

COMMENTS

SETTLING THE UNKNOWN: WHY CONGRESS SHOULD ADOPT REOPENER LIABILITY UNDER OPA 90 TO COMPENSATE VICTIMS OF THE DEEPWATER HORIZON OIL SPILL

I. INTRODUCTION

The Deepwater Horizon oil spill is considered the worst environmental disaster the United States has ever faced.¹ The aftermath of this devastating event poses a unique legal challenge regarding how to adequately compensate those who have been affected. For most claimants, filing an individual lawsuit against British Petroleum (BP) is simply not feasible. In order to avoid formalities, excessive legal costs, and an overloaded court system, many claimants expect to settle their claims through a streamlined claims process developed by BP, called the Gulf Coast Claims Facility (GCCF).

The GCCF has generated considerable interest, mainly because the legal relationship between the GCCF and the courts is unclear.² Claims filed with the GCCF do not establish BP's

1. On April 20, 2010, an explosion took place on the M/V Deepwater Horizon drilling rig located in the Gulf of Mexico, killing eleven men and injuring seventeen others. Transocean owned the rig, operated it under the Marshallese flag of convenience, and leased the rig to BP. The explosion resulted from methane gas that escaped from the well, shot up the rig's drill column, expanded onto the platform, ignited, and then exploded. It is speculated that the cause of the explosion was the failure of either the steel pipe-and-connectors system leading out of the well or the cement that sealed those pipes and held them in place. In addition to those failures, equipment designed to shut down a blowout or mitigate its effects either failed to function or was not installed on the rig. Shortly after the explosion, a large oil slick began to spread at the former rig site as an estimated 4.9 million barrels of crude oil gushed into the Gulf. See PETER LEHNER & BOB DEANS, IN DEEP WATER: THE ANATOMY OF A DISASTER, THE FATE OF THE GULF, AND ENDING OUR OIL ADDICTION (Natural Res. Def. Council 2010).

2. Denise M. Pilie, *Satisfying the Deepwater Horizon Oil Spill Claims: Will Ken*

liability under federal or state law; thus, their worth is not assessed according to those laws.³ Rather, BP has appointed a Claims Administrator who develops rules and procedures to determine the validity of claims.⁴ In doing this, the Administrator set out different categories of claims, each with different corresponding rights. Those who file “interim” claims with the GCCF are permitted to file separate legal actions in court.⁵ Claimants who seek payment of “final” claims through the GCCF, however, must settle based on expected losses, and once final-claim payments are completed, claimants waive any rights they might have against BP for future damages.⁶ These waiver provisions directly conflict with the Oil Pollution Act of 1990 (OPA 90), which guarantees claimants the right to file successive claims against the responsible party.⁷ What remains a crucial issue for the courts to address is whether a “final settlement” payment by the GCCF precludes claimants from recovering damages not reflected or paid in the claim if the claimant has agreed to waive his right to sue BP.

The purpose of this Comment is to analyze the legal liability resulting from the Deepwater Horizon oil spill and the adequacy of the existing administrative framework designed to compensate victims under the GCCF. Section II briefly discusses OPA 90, which is the federal law enacted after the Exxon-Valdez oil spill to govern relief to persons harmed as a result of an oil spill, and it goes on to provide an overview of BP’s legal liability under federal law. Section II develops the argument that OPA 90 is inadequate to meet the demands of the Deepwater Horizon oil spill. As a result of this inadequacy, BP has been permitted to fulfill its legal

Feinberg’s Process Work?, 58 LA. B.J. 176, 178 (2010).

3. *See infra* Section II.B.

4. *Id.*

5. Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/METHODOLOGY_8162011.pdf (last visited Nov. 20, 2011) [hereinafter GCCF Final Proposal].

6. *Id.*

7. Oil Spill Liability Trust Fund, 33 C.F.R. § 136.115 (a) (West 2011). “[A]cceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages which are subject of the compensated claim.” *Id.* However, the OPA 90 settlement provisions clarify that payment of a claim for interim damages does not foreclose a claimant’s right to recover all damages to which the claimant otherwise is entitled under the act of any other law. *See infra* note 36.

OPA 90 obligations through the adoption of the GCCF.⁸

Section III expands on the premise that partial payments, including a partial “final settlement” payment, should not preclude recovery by the claimant for damages not reflected or paid in the claim. Historically, in environmental catastrophes, courts have refused to allow parties to enter into covenants not to sue without a reopening provision, because public policy dictates that a toxic tort is a strict liability tort where the claimant is entitled to recover not only the immediate removal costs, but also future damages that result from such an incident.⁹ This Section compares the GCCF’s settlement tactics to other toxic tort settlements in which the responsible party was unsuccessful in its attempts to bind claimants to settlement terms because the claimants’ damages were ongoing and difficult to quantify at the time of settlement.¹⁰

This Comment challenges the notion that the GCCF provides an equitable forum for claimants by dispelling assertions set forth by BP that the administrative body acts independently and in accordance with OPA 90.¹¹ Consequently, BP uses economic duress to manipulate financially desperate claimants into providing the company with an improperly broad release of legal rights in exchange for inadequate compensation.¹² Section IV proposes that Congress amend OPA 90 to require a responsible party to include a reopener provision in all settlements containing release provisions. Amending OPA 90 in that manner would ensure that the responsible party fulfills its absolute-liability obligations under OPA 90 to the victims of the Deepwater Horizon oil spill.

II. BACKGROUND

A. BP’S LIABILITY UNDER THE OIL POLLUTION ACT

An understanding of the legal liability imposed under OPA 90 is imperative to analyzing the controversy surrounding the GCCF’s waiver provisions discussed in the subsequent Sections. On August 18, 1990, President George H.W. Bush signed the Oil

8. See *infra* notes 58-60 and accompanying text.

9. See *infra* Section III.B.

10. See *infra* Section III.B.

11. See *infra* Section III.A.

12. See *infra* Section III.B.

Pollution Act of 1990 into law, consolidating existing federal water-pollution laws and creating new provisions regarding oil-spill liability and compensation.¹³ OPA 90 was passed on the heels of the 1989 Exxon Valdez oil spill and sought to prevent future disasters by mandating that oil companies develop and maintain oil-spill-prevention plans.¹⁴ OPA 90 gives the federal government exclusive authority to direct cleanup operations, ensuring a unified response by the federal government and the responsible party.¹⁵ The legislation consists of two basic regimes. The first regime sets out the responsible party's liability in the event of an oil spill.¹⁶ The second regime provides a claims process that a claimant may use to recover losses incurred by an oil spill.¹⁷ Under OPA 90, payment of damages is divided between the responsible party and the Oil Spill Liability Trust Fund (OSLTF).¹⁸

1. OPA 90'S FIRST REGIME: LIABILITY

When Congress enacted OPA 90, its main concern was ensuring that parties injured by an oil spill were adequately compensated for their damages.¹⁹ Congress attempted to achieve this goal by doing the following: (1) rendering the responsible party strictly liable; (2) creating higher liability limits; (3) allowing claimants to recover economic losses in the absence of physical injury or property damage; and (4) allowing claimants to file successive claims to recover their "actual damages."²⁰

OPA 90 was intended to expand maritime law by rendering the responsible party strictly liable and entitling eligible claimants to obtain compensation without the burden of proving that the oil discharge resulted from carelessness or wrongdoing.²¹

13. See *infra* Section III.B.

14. See *infra* Section III.B.

15. See Patrick Nash, Note, *The Adequacy of the Oil Pollution Act's Compensation Scheme in the Case of a Catastrophic Oil Spill*, 7 J. MIN. L. & POL'Y 105, 106 (1991).

16. See discussion *infra* Section II.A.1.

17. See discussion *infra* Section II.A.2.

18. See discussion *infra* Section II.A.2.

19. See Steven T. Smith, Comment, *An Analysis of the Oil Pollution Act of 1990 and the 1984 Protocols on Civil Liability Damage*, 14 HOUS. J. INT'L L. 115, 117 (1991) (describing the impact of major oil spills such as Torrey Canyon, Amoco Cadiz, and Exxon Valdez and their effects on regulation of oil transport and shaping OPA 90).

