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OIL, FIRE, SMOKE AND MIRRORS: THE GULF COAST CLAIMS FACILITY AND ITS DANGEROUS PRECEDENT

NICHOLAS GUIDI*

INTRODUCTION

On February 2, 2011, United States District Court Judge Carl Barbier exposed the Gulf Coast Claims Facility (“GCCF”) as a wolf in sheep’s clothing. Or, more accurately, he disrobed a corporate agent of its messianic garb. Keep claiming independence from BP, he warned, and you will do unto oil-soaked Gulf Coasters a far greater harm: injustice sanctioned by the justice system.¹

Having determined that the GCCF deceived oil spill victims, Barbier ordered the GCCF’s administrator, Ken Feinberg, to refrain from representing himself or the GCCF as entities independent from BP.² Not a year had passed since that same corporation had allowed its offshore drilling rig to fail, releasing thousands of barrels of crude oil into the Gulf of Mexico.³ While Barbier acted swiftly and nobly in protecting victims from the GCCF’s false impartiality, he left intact the facility’s self-serving relief protocol. In unmasking the facility, he laid bare its motivations, but ultimately failed to address its procedural flaws.

Significantly, this focus gave the GCCF tacit consent to employ its questionable compensation practices, thereby presenting the opportunity for future claims funds to do the same as long as they cured any superficial defects. Such a cosmetic fix would theoretically permit a claims fund to shortchange legitimate damage sufferers and pay nominal damages in a frugal, self-serving manner. As the GCCF’s lifespan demonstrated, courts already afford mass tort funds substantial leeway in constructing their compensation methodologies. If the judiciary further loosens its reins, the growth of such claims funds will act only to the detriment of aggrieved claimants.

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¹ See *In re Oil Spill by the Oil Rig Deepwater Horizon*, 2011 U.S. Dist. LEXIS 10497, at *19 (E.D. La. 2011).

² *Id.*

³ *Oil Slick Spreads from Sunken Rig*, CNN (Apr. 22, 2010, 6:11 PM), <http://www.cnn.com/2010/US/04/22/oil.rig.explosion/>, archived at <http://perma.cc/8NH3-PLAE>.

* * *

After the explosion of BP's Deepwater Horizon oil rig, which resulted in eleven immediate deaths and a crude black pool, millions of gallons deep, BP established a \$20 billion trust to address forthcoming damage claims.⁴ The nascent GCCF would be headed by Ken Feinberg, at President Obama's request, after Feinberg's successful administration of the 9/11 Victims' Compensation Fund.⁵ Among other means of relief, the GCCF pledged to remunerate Gulf Coast residents for oil removal and clean up costs, damage to personal property, lost profits and earning capacity, and subsistence use of natural resources.⁶

Each of these types of relief falls under the greater umbrella of environmental damages.⁷ Consequently, environmental damages are notoriously difficult to quantify.⁸ They do not lend themselves to market valuations or fixed interval calculations the way real property or economic damages do.⁹ For this reason, and for deterrence purposes as well, the majority of environmental damage awards consist of punitive damages.¹⁰

Notwithstanding this computational difficulty, or the imposing magnitude of the environmental damages in this case, the GCCF was improperly designed to assess damage and compensate sufferers. Its status as a privately run relief fund, its structural framework, its utter lack of transparency, and its insensitivity to the realities of environmental harm frustrated the expectations of those seeking relief. As problematic as the GCCF's feigned independence from BP surely was, Judge Barbier failed to address the compensation flaws which truly hindered the GCCF in effectuating its statutory purpose. And even more damning, the precedent of a state-sanctioned relief fund run by the wrongdoer presents the tantalizing potential for impunity going forward. If Barbier's order holds true, proliferation of such funds becomes increasingly likely as long as administrators fully disclose their relationship to the offender.

⁴ Jackie Calmes & Helene Cooper, *BP to Set Aside \$20 Billion To Help Oil Spill Victims*, N.Y. TIMES, June 17, 2010, at A1.

⁵ *Id.*

⁶ GULF COAST CLAIMS FACILITY, PROTOCOL FOR EMERGENCY ADVANCE PAYMENTS (Aug. 23, 2010), available at http://www.restorethegulf.gov/sites/default/files/imported_pdfs/library/assets/gccf-emergency-advance-payments.pdf.

⁷ *Id.*

⁸ Murray B. Rutherford, Jack L. Knetsch, & Thomas C. Brown, *Assessing Environmental Losses: Judgments of Importance and Damage Schedules*, 22 HARV. ENVTL. L. REV. 51 (1998).

⁹ *Id.*

¹⁰ Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 111 (2007).

This Note will attempt to demonstrate the flaws inherent in the GCCF's compensation scheme. It will do so with an eye toward the goals of compensating environmental damage historically. These are, briefly, compensation, restoration, and deterrence. Part I will provide contextual information as to the oil spill itself, the widespread devastation wrought upon the Gulf Coast, the establishment of the GCCF, and its ultimate dissolution. Part II will consider the difficulty in assessing environmental damages generally and the strategies employed in this case. Part III will delve into the compensation issues that plagued the GCCF and endeavor to explain their greater implications. This section will take an abstract view of the GCCF as a privately administered relief fund and consider the fund in comparison to the judicial alternative. In doing so, it will demonstrate the deterrence flaws inherent in a relief fund administered by the wrongdoer. Lastly, Part IV will examine Judge Barbier's order, identify its problematic reasoning, and discuss the implications for privately run relief funds going forward.

I. BACKGROUND

A. *BP's Negligence Resulted in the Explosion of the Deepwater Horizon Rig and Subsequent Oil Spill*

The Deepwater Horizon drilling rig, located in the Mississippi Canyon of the Gulf of Mexico, was an especially complex rig, positioned in an area that required a great deal of care.¹¹ In particular, it "had ongoing challenges with escaping hydrocarbons, typically methane gas," rendering its potential for explosive mishaps alarmingly high.¹² On April 20, 2010, as workers on the rig began to cap the well, high pressure gas "shot through the drill column all the way to the drilling platform at the surface," where it ignited, exploded, and killed eleven workers.¹³

There were some indications in the days and hours preceding the explosion that something was amiss, but BP took questionable steps in addressing these warning signs.¹⁴ Rig workers reported concerns about natural gas penetration, which prompted BP to select a remedial course.¹⁵

¹¹ COLIN READ, *BP AND THE MACONDO SPILL: THE COMPLETE STORY* 112 (2011); *see also Deepwater Horizon Drills World's Deepest Oil & Gas Well*, TRANSOCEAN (2013), <http://www.deepwater.com/fw/main/IDeepwater-Horizon-i-Drills-Worlds-Deepest-Oil-and-Gas-Well-419C151.html>, archived at <https://perma.cc/3CD3-KNF9>.

¹² READ, *supra* note 11, at 112.

¹³ *Id.*

¹⁴ *Id.* at 112–13.

