates the hotelier for the lost income. However, unbeknownst to the Trustee, the shrimper’s drop in revenue had nothing to do with the environmental contamination, but rather was due to the fact that his boat had gone beyond its useful life and could no longer be used. In other words, with or without the oil spill, the shrimper would have seen a dramatic drop in revenue because he had no boat and therefore could not engage in shrimping.

Of course, the shrimper example provides only one example of fraud. A fraudulent claim could also be submitted by an oceanfront hotelier that submitted documentation of revenue for the years before the oil spill, and the year after, and claimed that a dramatic drop in revenue was directly attributable to the oil spill (e.g., either the beach in front of the hotel was spoiled by tar, or the public perceived that the beach was spoiled by the tar and went elsewhere). In fact, the hotel was under renovation at the time of the BP oil spill, and had taken a large number of its rooms out of inventory. As a result, the revenue decline was attributable to the renovations rather than to the oil spill. Or suppose that an individual who lives near the Gulf claims that he/she fishes the Gulf to provide food for his/her family, and asks for compensation for loss of the subsistence that he and his family had drawn from the Gulf. Since there are no records of this subsistence, the Administrator accepts the individual’s affidavit regarding his subsistence practices. In fact, the individual does not do subsistence
fishing, and decided to submit a claim only after learning about the fact that some of his neighbors had succeeded in obtaining money from the BP Oil Trust by making subsistence allegations.

Now suppose that a legitimate claimant fairly documents his claims and accepts a Final Payment with a waiver, but comes to regard his payment as insufficient given the payments made to others who submitted fraudulent claims. How does the legitimate claimant find out about the fraudulent claims? Suppose that the New York Times conducts an investigation of the BP Oil Trust and publishes a lengthy expose detailing fraud by individuals like the shrimper, the hotelier and the private individual who recovered for subsistence. Some of the payments made to the fraudulent claimants were quite large. The hotelier (who had 200 rooms) might have received compensation in the millions. Other claims (the individual who sought compensation for the loss of subsistence) might have a claim that is much smaller. Nevertheless, based on the New York Times article, you have reason to believe that lots of fraudulent subsistence claims were submitted, and that the total payout for these claims was quite large.

Section 43 would seem to permit the disappointed claimant to recover against both the Administrator (for breach of fiduciary duty) and against those who made the fraudulent claim. In this case, if the Administrator was not diligent in ensuring that claims were not fraudulently submitted, there may well be a breach of his quasi-fiduciary obligations. The Administrator would be required to disgorge his benefit in the entire transaction as a strong deterrent; indeed, § 43(2) seems to suggest that such recovery might be appropriate.
Another scenario in which recovery might be allowed is if the Administrator errs in evaluating the relative claims, in determining whether causation really exists, and in assessing priorities between claimants. Let us assume that the Administrator, in a well drawn scheme where priorities in payment of economic losses are patent, decided to provide recovery for mere economic loss. In that situation, it might be quite clear that one applicant’s claim on the BP Trust is quite strong and deserves to be paid. For example, there was a period of time when fishing vessels were not allowed to fish in the Gulf for fear that their catch would be contaminated. Suppose, for example, that fishing boats are unemployed because the oil spill contaminated the waters and potentially contaminated their catch. As a result, a number of individuals and companies were thrown out of work. Their claims to compensation might be quite well substantiated.

The claims of a hotelier in Florida, who alleges that the oil spill discouraged potential customers from staying at his resort, may be considerably more speculative. Indeed, there may be other possible explanations for a decline in the Florida hotelier’s occupancy rate, including a significant decline in economic activity. So, if the Administrator fails to sufficiently distinguish between claimants, more deserving claimants may claim that the Trustee breached his fiduciary obligations by failing to be sufficiently careful in the payment of claims.

Of course, the amount of the recovery against either the Administrator or against other claimants will depend upon circumstances. The Restatement distinguishes between claimants based on their blameworthiness. Section 43 provides:
(2) The extent of recovery depends on the blameworthiness of the defendant's conduct. As a general rule:

(a) A defaulting fiduciary, a person who breaches a duty of confidence, or a person who profits from another's breach of duty with notice of the wrong will be required to disgorge all gains (including consequential gains) derived from the wrongful transaction.

(b) An unwitting recipient of benefit from another's breach of duty will be liable only for the direct benefit derived from the wrongful transaction.\textsuperscript{81}

Based on this language, those who submitted fraudulent claims to the Trustee could be required to disgorge more because they accepted monies “with notice of the wrong.”\textsuperscript{82} Even those who were unaware of the wrong (e.g., those who recover more because the Trustee failed to sufficiently distinguish between claimants) might be required to disgorge, but they would only be responsible for “the direct benefit derived from the wrongful transaction.”\textsuperscript{83}

Of course, even if recovery is allowed, courts may face difficult issues in determining the amount that a particular claimant should receive, and there may not be clear answers about how the court should dole out any monies that are recovered. A given legitimate claimant may be simply one of many similarly situated legitimate individuals, and it is unclear that the plaintiff in a restitution action should receive full recovery while others (who did not sure) receive no extra funds. The BP Oil Trust is a $20 billion trust fund, and we are told that the funds are more than adequate. But this will not always be the case with all compensation schemes. Suppose that, of those directly affected by a disaster, can establish claims totaling

\textsuperscript{81} \textit{Restatement (Third) of Restitution} § 43. \textit{See also} Berg, \textit{Accessory Liability for Procuring or Assisting a Breach of Trust}, 111 \textit{Law Q. Rev.} 545 (1995).

\textsuperscript{82} \textit{Restatement (Third) of Restitution} § 43 (2)(a).

\textsuperscript{83} \textit{Id.} at § 43(2)(B).
$25 billion. Is it really fair to allow the plaintiff (as one member of the class) to receive full recovery while others (also members of the same class) receive only a partial recovery?

It may be said that any dissatisfied claimant can simply go to her rights at common law. This is passing strange, however, should the fund advertise itself as a superior compensation vehicle. And it follows from our argument that the fund must be viewed by a significant class of claimants as superior.

CONCLUSION

Although restitution rules are most often seen as a private law mechanism for achieving corrective or commutative justice, we have shown that they play an indispensable role in the design of an effective compensation scheme. Along with reassurances of reputation and other social and market norms, liability rules, as outlined, with restitutionary remedies, make up the substance of a well-designed scheme. It is this instrument role we highlight here and which is not akin to restitution’s private role and function elsewhere.

If anything, the missteps in the BP Oil, GCCF, scheme in fusing duties will impose on future compensation schemes a template that is more responsive to agency costs. The Restatement provisions in their careful articulation of trust and restitutionary rules are thus salutary in a field that has seemed far from the usual concerns of fiduciary duties, mistake, and fraud. Their prophylactic role should not be forgotten.