20. *Infra* notes 21-22.

21. *Rice v. Harkin Exploration Co.*, 250 F.3d 264, 266 (5th Cir. 2001); Oil

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Pursuant to OPA 90's first regime, any party whose vessel or offshore drilling facility discharges oil into navigable waters is strictly liable for physical injuries, property damage, and indirect losses caused by the spill.²² Because the United States government designated BP the responsible party for the Deepwater Horizon oil spill, BP is strictly liable to claimants.

Generally, under maritime law, a claimant is not entitled to recover economic losses in the absence of physical injury to his person or property.²³ However, under OPA 90, all claimants who suffer from lost profits or impaired earning capacity are permitted to recover, even those claimants who neither own nor lease property that has been damaged.²⁴ Given the broad scope of this mandate, the list of individuals and businesses claiming economic losses could be endless, as each entity suffering a setback could arguably pass a portion of that setback on to other entities dependent on them for business in an economic chain reaction.²⁵ However, OPA 90 establishes some limits by requiring

Pollution Act, 33 U.S.C. § 2702(a) (West 2011) [hereinafter OPA 90] ("Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each 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 . . . that result from such an incident."). OPA 90's liability regime also provides strict, joint, and several liability for responsible parties. Therefore, liability may be based simply on one's status as owner or operator of a vessel and does not require neither direct involvement nor control.

22. OPA 90, 33 U.S.C. § 2702(a) (West 2011) ("[E]ach responsible party . . . 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 . . . is liable for the removal costs and damages specified in [Section 2702 (B)] that results from such incidents.").

23. Jonathan K. Waldron, *Gulf Coast Escrow Fund Claims Procedure Established for the Deepwater Horizon Oil Spill Versus Remedies Available Under Current Law*, A.B.A. ENVTL. & ENERGY BUS. L. REP., 2010, at 3.

24. H.R. CONF. REP. No. 101-653, at 103 (1990) ("Subsection (b)(2)(E) [under Section 2702] provides that any claimant may recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. The claimant need not be the owner of the damaged property or resources to recover for the lost profits or income. For example, a fisherman may recover lost income due to damaged fisheries resources, even though the fisherman does not own those resources."). See also *infra* note 29. But cf. *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (applying the *Robins Dry Dock* rule to limit recovery of economic damages for only those claimants with a proprietary interest in the damaged property).

25. John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Oil Spill*, at 10 n.32 (Nov. 22, 2010),

that entities claiming economic losses offer adequate proof that (1) they actually suffered lost profits or diminished earning capacity, and (2) the loss resulted from the oil spill.²⁶ This causation standard is more relaxed than the traditional proximate causation analysis used in tort suits.²⁷ Claimants are merely required to demonstrate that their loss was more likely caused by the oil spill than by other possible causes, for example, a recession.²⁸

In keeping with Congress's dual intent to require that the responsible party bear the full cost of pollution and to adequately compensate affected persons for their losses, OPA 90 allows a claimant the right to file successive claims against the responsible party to compensate for "actual" damages.²⁹ OPA 90 expressly provides:

(a) Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.³⁰

. . . .

(b) Any person, including the Oil Spill Liability Trust Fund, who pays compensation pursuant to OPA 90 to any claimant for damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

<http://dash.harvard.edu/handle/1/4595438>.

26. John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Oil Spill*, at 10 n.32 (Nov. 22, 2010),

<http://dash.harvard.edu/handle/1/4595438>.

27.

In the legal usage, the modifier "proximate" in the phrase "proximate causation" has a specialized meaning that takes account of, but is not exhausted by, notions of physical or temporal distance. Under the heading of "proximate cause," one inquires whether a legally wrongful act has actually caused harm to another has caused it in a haphazard, unexpected, or attenuated manner, such that the actor should be relieved of responsibility for the harm notwithstanding his act caused it.

Id. at 20 n.41 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (2010)).

28. Section 2702's "result from" language precludes recovery for economic losses connected to property or resource damage where that damage happens coincidentally to a discharge of oil. See *Gatlin Oil Co. v. United States*, 169 F.3d 207 (4th Cir. 1999).

29. OPA 90, 33 U.S.C. § 2715(b)(2) (West 2011).

30. § 2705(a) (West 2011).

Moreover, payment of such a claim shall not foreclose a claimant's right to recovery of all damages to which the claimant otherwise is entitled under OPA 90 or under any other law.³¹

Once a claim is settled under OPA 90, the claimant is allowed to bring additional claims as he discovers more damages but is prohibited from bringing any further action on the settled claim.³² OPA 90 does, however, somewhat limit the responsible party's liability. The maximum liability of a responsible party differs depending on what causes the discharge of oil. The maximum liability for an offshore facility, other than a deepwater port, is the total cost of removal plus \$75 million.³³

2. OPA 90'S SECOND REGIME: THE OIL SPILL LIABILITY TRUST FUND

The second regime under OPA 90 provides administrative guidelines for the Oil Spill Liability Trust Fund (OSLTF), a federally administered trust fund that is used to pay costs related to oil-spill-removal activities, property damages, and economic damages.³⁴ OPA 90 establishes a compensation system so that victims can obtain prompt and full compensation without having to endure litigation.³⁵ A victim who wishes to raise a claim can do so under OPA 90 by first presenting their claim to the responsible party and waiting 90 days.³⁶ If the responsible party does not pay the claim, the claimant can resubmit to the National Pollution Funds Center (NPFC), which manages the OSLTF.³⁷ From there, the NPFC compensates the victim, and the U.S. Attorney General must commence actions against the responsible party to collect the amount.³⁸

31. § 2715(b)(2).

32. *Id.* See also *infra* Section III.B.

33. § 2704(a)(3).

34. § 2712.

35. See Nash, *supra* note 15, at 127.

36. OPA 90 provides that all claims for damages shall be presented first to the party responsible for the spill. If the responsible party denies all liability or the claim is not settled within 90 days, the claimant may elect to commence an action in court against the responsible party. If the plaintiff fails to comply with the prerequisites for bringing such an action, the [OPA 90] claim must be dismissed. OPA 90, 33 U.S.C. § 2713 (West 2011).

37. § 2713.

38. *Id.*

The OSLTF is intended to supplement payments made by the responsible party in the event that the responsible party exceeds a \$75 million liability limit.³⁹ It is funded by “a per barrel tax of 8 cents on petroleum products either produced in the United States or imported from other countries, reimbursements from responsible parties for costs of removal and damages, fines and penalties paid pursuant to various statutes, and interest earned on U.S. Treasury investments.”⁴⁰ As of September 30, 2010, the OSLTF balance was approximately \$1.69 billion.⁴¹

The OSLTF is capped at \$1 billion per incident.⁴² The fund is available to cover costs incurred by federal and state governments, as well as costs incurred by private entities.⁴³ In the event that a spill generates damages that exceed the limits on liability set by OPA 90 for a responsible party, as well as the per-incident \$1 billion cap, uncompensated claims may be pursued in court under maritime law.⁴⁴ However, maritime law defines spill-related liability more narrowly than the OSLTF claims process and, thus, typically does not permit recovery by claimants who might have recovered under the OSLTF had the caps not been reached.⁴⁵

39. § 2704(a)(3).

40. Brian Donovan, *BP Oil Spill: Failure to Act by the Obama Administration and Congress Threatens the Oil Spill Liability Trust Fund* (Dec. 6, 2010), <http://donovanlawgroup.wordpress.com/>.

41. *Id.*

42. *Id.* Incident is defined as “any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil” OPA 90, 33 U.S.C. § 2701 (West 2011).

43. § 2702(b)(2).

44. *See* Goldberg, *supra* note 25.