¹⁵ *Id.*

Rather than pursuing the most prudent course of action, a cement test, BP elected to perform two pressure tests.¹⁶ “[I]f BP had known or better understood the pattern of problems with Halliburton’s deep-sea cementing specifications, or if there was better communication between BP and Halliburton in the last days of centralizer and cement design,” BP would have likely employed the more cautious cement test.¹⁷ Instead, the alternative tests appeared successful, giving BP a false sense of security as to the well’s stability and ultimately resulting in tragedy.¹⁸

As the millions of gallons of crude oil¹⁹ cascaded into the Gulf of Mexico, the scope of the affected area grew steadily, eventually encompassing the coastlines of four states and eastern Mexico.²⁰ The legal implications for BP mounted as the oil surged. The company continues to face allegations of gross negligence in its post-spill oil handling, in addition to its faulty pre-spill testing.²¹ In the current proceedings, the government contends that BP fraudulently reported the flow rate of oil into the Gulf, hindering its efforts to cap the well.²² If found grossly negligent, BP would receive fines in excess of \$18 billion, adding to the \$42 billion it has already spent in cleanup and compensation.²³ In any event, the exorbitant sum that BP paid in the spill’s aftermath serves to demonstrate the astonishing scope of the devastation and perilous consequences of BP’s negligence. Appropriately, scrutiny of the company came from the media as well, as it found a voracious international audience for spill-related news

¹⁶ *Id.*

¹⁷ *Id.* at 112.

¹⁸ READ, *supra* note 11, at 113; see also Donna Brazile, *Greed, Negligence Behind BP Oil Spill*, CNN (May 5, 2010 8:20 AM), <http://www.cnn.com/2010/OPINION/05/03/brazile.oil.new.orleans/>, archived at <http://perma.cc/F3TS-JTPZ> (“The failure of the ‘shear ram,’ the set of steel blades intended to slash through a pipe at the top of a well and close off the flow of crude, should not have surprised BP Eight years ago, the Minerals Management Service found that 50 percent of the shear rams tested failed.”).

¹⁹ The exact quantity of oil that seeped into the ocean as a result of the spill is currently at issue in BP’s civil trial. The U.S. government contends that 4.2 million barrels escaped the well, while BP places the number closer to 2.45 million barrels. Clifford Krauss, *In BP Oil Trial, the Amount of Oil Lost Is at Issue*, N.Y. TIMES, Sept. 30, 2013, at B1, available at http://www.nytimes.com/2013/09/30/business/energy-environment/bp-trial-in-2nd-phase-to-set-amount-of-oil-spilled.html?_r=0, archived at <http://perma.cc/XFX6-C7S7>.

²⁰ Bill Polson, *BP Oil Still Ashore One Year After End of Gulf Spill*, BLOOMBERG (July 15, 2011 4:50 PM), <http://www.bloomberg.com/news/2011-07-15/bp-oil-still-washing-ashore-one-year-after-end-of-gulf-spill.html>, archived at <http://perma.cc/QU65-4PY5>.

²¹ Krauss, *supra* note 19.

²² *Id.*

²³ *Id.*

coverage.²⁴ As a result, BP continues to combat a villainous public characterization,²⁵ which further complicates efforts to judiciously address the spill's consequences.

B. The Effects of the Oil Spill Devastated a Large Geographical Area and Crippled the Wildlife and Economies of Small Communities

Such scrutiny was not without justification, as the wayward oil devastated the Gulf Coast environment in its gradual, viscous path.²⁶ The oil "soiled sensitive tidal estuaries and beaches," annihilated entire communities of wildlife,²⁷ and crippled the enormous fishing industry in the Gulf.²⁸ The spill's immediate aftermath left birds and sea turtles coated in a slick mess, mammals poisoned from ingesting the toxic spew, and sea corals suspended in calcified tombs miles beneath the well.²⁹ The prospect of long term effects, meanwhile, threatened to harm human residents of the Gulf Coast for years to come.³⁰ The black pool paralyzed the food web of fish and other wildlife, decimating the populations of these species and handcuffing the fishermen whose livelihoods depended upon their multiplicity.³¹

Economic damages caused by the spill gripped the coast primarily, while largely sparing the rest of the country.³² The region's largest

²⁴ READ, *supra* note 11, at 154 ("Within a couple of weeks of the fire and spill, 58% of the surveyed American public reported they followed the events very closely. The next most followed story in early July . . . was followed by only 13% of the population.").

²⁵ Sean Alfano, *BP Oil Spill CEO Tony Hayward Says He Was Made to Be a "Villain" for "Doing the Right Thing,"* DAILY NEWS (July 30, 2010, 8:19 AM), <http://www.nydailynews.com/news/national/bp-oil-spill-ceo-tony-hayward-made-villain-article-1.202186>.

²⁶ *Environmental Damages Remain Issue after BP Deal*, LONG ISLAND NEWSDAY (Mar. 3, 2012, 4:24 PM), <http://www.newsday.com/news/nation/environmental-damages-remain-issue-after-bp-deal-1.3575764>, archived at <http://perma.cc/U7UR-7XJJ>.

²⁷ For photographs displaying the gruesome environmental effects caused by the spill, see *Massive Oil Spill Spreads in Gulf of Mexico*, L.A. TIMES (Nov. 15, 2012, 10:06 AM), <http://www.latimes.com/news/nationworld/nation/la-na-oil-spill-html,0,6610369.htmlstory#axzz2kpHIUqzk>, archived at <http://perma.cc/F5QC-JXU8>.

²⁸ *Id.*

²⁹ *How Does the BP Oil Spill Impact Wildlife and Habitat?*, NAT'L WILDLIFE FED'N, <http://www.nwf.org/What-We-Do/Protect-Habitat/Gulf-Restoration/Oil-Spill/Effects-on-Wildlife.aspx>, archived at <http://perma.cc/4X29-QQXP>.

³⁰ *Id.*

³¹ *Id.*

³² *Oil Spill's Economic Impact Mostly Local*, CBS NEWS (June 28, 2010, 4:58 AM), <http://www.cbsnews.com/news/oil-spills-economic-impact-mostly-local/>, archived at <http://perma.cc/9LHQ-X9MV>.

industries—tourism, fishing, and energy—suffered tremendously.³³ Unfortunately for the locals, each of these industries could easily move elsewhere: tourists changed their plans, seafood restaurants changed their menus, and the energy industry contented itself in the Gulf's fairly minimal contribution to the energy market.³⁴ But whereas the Gulf region as a whole sustained a major economic blow, the small communities that individually supported these industries experienced a more painful, more complete economic paralysis.³⁵ Those locals who suffered economic and environmental damages would ultimately turn to the GCCF's promise of relief to recover their coastal status quo. Rather than finding a well-engineered compensation apparatus, however, they fell victim to the facility's ill-equipped relief capacity.

C. *The GCCF Was Created Under the Framework Provided by the Oil Pollution Act, but Largely Installed its Own Compensation Process*

The cause of the harm and the extent of the damage brought BP's conduct within the purview of the Oil Pollution Act ("OPA").³⁶ Passed in the wake of the Exxon Valdez Oil Spill, the OPA set stricter penalties, increased liability limits, and provided compensation for a much broader spectrum of environmental harms.³⁷

In the event of an oil spill, the OPA identifies "responsible parties" in relatively broad terms: "[E]ach responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages."³⁸ The OPA directs such parties to remedy the following environmental damages: harm to natural resources, damage to real or personal property, subsistence use of natural resources, revenues, profits, or earning capacity loss due to natural resource damage, and public services for cleanup efforts.³⁹

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Oil Pollution Act § 2702, 33 U.S.C.A. § 2702 (2006).

³⁷ Daniel Kopec & Phillip Peterson, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597, 598 (1992).

³⁸ Oil Pollution Act § 2702.