45. The Limitation of Liability Act of 1851 provides vessel owners protection from unlimited liability for oil-pollution damages. OPA 90 completely eliminated the protections traditionally afforded to vessel owners by the Limitation Act. Additionally, OPA 90 expands the scope of recoverable damages by claimants and abrogates the traditional admiralty protection to vessel owners under *Robins Dry Dock*. *Robins Dry Dock v. Flint*, 275 U.S. 303 (1927). *Robins Dry Dock* limited the scope of economic damages to those who owned property that was physically damaged. *Id.*; *see also* Lawrence L. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 532 (2000).

3. OPA 90'S FAILURE TO MEET THE DEMANDS OF THE DEEPWATER HORIZON OIL SPILL

Since its enactment in 1990, legal scholars have expressed concerns over the paradoxical liability framework under OPA 90.⁴⁶ On the other hand, OPA 90's first regime applies strict liability to the responsible party for all harm caused by an oil spill.⁴⁷ OPA 90 implements an extremely low liability cap per incident—only \$75 million.⁴⁸ Consequently, the OSLTF scheme fails to satisfy the volume of payments necessary to compensate federal, state, and private entities for the damages caused by the Deepwater Horizon oil spill.⁴⁹

Although one of the primary goals of OPA 90 was to establish a compensation system for private individuals to obtain prompt and full compensation without having to endure litigation, this goal was not achieved due to the OSLTF's insufficient reserves.⁵⁰ Because OPA 90's liability scheme recognizes compensation for loss of profits and impairment of earning capacity, in addition to physical damages caused by oil exposure, the amount of funding needed to address the Deepwater Horizon oil spill is unprecedented.⁵¹ The clean-up costs alone are grossly disproportionate to the OSLTF's reserves, considering that as of February 10, 2011, BP had already paid \$3.3 billion in claims.⁵² Further, some experts have estimated

46. Benjamin H. Grumbles, *Major Provisions, Themes of the Oil Pollution Act of 1990*, 21 ENV'T REP. (BNA) No. 27, at 1266 (Nov. 2, 1990).

47. *See supra* note 21.

48. OPA 90, 33 U.S.C. § 2704(a)(3) (West 2011).

49. Jaclyn A. Zimmermann, *Inadequacies of the Oil Spill Pollution Act of 1990: Why the United States Should Adopt the Convention on Civil Liability*, 23 FORDHAM INT'L L.J. 1499, 1533 (2000).

50. *See* JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41679, LIABILITY AND COMPENSATION ISSUES RAISED BY THE 2010 GULF OIL SPILL, available at http://assets.opencrs.com/rpts/R41679_20110311.pdf.

51. The Deepwater Horizon Oil Spill puts at risk two enormous economic entities that are highly sensitive to ecosystem harm: tourism and fishing. The reason for such tremendous vulnerability is that these industries are highly susceptible to public perceptions. In the aftermath of the Deepwater Horizon oil spill the "Gulf Coast brand" has been tainted. For example, the public perceives that otherwise clean beaches in the Gulf are now oiled, and what was once considered fresh seafood is unsafe to eat. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER & THE FUTURE OF OFFSHORE DRILLING (Jan. 2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>.

52. *Id.* at 210.

that restoring the Gulf will cost \$15 to \$20 billion, with conservative estimates requiring a minimum of \$500 million annually.⁵³ Consequently, many victims of the oil spill are experiencing severe financial setbacks and are in need of immediate financial assistance, particularly those who have lost their jobs because of the oil spill.⁵⁴

B. SATISFYING THE DEMANDS OF THE DEEPWATER HORIZON OIL SPILL CLAIMS: THE GULF COAST CLAIMS FACILITY

Given the sheer size of the Deepwater Horizon oil spill, legal experts in mass torts recognize a definite need for an administrative compensation scheme to assist claimants in quickly resolving their claims.⁵⁵ The need for an administrative compensation scheme stems from the legal system's inability to efficiently resolve hundreds of claims filed simultaneously, each seeking thousands of dollars in damages.⁵⁶ Additionally, in response to the insufficient reserves under the OSLTF, the Obama administration is pressuring BP to guarantee that funds are available to expeditiously pay claims.⁵⁷ To address this matter, BP and the U.S. Department of Justice established a \$20 billion escrow fund to compensate those impacted by the oil spill, and BP determined that the GCCF would disburse the funds.⁵⁸

The GCCF was established for the submission and resolution of claims by individuals who have incurred losses as a result of oil discharges from the M/V Deepwater Horizon drill rig.⁵⁹ The GCCF does not replace OPA 90's OSLTF regime. Instead it

53. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER & THE FUTURE OF OFFSHORE DRILLING 185-195 (Jan. 2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>.

54. Joel Achenbach, *Obama Will Pressure BP for Vast Escrow Fund*, CHRON.COM (June 14, 2010, 5:30 AM), <http://www.chron.com/business/energy/article/Obama-will-pressure-BP-for-vast-escrow-fund-1702802.php>.

55. Alfred Light, *Designing the Gulf Coast Claims Facility in the Shadow of the Law: A Template from the Superfund Report* § 301(E) Report, 40 ENVTL. L. REP. NEWS & ANALYSIS 11121, 11123 (2010).

56. *Id.*

57. See LEHNER, *supra* note 1, at 59.

58. Although \$20 billion was reported to have been paid into the escrow fund, only \$3 billion was transferred into the account. See Linda Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 836 (2011).

59. See generally, GCCF Final Proposal, *supra* note 5.

replaces the initial-claims procedure, where the claimant is required to notify the responsible party and wait 90 days.⁶⁰ Rather than submitting claims directly to the responsible party, as OPA 90 dictates, a claimant must submit claims to GCCF, where their validity is determined in accordance with the rules and procedures specified by the Claims Administrator, Ken Feinberg.⁶¹ In what is essentially a separate adjudicatory process, Feinberg and a team of “expert analysts” determine whether a viable claim exists and, if so, how much that claim is worth.⁶²

The GCCF claims process offers three different payment options for claimants who have incurred damages as a result of the Deepwater Horizon oil spill.⁶³ The first option allows claimants to file an Interim Payment Claim and recover for past losses on a quarterly basis.⁶⁴ Claimants who select this option do not receive full or final compensation and are not required to release BP from liability.⁶⁵ Also, claimants who file Interim Payment Claims with the GCCF retain their rights to initiate separate legal action.⁶⁶

The second option allows recovery for Quick Pay Claims, which is a fixed amount of \$5,000 for individuals and \$25,000 for businesses.⁶⁷ Quick Pay is an emergency payment and acts in conjunction with Interim Payment to fully resolve the claim.⁶⁸ Quick Pay claimants need not substantiate future damages and need only show past damages.⁶⁹ Claimants receiving Quick Pay waive their rights to receive any additional money and release their rights to sue BP.⁷⁰

60. *Comments With Respect to the Gulf Coast Claims Facility's Draft Proposal Governing Settlement Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology*, GULF COAST CLAIMS FACILITY 2 (Feb. 16, 2011), <http://www.gulfcoastclaimsfacility.com/publiccomments.pdf>.

61. *Id.*

62. *See* GCCF Final Proposal, *supra* note 5.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* GCCF Final Proposal, *supra* note 5.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* Frequently Asked Questions, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/faq#Q4> (last visited Oct. 24, 2011).