³⁹ *Id.*

Of particular note, the OPA imposes strict liability upon parties who meet the “responsible party” designation.⁴⁰ As such, the justice system should make no inquiry into the negligence of the wrongdoer when determining whether claims warrant relief. For cleanup and removal costs, the OPA sets no limit to the amount a responsible party must pay.⁴¹ However, the OPA does cap civil liability damages at \$75 million, but allows for removal of the cap if a plaintiff can show gross negligence, willful misconduct, or violation of a safety regulation.⁴² The OPA thus contemplates a strict and imposing liability upon those who cause an oil spill in the waters surrounding the United States, and BP certainly fit this characterization.

Immediately following the Deepwater Horizon spill, the Coast Guard initiated OPA procedures by designating BP Exploration & Production, Inc., Transocean Holdings, Inc. and other companies involved as responsible parties.⁴³ In response, BP made initial efforts to comply with its responsibilities under the OPA and address victims’ claims in-house, but criticism of its procedures and the sheer immensity of the task persuaded the company to pursue a different course.⁴⁴ President Obama met with BP to devise a solution that would both massage public perception and remove damage assessment from BP’s hands.⁴⁵ The president convinced the company to allocate a substantial sum to address the innumerable claims and establish an apparatus to administer the funds.⁴⁶ BP committed \$20 billion at the outset, but the President stressed that this number did not represent a cap, and that BP would honor each of its liability obligations to affected parties.⁴⁷

⁴⁰ *Id.*; see Vernon Valentine Palmer, *The Great Spill in the Gulf . . . and a Sea of Pure Economic Loss: Reflection on the Boundaries of Civil Liability*, 116 PENN ST. L. REV. 105, 126 (2011).

⁴¹ Palmer, *supra* note 40, at 126.

⁴² *Id.*

⁴³ Robert Force, Martin Davies & Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 TUL. L. REV. 889, 898 (2011).

⁴⁴ Robbie Brown & Michael Cooper, *BP Pays Out Claims, But Satisfaction is Not Included*, N.Y. TIMES, June 7, 2010, at A14, available at http://www.nytimes.com/2010/06/07/us/07claims.html?_r=0, archived at <http://perma.cc/9ESK-8A52>; see also Arthur J. Ewencyk, *For a Fistful of Dollars: Quick Compensation and Procedural Rights in the Aftermath of the 2010 Deepwater Horizon Oil Spill*, 44 J. MAR. L. & COM. 267, 272 (2013) (showing that BP initially resolved to pay fishing boat captains \$5,000 per month and \$2,500 to deckhands, but that such payments were found to be far lower than their pre-spill income).

⁴⁵ Calmes & Cooper, *supra* note 4, at A1.

⁴⁶ *Id.*

⁴⁷ Press Release, The White House, Office of the Press Secretary, Statement by the President After Meeting with BP Executives (June 16, 2010), available at <http://www.whitehouse>

The newly christened Gulf Coast Claims Facility officially replaced BP's internal claims processing facility in June 2010.⁴⁸ As the official means for spill sufferers to file claims under the OPA, the GCCF became the mandatory first step toward filing such claims.⁴⁹ This step precluded claimants from first appealing to the court system;⁵⁰ those who suffered environmental harm had no recourse but to utilize the GCCF. As a result, any reservations they may have harbored regarding the GCCF's claims processes or its payment record were rendered moot by this requirement.

At President Obama's request, BP placed Ken Feinberg, a lawyer who successfully administered the 9/11 Victims' Compensation Fund ("the Fund") and various other mass relief funds, in charge of the GCCF.⁵¹ The president's handpicked administrator met widespread praise, largely due to the near universal acclaim for the Fund.⁵² Celebrated as the paragon of mass relief funds, the Fund efficiently focused relief on individual sufferers while simultaneously easing the burden on the legal system, all in the aftermath of a disorienting national catastrophe.⁵³ But while supporters would quickly analogize the two funds, the GCCF represented an entirely different type of relief apparatus. Unlike the GCCF, the Fund was a legislative creation, established by Congress in an effort to insulate the airline industry from certain insolvency and compensate the many victims of the attack.⁵⁴ As such, it operated within the guidelines of Congressional specification and bowed to governmental oversight.⁵⁵ The GCCF, meanwhile, came into existence at the whim of BP, the perpetrator of the harm the facility sought to address.⁵⁶ Although the OPA provided for compensation of certain types of harm and vaguely provided for damages, BP and Ken Feinberg installed their own compensation scheme, and answered to no supervisory body during the first two years of the GCCF's existence.⁵⁷

.gov/the-press-office/statement-president-after-meeting-with-bp-executives, *archived at* <http://perma.cc/24XQ-FWLC>.

⁴⁸ Ewencyk, *supra* note 44, at 272.

⁴⁹ GULF COAST CLAIMS FACILITY, GULF COAST CLAIMS FACILITY PROTOCOL FOR INTERIM AND FINAL CLAIMS (Nov. 22, 2010), *available at* http://seafoodsustainability.us/uploads/GCCF_Protocol_for_Interim_and_Final_Claims_2010.pdf; Ewencyk, *supra* note 44, at 273.

⁵⁰ Ewencyk, *supra* note 44, at 273.

⁵¹ Calmes & Cooper, *supra* note 4, at A1.

⁵² Linda S. 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, 823 (2011).

⁵³ *Id.* at 828–29.

⁵⁴ *Id.* at 828.

⁵⁵ *Id.* at 911.

⁵⁶ Calmes & Cooper, *supra* note 4, at A1.

⁵⁷ Mullenix, *supra* note 52, at 838.

As the GCCF's administrator, Feinberg set the standards and processes by which the GCCF would assess and ultimately redress the claims brought before it.⁵⁸ And due to its immunity from official oversight, its methodology did not require publication.⁵⁹ So while Feinberg made conspicuous trips to the Gulf Coast to observe the damage and billed the time to his law firm, public record is scant with respect to Feinberg's role and degree of control over the process.⁶⁰ Given his position as a supremely visible figurehead and the GCCF's general lack of transparency, it suffices to reason that Feinberg dictated the operations of the GCCF largely on his own.

D. The GCCF Was Dissolved Due to Judge Barbier's Order as Well as its Dwindling Effectiveness

In February 2011, Judge Barbier ordered Ken Feinberg and the GCCF to refrain from representing themselves as independent actors.⁶¹ Regardless of this ruling, the GCCF continued to solicit claims from those who suffered oil-related damage and compensate them pursuant to its assessment scheme.⁶² In fact, BP increased its monthly payment to Feinberg's law firm, Feinberg Rozen, during this period, ostensibly approving of his efforts.⁶³

Nevertheless, widespread claimant dissatisfaction and the federal government's growing concern with the GCCF's compensation practices caused Attorney General Eric Holder to investigate the facility's record.⁶⁴ Holder outsourced the task, commissioning the independent New York firm BDO Consulting to perform the audit.⁶⁵ BDO initiated its inquiry in

⁵⁸ *Id.* at 819.

⁵⁹ *Id.* at 842.

⁶⁰ *Id.* at 842–43, 913.

⁶¹ *In re Oil Spill by the Oil Rig Deepwater Horizon*, *supra* note 1.

⁶² Harry R. Weber, *BP Increases Pay For Claims Czar Ken Feinberg's Law Firm To \$1.25 Million Per Month*, THE HUFFINGTON POST (Mar. 25, 2011, 6:03 PM), http://www.huffingtonpost.com/2011/03/25/bp-ken-feinberg-claims-salary-pay_n_840871.html, archived at <http://perma.cc/EUE7-8DMG>.

⁶³ *Id.*

⁶⁴ Jessica M. Karmasek, *Holder: Oil Spill Compensation Fund to be Audited*, LEGAL NEWSLINE (July 21, 2011, 1:26 PM), <http://legalnewsline.com/issues/bp-oil-spill/233356-holder-oil-spill-compensation-fund-to-be-audited>, archived at <http://perma.cc/853A-RAZH>.

⁶⁵ David Hammer, *Feinberg Made Few Mistakes, But 10,000 Gulf Oil Spill Claimants Shortchanged, Audit Says*, THE TIMES-PICAYUNE (Apr. 19, 2012, 6:26 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2012/04/feinberg_made_few_mistakes_but_1.html, archived at <http://perma.cc/DUN7-3GLU>.

the latter months of 2011 and early 2012, and ultimately announced its findings on June 5, 2012.⁶⁶

The "Independent Evaluation of the Gulf Coast Claims Facility" reiterated what thousands of oil-struck residents on the Gulf Coast already knew, that the GCCF's assessment procedures often undervalued the extent of their damage.⁶⁷ Specifically, BDO found that "almost 7,300 claimants were negatively affected by the identified errors," which amounted to more than \$64 million withheld from GCCF claimants.⁶⁸ The firm additionally discovered more than 2,600 claimants whose claims the GCCF "erroneously denied," because their claim applications did not include various documents that GCCF protocols required.⁶⁹

Despite this modest amount of criticism, BDO's report assumed a largely apologetic tone with respect to the GCCF's methods. The report emphasized that the GCCF faced a herculean and unprecedented task in addressing the claims of thousands of victims, and that any such undertaking was bound to experience difficulties.⁷⁰ The firm addressed the seemingly damning concern that multiple claimants in similar positions received varying awards, yet dismissed this issue rather nonchalantly.⁷¹ Reasons for such disparities included:

- (1) [T]he range of options for claimants to document pre-Spill earnings;
- (2) the timing of an individual's claim as compared to business claims by his employer;
- (3) the evolution of the GCCF's methodologies during its tenure;
- (4) the periodic implementation of processes to expedite payments;
- (5) the automatic eligibility in Phase II of claimants who may have been paid in error in Phase I;
- (6) human error by GCCF claims processors; and
- (7) the temporary differences in outcomes that were subsequently corrected.⁷²

In a somewhat problematic fashion, BDO lauded the GCCF's efforts, finding that 98 percent of the 574,000 claimants received adequate

⁶⁶ BDO Consulting, *Independent Evaluation of the Gulf Coast Claims Facility: Report of Findings & Observations to the U.S. Department of Justice* (2012), available at <http://www.justice.gov/iso/opa/resources/66520126611210351178.pdf>.

⁶⁷ *Id.* at 67.

⁶⁸ *Id.*

⁶⁹ *Id.* at 70.

⁷⁰ *Id.* at 85.

⁷¹ *Id.* at 72.

⁷² BDO Consulting, *supra* note 66, at 72.

compensation.⁷³ Going forward, it endorsed the GCCF's methodology as a positive paradigm on which future mass tort relief funds should be modeled.⁷⁴

Despite this official stamp of approval, the GCCF's importance diminished when, in March 2012, BP reached a settlement deal with Gulf Coast residents.⁷⁵ The settlement cost BP nearly \$7.8 billion, in addition to the \$8 billion it had already paid through the GCCF and the \$14 billion it spent in cleanup efforts.⁷⁶ However, the settlement addressed only harm to individuals and businesses, and thus failed to provide for damages to natural resources and the environment.⁷⁷ The GCCF remained in operation, but as a result of the settlement, Feinberg passed administrative duties over to Patrick Juneau, a court-appointed administrator, ending the era of the GCCF's lifespan that this Note will address.⁷⁸

II. THE DIFFICULTY IN ASSESSING ENVIRONMENTAL DAMAGES

A. *Environmental Damages Contemplate Unique Concerns and Are Immensely Difficult to Quantify*

The damage caused by the oil seeping into the Gulf presented harm assessors with numerous, complex issues. Personal injuries and property damage cases were routine enough, but the spill corrupted great swaths of the Gulf Coast in ways that would not manifest themselves for months or years after the rig failure.⁷⁹

⁷³ Hammer, *supra* note 65.

⁷⁴ BDO Consulting, *supra* note 66, at 85.

⁷⁵ John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES, Mar. 2, 2012, at A1, available at http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html?_r=1&, archived at <http://perma.cc/N8DL-ECNG>.

⁷⁶ *Id.*

⁷⁷ Harry R. Weber & Michael Kunzelman, *Environmental Damages from BP Oil Spill Still an Issue After Deal*, LAWRENCE JOURNAL-WORLD (Mar. 4, 2012), <http://www2.ljworld.com/news/2012/mar/04/environmental-damages-bp-oil-spill-still-issue-aft/>, archived at <http://perma.cc/TKU9-ZWWN>.

⁷⁸ David Hammer, *Gulf Oil Spill Claims Process is Now Governed by Negotiated Settlement*, THE TIMES-PICAYUNE (June 2, 2012, 10:00 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2012/06/gulf_oil_spill_claims_process_1.html, archived at <http://perma.cc/RDY9-XLLZ>.

⁷⁹ Mark Schleifstein, *National Wildlife Federation Says Environmental Effects of BP Spill Far From Over*, THE TIMES-PICAYUNE (Apr. 2, 2013, 12:57 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2013/04/national_wildlife_federation_s_1.html, archived at <http://perma.cc/4UMG-CES8>.

Regardless of the BP spill specifics, environmental damages present unique quantitative difficulties due to their forward-looking nature.⁸⁰ The compensation of environmental harm has a number of well-established purposes, but three are particularly compelling, especially in the context of this case. The first is remunerating the individuals who have experienced loss.⁸¹ This concern represents the most basic function of compensatory damages and finds obvious parallels in other tort scenarios. Second, environmental damages provide for environmental restoration.⁸² This facet finds a familiar niche in environmental compensation, given that environmental value lies not solely in its tangible worth. Rather, such damages attempt to replicate the environment's aesthetic appeal, its role in the wider naturalistic network, and its permanence. Lastly, because the general population and the legislators that represent them collectively cherish the environment, such damages wield a punitive arm to deter further harm.⁸³ That environmental damage calculators tend to prioritize punitive damages, demonstrates the importance of the underlying policy concerns.

These latter two functions demonstrate the forward-looking focus of environmental damages. However, this emphasis presents the problematic reality that future harm is exponentially harder to quantify than harm previously rendered. For this reason, environmental damage assessors struggle to appraise the monetary magnitude of such harms. There are practical reasons for this as well. Whereas the free market values most products and commodities, there simply does not exist a market for environmental quantities: "The environmental goods at issue here . . . do not trade in markets, for various reasons having to do with market failures (such as externalities and common property problems) and community rejection of market outcomes (based, for example, on inequitable distribution of environmental goods)."⁸⁴ So, while traditional compensation strives to effect an efficient use of resources, environmental damage assessors must evaluate resources that the market has deemed worthless.⁸⁵

⁸⁰ Rutherford, Knetsch, & Brown, *supra* note 8.

⁸¹ *Id.* at 56.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 57 (laying the three major resultant problems out as such: "(i) allocating public resources in ways that are consistent with their importance to the community; (ii) providing appropriate incentives to individuals who use or may harm the resources; and (iii) assessing damages when environmental resources are harmed or degraded by an unexpected event, such as an oil spill, or an intentional activity, such as waste discharge.").