The third option available to claimants is the Full Final Review Payment Claim.⁷¹ To exercise this payment option, a claimant must submit documentation of actual losses and estimate *future* losses for the GCCF to review.⁷² Claimants seeking economic damages must prove a reduction in their income or net earnings with reasonable certainty based on their 2010 earnings.⁷³ Furthermore, economic damages must be proven with “reasonable certainty.”⁷⁴ And those damages must be “proximately caused” by the spill, which is a different standard than the one used under OPA 90.⁷⁵ The OPA 90 only requires that the claimant show that the damages “result from” such an incident.⁷⁶

Once a claimant has sufficiently established lost income, the GCCF reviews future damages using a multiplier (called the “predicted loss factor”) based on the risk of predicted future loss, which is determined by GCCF’s consultants.⁷⁷ The predicted loss factor is multiplied by the claimant’s 2010 substantiated loss.⁷⁸ In 2011, claimants will receive 70% of their 2010 losses, and in 2012 they will receive 30% of 2010 losses.⁷⁹ In consideration for receiving a final payment, each claimant is required to sign a covenant not to sue, releasing the claimant’s right to sue BP for ongoing damages.⁸⁰

Every claimant has the option of filing a final claim or an

71. See GCCF Final Proposal, *supra* note 5.

72. See GCCF Final Proposal, *supra* note 5.

73. The GCCF payment methodology states:

The amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for:

All income resulting from the incident;

All income from alternative employment or business undertaken;

Potential income from alternative employment or business not undertaken, but reasonably available;

Any saved overhead or normal expenses not incurred as a result of the incident; and State, local and Federal taxes.

See GCCF Final Proposal, *supra* note 5.

74. See GCCF Final Proposal, *supra* note 5.

75. See GCCF Final Proposal, *supra* note 5.

76. See GCCF Final Proposal, *supra* note 5.

77. See GCCF Final Proposal, *supra* note 5.

78. See GCCF Final Proposal, *supra* note 5.

79. See GCCF Final Proposal, *supra* note 5.

80. GCCF Final Proposal, *supra* note 5.

interim claim.⁸¹ Additionally, a claimant who believes his future losses are greater than the amount calculated by the GCCF may decline a final payment and receive interim payments under OPA 90 or pursue a private action against BP.⁸² BP asserts that providing a three-tier compensation system ensures fairness in the claims-resolution process because claimants are not compelled to settle with BP.⁸³ However, because the GCCF's administration of payments and acquisition of releases is administered without oversight, it gives rise to public policy concerns.

C. GCCF WAIVER PROVISIONS

The GCCF waiver provisions limit an oil spill victim's right to full compensation, which directly conflicts with § 2705 of OPA 90.⁸⁴ Claimants who accept final payments are required to sign a release, waiving "any right that the claimant may have against BP to assert additional claims, to file individual legal action, to participate in other legal actions associated with the spill, or to that claim for payment by the OSLTF."⁸⁵ Conversely, under § 2705 of OPA 90, anyone with a legitimate claim against the party responsible for an oil spill has the right to full compensation.⁸⁶ Once a claim is settled, the claimant is barred from taking further action with respect to that claim, but OPA 90 allows the claimant to bring additional claims as more damages are discovered.⁸⁷

The final settlement waiver is the key difference between the GCCF and OPA 90. The courts have not yet determined whether a claimant who has signed a GCCF release provision waiving his rights to sue BP can still recover pursuant to OPA 90 for damages that are discovered after the GCCF settlement proceedings.⁸⁸

81. GCCF Final Proposal, *supra* note 5 ("Any claimant who disagrees with the GCCF's approach regarding future payment calculations or is not ready to accept it, is free to opt for Interim Payments based upon documented past damage, while awaiting further evidence of Gulf region economic recovery.").

82. See GCCF Final Proposal, *supra* note 5.

83. See Light, *supra* note 55, at 11124.

84. See *supra* notes 29-33.

85. GCCF Final Proposal, *supra* note 5.

86. See *Comments With Respect to the Gulf Coast Claims Facility's Draft Proposal*, *supra* note 61.

87. *Id.*

88. See Pilie, *supra* note 2, at 178.

In *Kenan Transport Co. v. United States Coast Guard*, the Eleventh Circuit upheld a release agreement, eliminating the claimant's ability to obtain full recovery under OPA 90.⁸⁹ The court held that the plaintiff could not recover additional damages once the parties reached a settlement agreement containing a waiver provision.⁹⁰ *Kenan* looked to state law where the tort occurred and determined that the release agreement was subject to the ordinary rules of contract law.⁹¹ The court reasoned that the parties' intentions at the time of the agreement controlled and presumed that the plaintiff intended to contractually relinquish his rights because he failed to clearly preserve his rights within the release.⁹²

Although the holding in *Kenan* demonstrates an instance in which a court interpreted § 2705 of OPA 90 to permit claimants to waive their right to obtain actual damages, the Deepwater Horizon oil spill presents different public policy considerations than *Kenan*. The plaintiff in *Kenan* suffered damages due to an auto accident where injuries were immediately detectable.⁹³ By contrast, the Deepwater Horizon oil spill is an environmental toxic tort, and damages can only be calculated based on projections of the timing of the ecosystem's recovery and associated economic losses.⁹⁴ These complexities beg the question: Is it fair to place the burden on the victims of the Deepwater Horizon oil spill to preserve the right to collect damages from BP that are not known to exist at the time of settlement?

D. TOXIC TORT

Before addressing the area of toxic tort damages and its relation to the GCCF's liability waivers, it is necessary to explain the threshold issue of what a "toxic tort" is and how special characteristics of toxic torts have affected the way that courts manage settlement agreements. A toxic tort is a tort claim that results from a plaintiff's exposure to toxic substances as a result

89. *Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed App'x 902 (11th Cir. 2006).

90. *Id.* at 904.

91. *Id.*

92. *Id.*

93. *Kenan Transp. Co. v. U.S. Coast Guard*, 211 Fed App'x 902 (11th Cir. 2006).

94. *See Donovan, supra* note 40.

of a defendant's actions.⁹⁵ In traditional tort cases, like *Kenan*, personal injuries occur contemporaneously with the causing event, which allows the victim to recover reasonable expenses for past and future damages in a lump sum.⁹⁶ In toxic tort cases, injuries are often not contemporaneous with exposure to the toxic substance and do not manifest until years after the exposure.⁹⁷

Typically, toxic tort laws impose strict liability on the responsible party whereby the claimant is entitled to recover not only the immediate costs, but also future damages that *result from* the incident.⁹⁸ This liability is

analogous to negligence per se, but is not called negligence because a court makes determination judgment that [the hazardous activity's] value to the community is sufficiently great that the mere participation in the activity is not to be stigmatized as wrongdoing The activity is simply required to pay its own way . . . , but it does pay with full tort damages⁹⁹

Another unique characteristic of toxic tort is that often the exposures involved injure thousands of people.¹⁰⁰ This is important in an administrative sense; it impacts the way toxic tort claims are handled.¹⁰¹ In order to avoid the potential legal complexities of litigating each claim separately, settlements are

95. See Steve Gold, Note, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376, 376 n.1 (1986).

96. CHARLES T. MCCORMICK, HANDBOOK ON LAW OF DAMAGES § 90, at 323-27 (West 1935); see, e.g., *Hagerty v. L & L Marine Servs.*, 788 F.2d 315, 319, *modified*, 797 F.2d 256 (5th Cir. 1986).

97. MCCORMICK, *supra* note 96; see also *Allen v. United States*, 588 F. Supp. 247, 269 (D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987).

98. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW 224-25 (West 2004) ("It should be noted that much of modern environmental litigation proceeds not on the basis of the common law but from efforts to recover cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) . . . [that] imposes what has been described as a 'super-strict' liability."); see also Junius C. McElveen & Pamela S. Eddy, *Cancer and Toxic Substances: The Problem of Causation and the Use of Epidemiology*, 33 CLEV. ST. L. REV. 29, 31 (1985).

99. VICTOR E. SCHWARTZ, ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 703-04 (Found. Press, 10th ed. 2000).

100. Robert Blomquist, *Emerging Themes and Dilemmas in American Toxic Tort Law, 1988-1991: A Legal- Historical & Philosophical Exegesis*, 18 S. ILL. U. L.J. 1, 13 (1993).

101. Bill Charles Wells, *The Grin Without the Cat: Claims for Damages From Toxic Exposure Without Present Injury*, 18 WM. & MARY J. ENVTL. L. 285, 289 (1994). See also Light, *supra* note 55 and accompanying text.

usually reached before litigation ensues.¹⁰² With so much money at stake in environmental disasters, the responsible party is often eager to settle claims to avoid adverse rulings that can render the responsible party insolvent, or in a worst-case scenario, destroy an entire industry.¹⁰³ Because of the variables facing litigants, large-scale toxic tort disputes involving thousands of plaintiffs are customarily settled through alternative dispute resolution, and claims are often administered through claims systems similar to the GCCF.¹⁰⁴

While alternative dispute resolution is essential to expeditiously and efficiently handling claims in mass toxic tort actions, the lack of judicial oversight raises concerns.¹⁰⁵ In the absence of statutory guidelines, claimants lack many of the protections afforded under the conventional court system, rendering them vulnerable to unscrupulous settlement tactics that are likely to be used by the responsible party.¹⁰⁶

III. SHORTCOMINGS OF THE GULF COAST CLAIMS FACILITY

Although the \$20 billion escrow fund is essential to provide necessary reserves to meet the demands of the Deepwater Horizon oil spill, BP has exploited this alternative-claims process as a means to relax liability provisions and escape having to pay actual damages, as required under OPA 90.

Proponents of the GCCF justify the provisions by arguing

102. See Wells, *supra* note 101, at 289.

103. PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURT ROOM 118 (HarperCollins 1991) ("Smarter plaintiffs' lawyers don't want a trial; a trial, after all, carries with it the risk of losing everything if the theories . . . don't quite persuade.").

104. See Wells, *supra* note 101, at 290.

105. Kenneth S. Rivlin & Jamaica D. Potts, *Proposed Rule Changes to Federal Civil Procedure May Introduce New Challenges in Environmental Class Action*, 27 HARV. ENVTL. L. REV. 519, 536 (2003).

106. *Id.* at 536-37; see also Jennifer Dinham Henderson, *Protecting Rule 23 Class Members From Unfair Class Action Settlements: The Supreme Court's Amchem and Ortiz Decisions*, 27 WM. MITCHELL L. REV. 489, 502 (2000) (Should a plaintiff partake in a class action, Rule 23(3) of the Federal Rules of Civil Procedure provides: "a class action shall not be dismissed or compromised without the approval of the court." Federal courts have developed a 'fairness test' to assess whether a particular class action settlement should be approved under Rule 23(e)."). Under this test the district court must decide that a settlement is fair, adequate and reasonable before it can approve it. *Id.*

that the arrangement serves an important public benefit because it aids the government's ability to address oil spill claims in the absence of an adequate federal system.¹⁰⁷ They contend that BP has rightfully and lawfully established a claims-compensation scheme under OPA 90, which contemplates that the responsible party shall "establish a procedure for the payment or settlement of claims for interim or short-term damages" wholly separate from the OSLTF.¹⁰⁸ This does not, however, authorize the responsible party to limit liability through a separate claims process, which is precisely what BP achieves through the GCCF.¹⁰⁹ The following Section discusses how the GCCF fails to provide an equitable forum for claimants to submit claims against BP due to its lack of transparency and liability-release provisions.

A. THE GCCF'S LACK OF TRANSPARENCY

Recently, the GCCF has come under attack for its lack of public disclosure regarding the procedures used to pay claimants who suffer damages as a result of the Deepwater Horizon oil spill.¹¹⁰ In an attempt to address transparency concerns, the GCCF issued a final proposal for public review on February 15, 2011.¹¹¹ However, rather than allaying concerns, the proposal revealed a number of problems pertaining to the process by which the GCCF evaluates a claimant's submission. Most troublesome is the proposal's failure to reveal the methodology by which the GCCF estimates final-settlement figures.¹¹² The GCCF relies on a panel of experts to analyze claims, and their decision is determinative of the amount claimants are awarded.¹¹³

Further, the proposal fails to demonstrate that these experts are independent and objective, or that they are qualified to do the future-loss calculations for related damages.¹¹⁴ Moreover, because the predictive-loss factor adopted by the GCCF lacks factual support and peer review, many have speculated that the figure is intended to grossly undercompensate claimants.¹¹⁵

107. See Light, *supra* note 55, at 11125.

108. OPA 90 33 U.S.C. § 2705(a) (West 2011).

109. See *id.*

110. See RAMSEUR, *supra* note 50, at 15.

111. GCCF Final Proposal, *supra* note 5.

112. *Id.*

113. *Supra* note 68.

114. *Supra* note 66, at 5.

115. *Id.*

Congress raised another concern by pointing out that the GCCF is missing a third party auditing provision to review final claims.¹¹⁶ Because of the speculative nature of attempts to estimate a final-claim value and the breadth of the GCCF waiver provision, an auditing mechanism would seem appropriate to protect claimants from miscalculations. Under OPA 90's claims procedure, the Comptroller General is vested with authority to review claim determinations issued by the National Pollution Funds Center.¹¹⁷ However, in a departure from OPA 90, the GCCF incorporates only an internal-review process by which a panel of analysts decides whether decisions rendered by the Claims Administrator are sufficient.¹¹⁸ As of February 2, 2011, the GCCF had failed to overturn a single decision of the Claims Administrator in over 500 appeals.¹¹⁹

In addition to complaints aimed at the transparency of the claims process, the GCCF Claims Administrator, Ken Feinberg, is under attack for misrepresenting his relationship with BP.¹²⁰ In the face of questions about the impartiality and legitimacy of the GCCF, Feinberg has insisted that because the Claims Administrator is selected to administer claims as a neutral third party, victims who have been denied money or received less than they feel they deserve should trust the GCCF's decisions.¹²¹ However, Judge Carl Barbier recently issued an order stating that the GCCF and Feinberg are actually agents of BP and are therefore required to represent that they "are acting for and on behalf of BP in fulfilling its statutory obligations as the 'responsible party' under [OPA 90]."¹²² The order revealed that Feinberg is a salaried employee of BP and is obligated to consult and provide information to BP while administrating the company's \$20 billion recovery fund.¹²³

116. H.R. 6016, 111th Cong. (2d Sess. 2010); *see also* RAMSEUR, *supra* note 50.

117. OPA 90, 33 U.S.C. § 2712(g) (West 2011).

118. GCCF Final Proposal, *supra* note 5, at 4.

119. *See* Letter from Steve Scalise, Member of the Louisiana House of Representatives, to Kenneth Feinberg (Feb. 15, 2011), *available at* www.scalise.house.gov/list/press/la01_scalise/PR_021711.shtml.

120. Patrick Semansky, *Judge Rules that Feinberg is Not Independent*, BP OIL DAMAGE CLAIMS (Feb. 3, 2011), <http://www.bpoildamageclaims.com/blog/judge-rules-that-feinberg-is-not-independent/>.

121. *Id.*

122. *In re* Oil Spill by "Deepwater Horizon" in Gulf of Mexico, No. 2179, 2011 WL 323866, at *8 (E.D. La. Feb. 2, 2011).

123. *Id.* at *5 ("BP pays Mr. Feinberg and his law firm a flat fee each month,

Judge Barbier regarded Feinberg's claims of neutrality as "misleading" to claimants and a "serious threat to the fairness of the litigation process."¹²⁴ Although Feinberg and BP have signed a trust agreement stating that the GCCF has no conflicts of interest, as more facts are revealed, like those pointed out by the district court, there is more reason to question whether the process is truly impartial.¹²⁵ Additionally, reports stating that BP retains direct control over GCCF payments and has even ordered the GCCF to pay a \$10 million business claim that was never reviewed by the GCCF for merit have further undermined BP's claims of fairness.¹²⁶

B. THE GCCF'S WAIVER PROVISION VIOLATES PUBLIC POLICY

The GCCF violates OPA 90 by limiting, rather than supplementing, the claims that victims can bring against BP, and by requiring claimants to sign release provisions waiving all rights to collect future damages from BP.¹²⁷ While the legal status of GCCF liability waivers has yet to be adjudicated, public policy considerations weigh in favor of a judicial finding that these provisions are unenforceable.