When courts do attempt to value environmental harm, however, they have a number of alternatives at their disposal. Most of the time, they will simply include remediation expenses in the award.⁸⁶ In the Gulf Coast, such expenses would include the various cleanup efforts that took place immediately after the spill. Another means of quantifying harm might include assessing the environmental asset's diminution in value as a result of the pollution.⁸⁷ An assessor may also attempt to appraise the value of public natural resources to an entity that represents the public, such as the local governments in coastal Gulf towns.⁸⁸

In each of these methods, however, difficulties persist. For one, depending on the damage, remedial measures will not likely restore the area to its original state. Moreover, cleanup costs and diminished value calculations fail to consider the future worth of natural commodities. A great deal of the environment's value resides in its permanence, and permanence eludes valuation, especially when different people experience varying degrees of enjoyment in the natural aspects of their property. And a certain segment of environmental real estate does not find its value solely in its sedentary features. Each plot of land constitutes a natural habitat enlivened by kinetic, noisy, diverse creatures, each of whose value cannot be readily quantified.⁸⁹ Consequently, after the Gulf Coast oil spill, living creatures bore a devastating share of the burden.⁹⁰

The difficulty in quantifying such damages results in the third, punitive prong of environmental damages receiving top priority. In the case of private landowners, actions for private nuisance—the form that environmental harm cases usually take—cannot be brought without some identifiable value diminution in the environmental asset.⁹¹ But these measurements are not easily taken and are unlikely to fully represent the value to the plaintiff.⁹² This reality, combined with the fact that natural resource damage suits require a public plaintiff, means that private actions for environmental damage rarely come forward.⁹³ Punitive damages have

⁸⁶ Klass, *supra* note 10, at 126.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 134.

⁹⁰ *Assessing Impacts of the Deepwater Horizon Oil Spill in the Gulf of Mexico*, SCI. DAILY, July 10, 2013, <http://www.sciencedaily.com/releases/2013/07/130710122004.htm>, archived at <http://perma.cc/QP8G-S56Z>.

⁹¹ *Id.* at 131.

⁹² *Id.* at 130.

⁹³ *Id.* at 132.

thus become the vehicle by which private plaintiffs recover some measure of relief for an otherwise noncompensable loss, while simultaneously effectuating the policy concern of deterring future conduct.⁹⁴

After the BP oil spill, any organization charged with compensating environmental harm sufferers faced an unenviable task. Unprecedented difficulties existed, to be sure, but the success or failure of the GCCF would be judged, from an environmental perspective, by its effectiveness in three fields: (1) providing victims with a reasonable monetary substitute for their loss; (2) restoring the area to its pre-spill state as completely as possible; and (3) punishing its benefactor and target, so that similar catastrophes would not occur without the utmost care.

B. The Types of Environmental Damages Available to Claimants Are Limited by the OPA

Created, as it was, by the OPA, the GCCF was statutorily required to compensate a few specific types of environmental damage. The OPA mandates first that the responsible party remunerate organizations and government entities for any costs they incur in cleanup efforts.⁹⁵ In terms of actual damages, a responsible party must account for destruction of natural resources.⁹⁶ However, this remedy is limited to claims by public entities and so provides no recourse for private citizens.⁹⁷ The OPA covers common remedies by mandating damages for property harm and lost earnings.⁹⁸ While not explicitly environmental in nature, these provisions do implicate environmental concerns when the land constitutes the property damaged, or when lost profits derive from natural sources, as with the Gulf's fishing industry. Lastly, the OPA allows plaintiffs to bring claims for subsistence use of natural resources that have been destroyed.⁹⁹ These claims are rarer than the others, as they predominantly refer to fish or other wildlife used as a personal food source.¹⁰⁰ All told, the claims available to those harmed by the BP spill were limited

⁹⁴ *Id.* at 111.

⁹⁵ 33 U.S.C. § 2702(b)(1) (2012).

⁹⁶ 33 U.S.C. § 2702(b)(2)(A).

⁹⁷ *Id.*

⁹⁸ 33 U.S.C. §§ 2702(b)(2)(B), (E).

⁹⁹ 33 U.S.C. § 2702(b)(2)(C).

¹⁰⁰ Michael L. Rustad & Thomas H. Koenig, *Parans Patriae Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crim torts*, 29 UCLA J. ENVTL. L. & POL'Y 45, 62 (2011).

and presented the standard set of difficulties that environmental damage assessors tend to encounter.

How, exactly, the GCCF was supposed to value these damages was not as statutorily explicit. The OPA provides some hints, however, in its calculation of damages to natural resources: (A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources; (B) the diminution in value of those natural resources pending restoration; plus (C) the reasonable cost of assessing those damages.¹⁰¹ Again, whatever help this section of the OPA provided, it still left the GCCF at the mercy of traditionally insufficient damage valuation measures.

III. THE GCCF'S FLAWED COMPENSATION SCHEME

A. *As a Relief Fund Divorced from the Purview of the Judicial System, the GCCF Suffered from Flaws That Characterize Similar Funds*

The GCCF was not the first mass tort relief fund. Since the 1970s, relief funds have emerged to address such large-scale torts as occupational injuries and illnesses caused by asbestos, among others.¹⁰² When the class of victims affected by some manmade harm is especially widespread, mass tort funds become attractive for the burden they relieve from the court system.¹⁰³ In the case of the BP oil spill, the sheer number of potential claimants would have suffocated the dockets of courts along the Gulf Coast.¹⁰⁴ Mass tort funds are also appealing for the speed with which they allocate relief, the general consistency of their damage awards, their structural flexibility, and the finality of their decisions.¹⁰⁵

But despite their undeniable benefits, mass tort funds suffer from compensation-related inefficiencies due to their detachment from the justice system. For one, their award ceilings generally hang lower than they would

¹⁰¹ 33 U.S.C. § 2706(d)(1).

¹⁰² George W. Conk, *Blowout: Legal Legacy of the Deepwater Horizon Catastrophe: Diving into the Wreck: BP and Kenneth Feinberg's Gulf Coast Gambit*, 17 ROGER WILLIAMS U. L. REV. 137, 148 (2012).

¹⁰³ Rustad & Koenig, *supra* note 100, at 58–59.

¹⁰⁴ *Id.* at 58.

¹⁰⁵ Deborah E. Greenspan & Matthew A. Neuberger, *Settle or Sue? The Use and Structure of Alternative Compensation Programs in the Mass Claims Context*, 17 ROGER WILLIAMS U. L. REV. 97, 110–15 (2012).

in court.¹⁰⁶ This is especially true for the GCCF; whereas punitive damages would normally inflate the compensation awards in the courtroom, such damages are unlikely to exist when the wrongdoer's punishment rests within its own hands.

In the mass tort fund, individual cases receive less individualized attention. They fall into a general pool, classified by broad similarities, but the nuances of their individual facts are neutralized by aggregation. This reality derives from the logistical limitations, as claims funds usually lack the investigative capacity and the discovery procedures that the legal system provide.¹⁰⁷ This process inevitably leads to more meritorious claims receiving identical compensation to those whose severity is considerably less.