Perhaps the strongest argument in support of the GCCF is that claimants can choose between proceeding by way of the three-tier-claims process under GCCF and filing a separate action in court.¹²⁸ Also in its favor, the GCCF offers emergency payments, allowing a claimant the ability to sustain himself and his family without giving up his right for plenary action.¹²⁹ It is only when a claimant wishes to recover for flat payment or future damages that he waives his legal rights against BP.¹³⁰ Proponents of the GCCF argue that because of these alternatives, courts should be deferential to the GCCF's settlements, maintaining the principle that parties have considerable freedom

pursuant to a written contract which outlines his duties and responsibilities in great detail.").

124. *In re Oil Spill by "Deepwater Horizon" in Gulf of Mexico*, No. 2179, 2011 WL 323866, at *7 (E.D. La. Feb. 2. 2011).

125. *Id.* at *1.

126. *Id.* at *6 n.3.

127. *See supra* Section II.B.

128. *See Light, supra* notes 55, at 11125.

129. *Supra* notes 71-75, 86-87.

130. *See* notes 90-92.

and liberty in their ability to contract.¹³¹

Those who have attacked the GCCF's legitimacy, on the other hand, have claimed that courts should refuse to enforce waiver provisions because of public policy, emphasizing the difference between justice in a tort context and in a contract context. Even when the contract is a full and genuine exercise of both parties' freedom to contract, contract provisions may offend public policy, in which case courts can and should refuse to enforce them.¹³² The issue is not whether the parties dealt wrongfully with each other, but whether the contract is or should be forbidden because it damages the public good.¹³³

When courts evaluate public policy considerations, they examine the nature of the activity that caused the injury and its place in the larger social and economic context.¹³⁴ In evaluating the Deepwater Horizon oil spill, one must consider that the unique characteristics of toxic tort render traditional-tort remedies inadequate to justly compensate victims.¹³⁵ The predominant procedural obstacle for a claimant is the single-controversy rule, which bars a plaintiff from recovering for future harm when he fails to request relief for all injuries in his initial lawsuit.¹³⁶ Because the tortious conduct and the resulting injuries often occur contemporaneously in traditional torts, it is possible for claimants to recover a lump sum for a particular harm.¹³⁷ However, the application of the single-recovery doctrine in toxic tort jeopardizes a claimant's right to recover from the responsible party by potentially underestimating the future

131. See Light, *supra* note 55, at 11123-24; see also SHAPO, *supra* note 98, at 224.

132. See also SHAPO, *supra* note 98, at 224-25.

133. See also SHAPO, *supra* note 98, at 224-25.

134. See also SHAPO, *supra* note 98, at 224-25.

135. See William R. Gingsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859 (1981); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Palma J. Strand, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983); Linda A. Elfenbein, Note, *Future Medical Surveillance: An Award for Toxic Tort Victims*, 38 RUTGERS L. REV. 795 (1986).

136. Amy B. Blumenberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 669 (1992).

137. See MCCORMICK, *supra* note 96; see, e.g., *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 319, *modified*, 797 F.2d 256 (5th Cir. 1986).

damages being resolved.¹³⁸ Because it is often impossible to completely and accurately quantify damages at the time of the injury or damage causing toxic tort, courts must revisit claims after the full extent of the damage is known to allow claimants to recover for actual injuries.¹³⁹

To alleviate the injustice that results from applying the single-controversy rule in toxic tort cases, the trend among state courts has been to develop “second injury” rules, which allow claimants to reopen a claim once a claimant has a more complete assessment of damages available.¹⁴⁰ Courts, aware of the very nature of toxic tort, are increasingly reluctant to limit liability where claimants have no way to predict or negotiate for the full extent of their damages.¹⁴¹ The best illustration of this reluctance to limit future recovery in toxic tort cases is in asbestos litigation.¹⁴² Asbestos litigation is the longest and most expansive mass toxic tort in United States history.¹⁴³ Exposure to asbestos does not cause contemporaneous injury; rather, the exposure manifests as asbestosis and develops into mesothelioma years later.¹⁴⁴

It has become customary in asbestos cases for courts to allow victims the ability to split a cause of action into a suit for present harm and a suit for future harm.¹⁴⁵ One example is *Eagle-Picher Industries v. Cox*, in which the plaintiff, a victim of asbestosis, was permitted to bring a second cause of action when a future injury occurred.¹⁴⁶ In its decision, the court balanced considerations of finality against the equitable considerations of

138. Williams H. Rodgers, Jr., *The Exxon Valdez Reopener: Natural Resource Damage Settlements and Roads Not Taken*, 22 ALASKA L. REV. 135, 153 (2005).

139. Williams H. Rodgers, Jr., *The Exxon Valdez Reopener: Natural Resource Damage Settlements and Roads Not Taken*, 22 ALASKA L. REV. 135, 153 (2005).

140. Blumenberg, *supra* note 136, at 669-70.

141. Blumenberg, *supra* note 136, at 669-70.

142. *Infra* notes 146-147.

143. See Elise Gelinis, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 164 (2009).

144. *Id.* Most diseases caused by toxic substances are “insidious” and have long latency periods before manifestation. See KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (W. Page Keeton ed., 5th ed. 1984).

145. *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 525-26 (Fla. Dist. Ct. App. 1985), *reh’g denied*, 492 So. 2d 1331 (Fla. 1986).

146. *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 525-26 (Fla. Dist. Ct. App. 1985), *reh’g denied*, 492 So. 2d 1331 (Fla. 1986).

compensating the injured plaintiff, and found the equitable considerations more compelling.¹⁴⁷ The court explained that “the desirable goal of finality is not an absolute and . . . the procedural rule against splitting causes of action must be relaxed when equitable considerations demand it.”¹⁴⁸

Interestingly, in *Eagle-Picher* the court looked at equitable considerations from the defendant’s standpoint.¹⁴⁹ The rationale for permitting two causes of action is that plaintiffs have a right to recover only for injuries that have actually manifested, rather than for speculative injuries that might never actually occur.¹⁵⁰ The court acknowledged that it is problematic to allow a claimant to recover for speculative damages in mass toxic tort litigation. In addition to potentially overcompensating a plaintiff, allowing a claimant to recover for speculative damages in mass toxic tort litigation enhances the risk that the compensation pool may be so depleted that plaintiffs who actually develop injuries in the future may be forced to forego recovery.¹⁵¹

Courts should be reluctant to enforce the GCCF waiver provisions against claimants who later develop injuries caused by the oil spill because they violate public policy. In *Eagle-Picher*, the court deemed equitable considerations as sufficient grounds to reopen a claimant’s case and allow the claimant to bring a second cause of action.¹⁵² The same equitable considerations are at stake with regard to the GCCF settlement contracts, because claimants have no way of predicting the long-term effects of the damages incurred due to the oil spill. The latent nature of such damages is the compelling public policy reason for OPA 90’s strict liability provision. Further, the rationale underlying OPA 90’s imposition of strict liability on oil rigs is the fact that drilling for oil is an inherently dangerous activity and those who engage in such activities do so at their own peril and must pay for any

147. *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 525-26 (Fla. Dist. Ct. App. 1985), *reh’g denied*, 492 So. 2d 1331 (Fla. 1986).

148. *Id.* at 520 (“[P]laintiff may bring a second action for damages if and when he actually contracts cancer.”).

149. *Id.*

150. *Id.* at 525-26. See also David G. Poston, Note, *Gone Today and Here Tomorrow: Damage Recovery for Subsequent Developing Latent Diseases in Toxic Tort Exposure Actions*, 14 AM. J. TRIAL ADVOC. 159, 179-80 (1990).

151. *Id.*

152. *Supra* notes 148-49.

foreseeable damage.¹⁵³

The GCCF is BP's attempt to contract out of the strict liability regime that is mandated under OPA 90.¹⁵⁴ The M/V Deepwater Horizon oil rig released hundreds of hazardous substances into the Gulf. At present, the scope of the long-term environmental and economic damages caused by the discharge of the substances is uncertain, and the GCCF has failed to provide credible and reliable estimates of how long it will take for the Gulf and its dependent industries to recover.¹⁵⁵ Uncertainties about the scope of the long-term damage combined with the GCCF's unwillingness to release critical information regarding the methodology by which the GCCF determines claimants' future losses evokes serious fairness concerns.

Because settlements are private contractual agreements, they have not been restricted by the single-recovery rule. However, when a plaintiff engages in alternative dispute resolution with the responsible party, they sacrifice many of the protections afforded under the conventional court system making a secondary-injury rule even more necessary.¹⁵⁶ Although finality and certainty in settlement are goals that have long been recognized in our judicial system, no such finality can exist when doing so violates public policy.¹⁵⁷

In *Amchem Products, Inc. v. Windsor*, the Supreme Court evaluated an alternative-claims process, similar to the GCCF, involving toxic tort settlements.¹⁵⁸ During the 1990s, asbestos manufacturers sought to achieve a global settlement of current and future asbestos-related claims through a class action settlement.¹⁵⁹ At the time, the judicial system faced a major financial drain as dockets in both federal and state courts began

153. Noel Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 STAN. ENVTL. L.J. 283, 330-33 (2002).

154. See Waldron, *supra* note 23.

155. *Supra* note 118-20.

156. Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 594 (2001).

157. See MCCORMICK, *supra* note 96, at 119.

158. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

159. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

to grow at alarming rates due to an influx of asbestos lawsuits.¹⁶⁰ In response to the congestion in the courts, asbestos manufacturers created a separate claims facility, the Center for Claims Resolution (CCR), as an alternative to litigation.¹⁶¹ The asbestos manufacturers demanded that in addition to their immediate claims, claimants settle all asbestos claims that might arise in the future.¹⁶² Claimants who settled with the CCR waived their rights to pursue damages for future injuries against the asbestos manufacturing companies.¹⁶³ Under the terms of the settlement, future asbestos claimants were precluded from suing the asbestos manufacturers.¹⁶⁴ The plaintiffs filed a lawsuit against the asbestos manufacturers alleging that the claims system violated public policy.¹⁶⁵

The Court found in favor of the plaintiffs and refused to approve the settlement provisions set forth by the CCR because each individual class member's interest must be adequately protected in a class action.¹⁶⁶ Specifically, each class member must be afforded an opportunity to request relief in the event an injury manifests after the settlement has been finalized.¹⁶⁷ The Court reasoned that because future claimants may not realize the full extent of their exposure to a defendant's toxins at the time of settlement, it violates their procedural right to due process to hold them to settlement terms that waive ongoing damages.¹⁶⁸

160. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 597-98 (1997).

161. *Id.* at 599-600.

162. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 601 (1997).

163. *Amchem*, 521 U.S. at 591.

The exhaustive agreement, inter alia, (1) proposed to settle, and to preclude nearly all class members from litigating, claims not previously filed against petitioners; (2) detailed an administrative mechanism and a schedule of payments to compensate class members who meet defined exposure and medical criteria; (3) described four categories of compensable cancers and nonmalignant conditions, and specified the range of damages to be paid qualifying claimants for each; (4) did not adjust payments for inflation; (5) capped the number of claims payable annually for each disease; and (6) denied compensation for family members' loss-of-consortium claims, for exposure-only plaintiffs' claims for emotional distress, enhanced risk of disease, and medical monitoring, and for "pleural" claims involving lung plaques but no physical impairment, even if otherwise applicable state law recognized such claims.

Id. (Syllabus).

164. *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, at 626-27 (3d Cir. 1996).

165. *Amchem*, 521 U.S. at 612.

166. *Id.*

167. *Id.* at 593; see also, VA. ENVTL. L.J., Note, *The Influence of Mass Toxic Tort Litigation on Class Action Rules Reform*, 22 VA. ENVTL. L.J. 249, 278 (2004).

168. *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, at 625-28 (3d Cir. 1996).

Although the Court focused heavily on class certification in *Amchem*, the Court's discussion regarding the unconscionability of toxic tort settlements, rendering a claimant unable to recover future injuries, is applicable to all toxic tort settlements. Only when a claimant possesses full information can he determine whether the terms of a settlement are fair, reasonable, and adequate.¹⁶⁹ Without a device to offset the harsh effect of a waiver, the Court found that the terms of the settlement were inadequate.¹⁷⁰

IV. LESSONS FROM EXXON VALDEZ: THE NEED FOR REOPENER LIABILITY

Settlements under the GCCF must afford victims of the Deepwater Horizon oil spill the ability to revisit their claims to ensure that BP fulfills its liability obligations under OPA 90. The Full Final Payment option set forth by the GCCF cuts off BP's liability by establishing covenants not to sue, which disregard the latent nature of injuries that often arise from exposure to a toxic substance.¹⁷¹ Although the GCCF takes into account future damages, the current predictive-loss factor and two-year compensation allotment are grossly inadequate to meet the demands of the Deepwater Horizon oil spill.¹⁷²

In a manner similar to the second-injury rule adopted in asbestos litigation, reopener clauses provide contracting parties the ability to revisit a claim to allow victims of toxic exposure to recover future damages that were unknown at the time of settlement.¹⁷³ Most notably, reopener clauses were used in settlements after the 1989 Exxon Valdez oil spill, which was considered the worst oil spill in United States history prior to the Deepwater Horizon oil spill.¹⁷⁴ Like BP, Exxon (the responsible party) brokered an agreement with the Department of Justice,

DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 27 (RAND 2000).

169. *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 628 (3d Cir. 1996).

170. *Id.*

171. *See supra* Section III.B.

172. *See supra* Section II.A.3.

173. Frederick W. Addison, *Reopener Liability Under Section 122 or CERCLA: "From Here to Eternity"*, 45 Sw. L.J. 1081, 1084-85 (1991).

174. Robert E. Jenkins & Jill W. Kastner, Comment, *Running Around in a Sea of Complex Litigation: A Case Comment on the Exxon Valdez Litigation*, 18 UCLA J. ENVTL. L. & POL'Y 151, 153 (2000); *see also* Rodgers, *supra* note 139, at 137.

resulting in a settlement that required Exxon to pay \$900 million into an escrow account.¹⁷⁵ The account was distributed to a panel of trustees who were given authority to spend the money on rehabilitation and restoration.¹⁷⁶ Unlike the BP agreement, the settlement included a reopener provision.¹⁷⁷ Claims based on the reopener liability were funded by an additional \$100 million, set-aside in a separate fund for injuries that were not foreseen at the time of the agreement.¹⁷⁸ The reopener clause was titled in the Agreement and Consent Decree as a “Reopener for Unknown Injury”¹⁷⁹ and reads as follows:

Notwithstanding any other provision of this Agreement, between September 1, 2002, and September 1, 2006 Exxon shall pay to the Governments such additional sums as are required for the performance of restoration projects in Prince William Sound and other areas affected by the Oil Spill, that have suffered a substantial loss or substantial decline in the areas affected by the Oil Spill; provided, however, that for a restoration project to qualify for payment under this paragraph the project must meet the following requirements:

(a) The cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and

(b) The injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any trustee on the Effective Date.¹⁸⁰

The Exxon Valdez settlement also received judicial review.¹⁸¹ In approving the settlement, the court weighed whether the proposal was procedurally and substantively fair, reasonable, and compatible with underlying statutory goals.¹⁸² Within this

175. Rodgers, *supra* note 139, at 137.

176. Rodgers, *supra* note 139, at 138.

177. Rodgers, *supra* note 139, at 138.

178. Rodgers, *supra* note 139, at 138.

179. Rodgers, *supra* note 139, at 152.

180. Rodgers, *supra* note 139, at 138.

181. Rodgers, *supra* note 139, at 148.

182. Rodgers, *supra* note 139, at 148; *see also* United States v. Fort James Operating Co., 313 F. Supp. 2d 902, 907-08 (E.D. Wis. 2004) (analyzing a CERCLA consent decree).