Additionally, whereas the removal from the court system is often cited as a benefit, it can also work to the claimants' detriment. Mass tort funds lack the structure that the court provides, whose methods are legitimized by centuries of precedent and procedural habit. Also, the mass tort fund may answer to no supervisory body, as in the case of the GCCF.¹⁰⁸ Abuses will more easily avoid detection if a mass tort fund polices itself. And if a claimant walks away from her adjudication dissatisfied, she may have no recourse to appellate review if the fund's administrator elects not to provide such a mechanism.¹⁰⁹ These problems affect mass tort funds generally and, given its independent construction, certainly characterized the GCCF.

B. The GCCF Instituted its Own, Unique Damage Assessment Methodology, Which Further Diminished Claimants' Rewards

While the GCCF largely concealed its methodology during its life span, the audit performed by BDO Consulting and the GCCF's claim solicitation documents have revealed its basic compensatory framework.¹¹⁰ The GCCF allocated relief by providing claimants three options for payment: the Quick Payment Final Claim, the Interim Payment Claim, and

¹⁰⁶ *Id.* at 114–15 (explaining that “[b]ecause the very purpose of claims facilities is to pay similarly situated claimants similarly, this inherently means that some claimants would have been paid more through litigation and some would have been paid less”).

¹⁰⁷ *Id.* at 116–17.

¹⁰⁸ Mullenix, *supra* note 52, at 838.

¹⁰⁹ Greenspan & Neuberger, *supra* note 105, at 114.

¹¹⁰ *See generally* BDO Consulting, *supra* note 66.

the Full Review Final Payment Claim.¹¹¹ Each of these claims awarded compensation based upon different types of damage and provided different timelines for the GCCF to review claims and ultimately disburse a reward.¹¹²

First, a claimant could file for an Interim Payment Claim. This type of claim allowed claimants to “receive compensation for documented past losses or damages caused by the Spill” immediately.¹¹³ In order to file such a claim, the claimant would have to submit various documentation, depending on the type of claim they advance.¹¹⁴ For instance, a claimant bringing a lost profits or lost earning capacity claim would submit an identification of the alleged injury, documentation of the spill’s profit-harming causation, and information as to any offsetting, alternative employment.¹¹⁵ Similarly, someone alleging loss of subsistence use of natural resources would present detailed documentation of the natural resources destroyed, the claimant’s use for them, and any expenditures made for substitutes.¹¹⁶ Proof of such losses could be difficult to demonstrate, especially without a neutral fact-finder making factual determinations based on extensive evidence. However, the awarding of an Interim Payment Claim would not preclude claimants from filing the more comprehensive Final Claim.¹¹⁷ Designed to address immediate needs, Interim Payment Claims would typically involve small amounts.¹¹⁸

Following the awarding of an Interim Payment Claim, the claimant would have another decision to make. She could file a Full Review Final Payment Claim, which would again cover “documented past and future losses resulting from the Spill.”¹¹⁹ Such a claim would receive a more intensive review process, thereby assuaging fears that an individual claim might receive a more cursory review.¹²⁰ The downside, as the Quick Payment Final Claim makes apparent, was the lengthy process of giving claims a full review.¹²¹

¹¹¹ *Id.* at 34–35.

¹¹² *Id.*

¹¹³ *Id.* at 35.

¹¹⁴ GULF COAST CLAIMS FACILITY, PROTOCOL FOR INTERIM AND FINAL CLAIMS, 2–5 (Nov. 22, 2010), available at <http://s3.amazonaws.com/nytdocs/docs/521/521.pdf>.

¹¹⁵ *Id.* at 3–4.

¹¹⁶ *Id.* at 4.

¹¹⁷ BDO Consulting, *supra* note 66, at 35.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 64.

Alternatively, claimants could opt to file a Quick Payment Final Claim.¹²² These claims would involve an expedited review process, which again called the review's quality into question.¹²³ However, claimants who elected to file a Quick Payment Final Claim would receive a one-time final payment of \$5,000 for individuals and \$25,000 for businesses.¹²⁴ The claimant would not need to provide any further documentation in this case.¹²⁵ Given the ease with which claimants could bring this type of claim and the truncated timeframe, the Quick Payment Final Claim presented an alluring alternative.

Both the Quick Payment Final Claim and Full Review Final Payment Claim required recipients to sign a release clause that precluded them from ever recovering additional money from BP.¹²⁶ Soon after the GCCF released its Protocol for the awarding of these claims, the Attorneys General of four states along the Gulf Coast published a letter to potential claimants warning them to consider the implications of accepting either type of final claim.¹²⁷ The letter recognized the finality of the release clause and cautioned claimants against making hasty decisions.¹²⁸ Succumb to the temptation of instant gratification, they warned, and you could squander thousands of dollars forever.¹²⁹

As such, the release clause represented the fundamental flaw in the GCCF's compensation scheme, especially in the environmental compensation context. The finality of the release clause could, in theory, prohibit claimants from bringing further claims when harms become apparent long after the spill.¹³⁰ This prospect held particular relevance in the Gulf Coast case because the extent of the damage would not become apparent for months and years after the rig explosion.¹³¹ The clause's capacity for exploitation did not go unnoticed, as environmental groups like the National Wildlife Federation urged the GCCF to include a "reopener clause" that

¹²² *Id.* at 34.

¹²³ BDO Consulting, *supra* note 66, at 34.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Notice: BP/Gulf Coast Claims Facility Claimants Considering Final or Quick Payments*, GULF COAST STATE ATTORNEYS GENERAL (Dec. 16, 2010), available at [http://myflorida.legal.com/webfiles.nsf/WF/JFAO-8CDH45/\\$file/JointAGGCCFNotice.pdf](http://myflorida.legal.com/webfiles.nsf/WF/JFAO-8CDH45/$file/JointAGGCCFNotice.pdf).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Schleifstein, *supra* note 79.

would allow paid claimants to bring further claims if additional damage appeared.¹³² Regardless of their obvious merit, these suggestions went unheeded and the release clause remained a fundamental feature of the GCCF's compensation scheme.¹³³

Whatever its actual impact, the cautionary letter identified the information asymmetries inherent in the GCCF's framework.¹³⁴ The GCCF's secretive nature largely contributed as well. Beholden, as it was, to no authority but BP, the GCCF did not publicize a compensation grid that would let potential claimants preview the damages they might receive: "No valuation standards have been published to the public. There is no publicly available information concerning the identity, experience, or training of staff claims administrators, or the methodology by which staff adjusters evaluated emergency payments and will determine final settlement offers."¹³⁵ This information rendered void the warnings of the Attorneys General, as potential claimants could hardly assess the alternatives when they had no frame of reference. Taken together, the GCCF's guarded secrecy, the calculated allure of the Quick Payment Final Claim, and the release clause's stranglehold combined to coerce claimants into receiving less than they likely deserved.

C. *The GCCF's Treatment of the Collateral Source Rule and its Extrastatutory Application of Causation Principles Further Diminished Claimants' Awards and Weakened the OPA's Deterrent Effect*

The collateral source rule finds fairly wide application in tort law.¹³⁶ It dictates that any relief received from a third party to address the harm should not be deducted from the claimant's ultimate award.¹³⁷ In compensating spill damage, the GCCF opted to ignore this common law stalwart, leading to further diminution of claimants' awards.¹³⁸ In particular, it "deduct[ed] the amount a claimant receive[d] from private insurance, unemployment payments benefits, and other government benefits."¹³⁹

¹³² *Id.*

¹³³ BDO Consulting, *supra* note 66, at 34–35.

¹³⁴ GULF COAST STATES ATTORNEYS GENERAL, *supra* note 126.

¹³⁵ Mullenix, *supra* note 52, at 858.

¹³⁶ *Id.* at 859.

¹³⁷ *Id.*

¹³⁸ *Id.* at 859–60.

¹³⁹ Rustad & Koenig, *supra* note 100, at 70.

Unfortunately, those who bore the brunt of the practice were those working the hardest to mitigate the spill's effects.¹⁴⁰ BP hired a large number of fishermen to assist in the cleanup efforts immediately following the spill.¹⁴¹ BP paid these fishermen for their services, as their livelihood had been destroyed.¹⁴² Nevertheless, when they approached the GCCF to recover damages for their lost fishing enterprises, the GCCF deducted the amount paid to them for their cleanup efforts from their ultimate awards.¹⁴³ Due to public backlash, however, Feinberg revised his position on the collateral source application and halted the practice of deducting cleanup amounts.¹⁴⁴

But this bizarre application of the collateral source doctrine was not the GCCF's only deviation from standard legal practice. The GCCF's claim assessors employed causation determinations that seemingly clashed with standards set forth in the OPA. The OPA dictates that "each responsible party for a vessel or a facility from which oil is discharged . . . into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages."¹⁴⁵ Nowhere does the Act specify a requisite mental state for the offender.¹⁴⁶ Thus, unlike negligence-based pollution statutes, the OPA's damage provisions are enforced on a strict liability basis.¹⁴⁷

The stringency of the OPA's liability provisions serves to emphasize the risk involved in offshore drilling.¹⁴⁸ In fact, the OPA is fairly unique in this regard. As Vernon Palmer indicates, Congress clearly intended to expand the recourses for potential claimants who suffer the harmful effects of an oil spill.¹⁴⁹ Accordingly, the OPA imposes liability in a much stricter fashion than do statutes regulating other ultrahazardous activities.¹⁵⁰ The variety of expenses and harms remunerated is similarly expansive.¹⁵¹ Whereas comparable statutes might cover the cost of cleanup,

¹⁴⁰ Mullenix, *supra* note 52, at 861–62.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ 33 U.S.C. § 2702(a) (2012).

¹⁴⁶ *See id.*

¹⁴⁷ Palmer, *supra* note 40, at 110.

¹⁴⁸ *Id.* (explaining that "strict liability, channeled responsibility, narrowed defenses, and recoverability of economic loss—clearly testify that exploration . . . of oil [is a] high risk activit[y] that should pay [its] own way irrespective of fault.").

¹⁴⁹ *Id.* at 111.

¹⁵⁰ *Id.* at 110.

¹⁵¹ *Id.* at 110–11.

or impose a negligence-based intent requirement upon personal damage, the OPA awards funds for “the costs of diverted governmental services, diminished governmental revenues, and the lost earnings and profits of private individuals and businesses.”¹⁵² The reach of these provisions assumes an even greater scope considering that the OPA sets no cap on the number of claimants.¹⁵³ The punitive magnitude of the Act’s damage provisions strongly suggests that Congress intended to deter future oil spills with all of its substantial legislative arsenal.¹⁵⁴ This inference is further supported by the Act’s passage soon after the devastating effects of the Exxon Valdez oil spill off the coast of Alaska.¹⁵⁵

Considering the intentionally expansive reach of the OPA, Congress would dictate that a claims facility pay a wide range of claimants on a strict liability basis. The inquiry into causation should thus be limited, commensurate with a strict liability regime. However, the GCCF implemented a proximate cause requirement that resembled a negligence-like causation scheme.¹⁵⁶ Not coincidentally, such a prerequisite stood to benefit BP: “[P]roximate cause is a duty-limitation that benefits defendants by eliminating their liability in circumstances in which the damages or injuries are ‘so unusual, extraordinary, or bizarre . . . that the policy of the law will relieve the defendant of any liability for negligently creating this dangerous situation.’”¹⁵⁷ Courts applying a strict liability standard rarely resort to proximate cause determinations for this reason.¹⁵⁸ Nevertheless, the GCCF’s imposition of this requirement more closely aligned its payout with a negligence regime than the strict liability standard set forth in the OPA.¹⁵⁹

The GCCF’s proximate cause determinations armed its administrator with a great deal of discretion. For example, Feinberg could determine the geographic radius of permissible claims simply by promulgating

¹⁵² *Id.*

¹⁵³ Palmer, *supra* note 40, at 111.

¹⁵⁴ *Id.*

¹⁵⁵ Kopec & Peterson, *supra* note 37, at 597.

¹⁵⁶ Rustad & Koenig, *supra* note 100, at 68; see Jackie Calmes, *For Gulf Victims, a Mediator with Deep Pockets and Broad Power*, N.Y. TIMES, June 23, 2010, at A27, available at http://www.nytimes.com/2010/06/23/us/23feinberg.html?_r=0, archived at <http://perma.cc/3K98-F7R6> (quoting an interview with Ken Feinberg in which he likens this proximate cause requirement to that used in the 9/11 Victims’ Compensation Fund).

¹⁵⁷ Rustad & Koenig, *supra* note 100, at 68 (quoting *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1105, 1116 (Fla. 2005)).

¹⁵⁸ *Id.*

¹⁵⁹ 33 U.S.C. § 2702(a) (2012).

new GCCF guidelines.¹⁶⁰ Such a measure would preclude potential claims originating in certain sectors of the Gulf—deemed to be outside the spill's harmful reach—from receiving any relief.¹⁶¹ In the case of the Gulf spill, whose reach corrupted disparate areas of the coast due to aquatic ebb and flow, this limitation was uniquely harsh.¹⁶² Even those areas untouched by oil saw their profits decline when the entire region's tourism and seafood industries faced a harmful stigma.¹⁶³ As some legal scholars have commented, and as common sense dictates, “[t]hese important decisions should be made in a public forum, enabling the cross-examination of experts on all sides of the issue.”¹⁶⁴ By limiting the geographic reach of the GCCF's compensation process, Feinberg likely withheld damages from deserving victims and in so doing, seemingly operated outside the boundaries of the OPA.

Proximate cause determinations extended to the types of claims remunerated as well. Although the OPA does not explicitly compel responsible parties to compensate sufferers of psychological damage, a catastrophic oil spill could plausibly cause such harm.¹⁶⁵ Nevertheless, the GCCF declined to address psychological harm, although claimants certainly existed, because Feinberg could unilaterally determine eligibility requirements.¹⁶⁶ The GCCF declined to consult with psychiatrists, counselors, or other experts who could attest to a claimant's damaged psychological state.¹⁶⁷ This practice merely signified another example of the GCCF diminishing or even ignoring the claims of those harmed by the oil spill.

Together with its coercive payment schedules, release clause, and assessment methodologies, the GCCF's self-serving use of the collateral source doctrine and negligence-like proximate cause suggest that it operated primarily with BP in mind. As a creature of the law, the GCCF existed to justly compensate those who suffered from BP's wrongdoing.¹⁶⁸ Yet each unique feature of the GCCF's compensation scheme either diminished the number of claimants or the size of their reward. None of the practices mentioned effectuated the stated goals of the OPA in punishing careless

¹⁶⁰ Rustad & Koenig, *supra* note 100, at 69.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ 33 U.S.C. § 2702(b) (2012).

¹⁶⁶ Rustad & Koenig, *supra* note 100, at 69.