analysis the court reviewed whether the settlement was a product of arm's length negotiations and whether it took into account uncertainties and litigation risks.¹⁸³ The judge permitted settlements pending the inclusion of a reopener provision.¹⁸⁴ Also, the settlement with the government was approved based on the fact that the trustees who were appointed to administer the \$900 million escrow fund were composed of independent administrators appointed by the federal government and the state of Alaska, not Exxon employees.¹⁸⁵

A judicial determination regarding the validity of the GCCF liability waivers should be made as to whether the GCCF has substantively and procedurally aligned its payment process with the statutory objectives set forth under OPA 90. As previously mentioned, the settlement tactics employed by BP are unclear and entirely at arm's length.¹⁸⁶ Also, unlike the Exxon Valdez settlement, payment decisions under the GCCF are determined by a panel of BP employees rather than independent trustees appointed by the government.¹⁸⁷ It is unlikely that a court will determine that BP has complied with OPA 90, mainly because the waivers fail to take into account the uncertainty surrounding the Deepwater Horizon oil spill's long-term damages.¹⁸⁸ Because the GCCF lacks many of the safeguards contained in the Exxon Valdez settlement, its waiver provision violates public policy and should not preclude a claimant's ability to recover future damages.

Congress should adopt a statutory mandate that reopener clauses be required for final settlements under OPA 90, as a means of protecting claimants from the risk that their actual damages exceed the final settlement payment. The Exxon Valdez Agreement and Consent Decree provides a legal framework that the federal government should follow in regulating the settlement activities of a responsible party that establishes an alternative-claims-compensation scheme after an oil spill, separate from the OSLTF. First, in order to ensure that the terms of a settlement will not preclude recovery by the claimant, OPA 90 should require

183. Rodgers, *supra* note 139, at 148.

184. Rodgers, *supra* note 139, at 148.

185. Rodgers, *supra* note 139, at 137.

186. *See supra* Section III.A.

187. *See supra* Section III.A.

188. *See supra* notes 118-20, 122.

that the responsible party include a reopener provision in all settlements. Second, OPA 90 should require the responsible party to set up a separate trust fund to meet the demands of future claimants so that immediate claims will not deplete the compensation pool.

A. REOPENER LIABILITY

Requiring a reopening provision similar to the one included in the Exxon Valdez Agreement provides a workable compromise between freedom of contract and public policy concerns regarding the rights of claimants in toxic tort cases to collect future damages. Inserting reopener clauses in settlement contracts will enable parties to settle their claims immediately, while simultaneously allowing an escape valve for claimants to recover long-term damages if they arise after the settlement is finalized.

Under the Consent Decree used in the Exxon Valdez Agreement, the reopener provision applied only to damages that could not have been reasonably known or anticipated in 1990–1991.¹⁸⁹ Reopeners are triggered only in “extraordinary circumstances.”¹⁹⁰ The term “extraordinary circumstances” is defined by the Environmental Protection Agency to mean any “undetected condition . . . that arises or is discovered which may present an imminent and substantial endangerment to public health, welfare or the environment.”¹⁹¹ Thus, should OPA 90 adopt a reopening provision to trigger reopener liability, a court’s inquiry would turn on what a claimant knew or could have anticipated at the time of the settlement.¹⁹²

Congress will encourage the finality of settlements by way of maintaining that a reopener does not preclude the responsible party from using a covenant not to sue in its contracts. Although this seems counterintuitive considering the nature of a covenant not to sue is grounded on the principle of finality, a reopener is merely an exception to a waiver in extraordinary circumstances.¹⁹³ OPA 90 can still permit a waiver if the following occurs: (1) the release is in the public interest; (2) the release would expedite response action; and (3) the responsible

189. *Supra* note 182.

190. Addison, *supra* note 173, at 1088.

191. Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5040 (1985).

192. *See* Addison, *supra* note 173, at 1084.

193. *See* Addison, *supra* note 173, at 1084.

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party has acted in full compliance with OPA 90.¹⁹⁴ For instance, a claimant would not be able to recover damages from the responsible party that resulted from a failure of the original restoration remedy, unless the failure was due to information not known at the time of settlement.¹⁹⁵

Thus, should Congress amend OPA 90 to require a reopening provision in settlements, reopener liability should be triggered based on what was known or what a claimant could have anticipated at the time of the settlement. This ensures that claimants of an oil spill are given a right to recover based on the actual manifestation of an unknown injury, not an unlimited opportunity to recover from the responsible party based on speculation.

B. THE REOPENER LIABILITY FUND

At the outset, Congress should require the responsible party to set aside an additional fund, called a Reopener Liability Fund, to compensate claimants for injuries that are not foreseen at the time of the settlement. Congress should make the Reopener Liability Fund contingent upon a percentage of estimated damages rather than a set figure, because oil spills vary in size and scope. The amount of the fund should be based on a natural-resource damage assessment conducted by the National Oceanic and Atmospheric Administration (NOAA) and the Damage Assessment, Remediation, and Restoration Program (DARRP).¹⁹⁶ Using a fixed assessment would ensure the availability of funds in the future and alleviate the concern raised in *Eagle-Picher*, that immediate payouts would deplete the compensation pool and prevent plaintiffs who actually develop injuries years later from recovering.¹⁹⁷

194. Richard H. Mays, *Settlements with SARA: A Comprehensive Review of Settlement Procedures Under the Superfund Amendments and Reauthorization Act*, 326 PLI/LIT 229, 252 (1987).

195. *Id.*

196. Matthew P. Coglianese, *The Importance of Determining Potential Chronic Natural Resource Damages From the Deepwater Horizon Accident*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11100 (2010). NOAA and DARRP are two federal co-trustee agencies charged with completing national resource damage assessments. *Id.* A national resource damage assessment is “a legal process to determine the type and amount of restoration needed to compensate the public for harm to natural resources and their human uses that occur as a result of an oil spill.” *Id.*

197. *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 525-26 (Fla. Dist. Ct. App. 1985), *reh’g denied*, 492 So. 2d 1331 (Fla. 1986).

Of course, some will argue that any additional fact-finding and legal process will be both lengthy and costly. In the case of the Deepwater Horizon oil spill, the scope of which has never been seen before, the national-resource damage assessment process will take years and involve thousands of personnel.¹⁹⁸ However, the Comprehensive Environmental Response, Compensation and Liabilities Act (CERCLA), requires that the government conduct a national-resource damage assessment after an oil spill and that the responsible party pay the full amount of the assessment.¹⁹⁹ Because a national-resource damage assessment is already required under CERCLA, the Reopener Liability Trust Fund would merely be putting preexisting data to use in order to properly gauge how much funding is needed to necessitate future recovery.²⁰⁰

V. CONCLUSION

The aftermath of the Deepwater Horizon oil spill has created an opportunity for Congress to rethink and restructure the legislation regulating oil spill disasters. Because Congress has provided a means for the responsible party to develop a separate claims facility to fulfill its OPA 90 obligations, it has a responsibility to ensure that victims of an oil spill are afforded the right to recover actual damages resulting from the oil spill. Congress should mandate that reopening provisions be included in settlements pursuant to § 2705 of OPA 90. Additionally, the responsible party should be required to set aside a percentage of funding based on national resource damage assessments. By altering OPA 90 in these ways, Congress will simultaneously hold the responsible party liable for actual damages and provide claimants a means to assert a cause of action in the event that an unforeseen injury occurs after settlement negotiations. Reopener provisions balance the scales so that the responsible party maintains the ability to resolve claims expeditiously, but without violating public policy.

Mary M. Owens

198. See Coglianesse, *supra* note 196, at 11100-01.

199. *Id.* at 11001.

200. *Id.*