¹⁶⁷ *Id.*

¹⁶⁸ Calmes & Cooper, *supra* note 4, at A1.

purveyors of hazardous materials and compensating their victims.¹⁶⁹ That the GCCF constantly sought to limit the amounts it paid to sufferers indicates its overarching fealty to BP. Its utter lack of punitive force further indicted the facility as an imperfect means of compensating harm.

D. The GCCF's Original Power over its Punishment Was Relieved by Gross Negligence Proceedings, but Future Wrongdoers Could Benefit from Such Responsibility

The difficulty in quantifying environmental damages likely contributed to the GCCF's flawed compensation system. As discussed above, typical environmental damage claims rely heavily on punitive damages to offset this problem.¹⁷⁰ The GCCF, as a mass claims fund, entirely bypassed this requirement by focusing solely on remunerating claimants for damage actually suffered.¹⁷¹ Nevertheless, BP has not avoided punitive proceedings completely.¹⁷² The company currently stands in civil court, potentially liable for an additional \$18 billion if Judge Barbier finds the company grossly negligent.¹⁷³ This determination will hinge largely upon the quantity of oil released into the Gulf of Mexico.¹⁷⁴

Regardless of the judge's findings, BP will pay a large amount in punitive damages.¹⁷⁵ However, these originate from BP's specific obligations as a responsible party under the OPA.¹⁷⁶ Future claims facilities, those that could otherwise avoid payment of punitive damages, may not be so restrained by legislation. The GCCF set a dangerous precedent as a claims fund created and overseen by the wrongdoer.¹⁷⁷ A similar mass tort fund could similarly put the offender in charge of punishing itself. In such a case, self-interest would surely keep the defendant from imposing punitive damages on itself in an impartial manner. This arrangement is particularly problematic in the environmental harm context, where punitive damages constitute the majority of the reparations.¹⁷⁸ Although

¹⁶⁹ 33 U.S.C. § 2702.

¹⁷⁰ Klass, *supra* note 10, at 111.

¹⁷¹ GULF COAST CLAIMS FACILITY, *supra* note 114, at 5–8.

¹⁷² Krauss, *supra* note 19, at B1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ 33 U.S.C. § 2702 (2012).

¹⁷⁷ Calmes & Cooper, *supra* note 4, at A1.

¹⁷⁸ Klass, *supra* note 10, at 111.

a wrongdoer-commissioned claims fund seems counterintuitive and inefficient, it occurred in the Gulf Coast and could plausibly occur again.

IV. JUDGE BARBIER'S ORDER AND THE FUTURE OF MASS TORT FUNDS

A. *Judge Barbier's Order Ignored the Compensation Flaws Inherent in the GCCF's Scheme in Favor of Eliminating its Nominal Independence from BP*

In early February 2011, Judge Barbier addressed the GCCF's efforts in the Gulf Coast.¹⁷⁹ He responded to a motion filed by the plaintiffs which asked that he "oversee or supervise communications between the GCCF and putative class members to ensure that communications [were] neither misleading nor confusing."¹⁸⁰ The plaintiffs questioned the relationship between BP and the GCCF.¹⁸¹ They contended that BP and the GCCF's claims of independence from each other were misleading and that BP exerted control over the GCCF.¹⁸² BP countered by questioning the plaintiffs' right to bring an action in the district court, given the OPA's removal of the process from the court system.¹⁸³ It also denied the plaintiffs' contention that it controlled the GCCF and maintained Feinberg's independence from the company.¹⁸⁴

The judge first explained his role as the upholder of the OPA's mandates.¹⁸⁵ He then posed a number of questions that would guide his analysis of the question: "Is the GCCF completely independent of BP and a neutral arbiter of claims? Is the GCCF actually BP or an agent of BP? Or, is the GCCF another type of hybrid mixture of the traditional plaintiff-defendant adversarial model of dispute resolution and the use of a third party?"¹⁸⁶ Such questions forecasted an uncompromising review, but its focus was largely procedural. Implicit in these questions were concerns as to the effectiveness of the GCCF in achieving its ostensible goal, yet these concerns ultimately went unarticulated. Presented with the opportunity to review the methodology of the GCCF and reconcile its process with the OPA's requirements, Judge Barbier declined.

¹⁷⁹ In re Oil Spill, 2011 U.S. Dist. LEXIS 10497, at *4.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at *9.

¹⁸⁴ *Id.* at *10.

¹⁸⁵ 2011 U.S. Dist. LEXIS 10497, at *11.

¹⁸⁶ *Id.* at *12.

Rather than consider the inner workings of the GCCF's compensation model, Barbier dwelled on the more abstract implications of the GCCF's existence. He first commended mass tort funds for efficiently resolving blocks of related claims.¹⁸⁷ Nevertheless, he determined that BP created a "hybrid entity" in the GCCF, as opposed to a fully independent one.¹⁸⁸ The judge based his conclusions on the following factors: BP's appointing of Feinberg as administrator absent plaintiff consultation or court order, Feinberg's status as an interested third party, and the monthly fee Feinberg's firm received from the company.¹⁸⁹ Judge Barbier ultimately held that such feigned independence misled potential claimants and ordered the GCCF and BP to refrain from representing themselves as independent parties.¹⁹⁰

Judge Barbier's order represented an important first step in court supervision of the GCCF. However, considering the pervasive compensation flaws in the system, Barbier missed an important opportunity to fix the facility. While BP and the GCCF could no longer refer to their independence from one another, the incidents of their close relationship would continue to manifest themselves in the damage awards distributed to claimants.

B. Judge Barbier's Order Sets a Dangerous Precedent for Similar Mass Tort Funds to Shortchange Claimants Without Claiming Independence

For all the significance of Judge Barbier's order, and it certainly held the interest of the claimants in high regard, the order's failings placed a fairly low burden on mass tort funds following in the GCCF's wake. Barbier's critique of the GCCF was superficial, considering the impressive scope of the facility. As long as the GCCF refrained from claiming its independence from BP, it could continue employing its self-serving compensation scheme with impunity.¹⁹¹ A mass tort fund contemplating its design could easily address this cosmetic flaw while instituting similar methodologies that favored the wrongdoer. So long as it represented itself as an agent of the defendant, the fund could theoretically operate in whatever manner it chooses.

¹⁸⁷ *Id.* at *13–14.

¹⁸⁸ *Id.* at *14–15.

¹⁸⁹ *Id.* at *15.

¹⁹⁰ *Id.* at *22–25.

¹⁹¹ 2011 U.S. Dist. LEXIS 10497 at *22–25.

The GCCF is still a recent memory, and mass tort funds of a comparable significance have yet to emerge; but when they do, they have a paradigm to follow in the GCCF. Unfortunately for those who must resort to these “independent” funds, especially those who have suffered environmental damage, they can hardly expect a fair sum for their troubles.

CONCLUSION

It is hard to fault Feinberg or the individuals in charge of the GCCF for doing their job. BP hired them in pursuit of its own interests and the results reflected the company's motivations. The greater problem lies in a legal system that will tolerate such abuses. After a catastrophic event like the BP oil spill, the justice system should prioritize the just reparation of harms suffered, not expediency. When consideration for the wrongdoer rises to the forefront—unless that consideration is deterrence—the victims' wounds deepen and the legal system sustains credibility scars. Our justice system should do more to prevent funds like the GCCF from proceeding unregulated. Going forward, scrutiny of claims funds' methodologies should increase, as should oversight of their implementation. Only then can the mass tort fund realize its immense potential as a beneficial break for the legal system.