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THE RETURN OF KING SOLOMON: THE GULF COAST CLAIMS FACILITY FROM THE PERSPECTIVE OF THE 9/11 FUND

"It would be mistake for Congress or the public to take the 9/11 fund as a precedent for similar programs." -Kenneth Feinberg, Special Master of the September 11th Victim Compensation Fund and administrator of the new Gulf Coast victim compensation fund.¹

On June 16, nearly two months into the worst environmental disaster in United States history, the White House announced that BP had agreed to fund a \$20 billion escrow to compensate victims of the Gulf oil spill.² The New York Times called it an exercise of "raw presidential power."³ Representative Joe Barton (R-Tex.) called it a "shakedown."⁴ Whatever the characterization, the new Gulf Coast Claims Facility ("Facility") was to be an independent entity, "not beholden to the administration ...; not beholden to BP,"⁵ that would offer victims of the spill an extra-legal path to damage payments.

While the details of the Facility remain cloudy, the biggest clue as to what the program might look like is its administrator: mega-lawyer Ken Feinberg. Feinberg was appointed by the Bush administration in the aftermath of 9/11 to serve as Special Master in charge of compensating victims of the tragedy.⁶ The act creating the 9/11 fund vested unprecedented power in its Special Master, who wrote the rules fleshing out the bare-bones delegation of power, and served as the judge in each of the roughly 1,500 claims hearings.⁷ The fund is generally regarded as a success despite its shaky legal underpinnings,⁸ largely due to Feinberg's benevolence. Indeed, Feinberg referred to himself as "King Solomon" while he was running the fund.⁹

The 9/11 Fund as Precedent

The Gulf Coast Claims Facility can be distinguished from the 9/11 fund in certain regards. Fundamentally, the 9/11 Fund was a substitute for wrongful death and personal injury actions, whereas the Facility is intended to compensate for economic loss. The 9/11 Fund was created by an act of Congress, which at the same time limited the airlines' tort liability, essentially funneling victims into the Fund. The Facility, on the other hand, has no legal basis--no legislation, no executive order¹⁰ -- and BP's liability has not been limited. In fact, BP waived its \$75 million liability limit imposed by the Oil Pollution Act.¹¹ Although BP will pay \$20 billion into the escrow in installments over the next three years,¹² that figure does not represent the ceiling of BP's liability.¹³ On a more human note, in a poignant departure from the 9/11 fund, the Facility will not compensate undocumented immigrants,¹⁴ a group that has come to represent an increasing percentage of the Gulf's population since Hurricane Katrina.¹⁵

However, Feinberg has intimated that his experience with the 9/11 fund will guide his administration of the Facility.¹⁶ For instance, he has said that, like the 9/11 Fund, the Facility might rely on state tort law as a guideline for whether a victim's claim is compensable.¹⁷ Furthermore, looking back on his experience with the 9/11 Fund, Feinberg stated that he thought the

model could be improved by making individual claims more standardized.¹⁸ Similarly, Feinberg has suggested that under the Facility, “maybe we ought to cluster all the oyster claims, all the fisherman claims, all the tourism claims, come up with a common methodology.”¹⁹ Although Feinberg is “convinced that the civil justice system is an important force for promoting safe standards of conduct and individual responsibility,”²⁰ he is vociferously encouraging victims to use the Facility rather than litigating,²¹ much as he did with the 9/11 Fund (calling litigation a “loser’s game.”)²² He recently opined that “you are crazy if you don’t participate [in the Facility].”²³

The Gulf Coast Claims Facility is not the 9/11 Fund, but there is a sense of déjà vu--an unimaginable national disaster of mass proportion, and a concomitant flight from tort. Hopefully Feinberg’s sense of benevolence will remain a constant. Indeed, a great value of the Fund was the way it represented a national response to individuals’ devastating losses. Robert Rabin, speaking of the 9/11 Fund, noted that “[n]either the American public nor its political leaders would have rested easily with the spectacle of the surviving families engaged in a lengthy and emotionally draining pursuit of recovery in tort, giving the overwhelming sympathy for their plight.”²⁴ The Facility, likewise, may serve an important role in giving the victims of the spill a path to recovery less fraught with pitfalls than a traditional legal route.

An Alternative to Tort

The Facility will almost certainly be superior to the tort system in terms of efficiency. Feinberg has said that the Facility will capitalize on BP’s existing compensation infrastructure,²⁵ and therefore be able to provide expedited emergency payments that would be unimaginable in the lethargic court system. Furthermore, Feinberg hopes to be able to pay out long-term claims within 30-45 days. Notably, the Facility, if properly administered, could reduce the need for victims to obtain counsel on contingency. This could mean more money ultimately ends up in victims’ pockets. The Facility will also spare state and Federal courts the substantial administrative burden of innumerable lawsuits.

As a critic of the 9/11 Fund concluded, “Both procedurally and economically, the Fund is the superior option.”²⁶ Perhaps the same will hold true for the Facility.

The Facility: A Boon to BP?

Although the Facility has certain perceived advantages over tort, will it be able to effectuate one of the basic principles of tort: behavioral correction? Notably, BP investors gave a “tepid huzzah” when the facility was announced, suggested by a bump in BP’s stock price.²⁷ Tracing the blips of a stock ticker is ordinarily a futile exercise, but it is almost certain that BP acted out of self-interest in entering into the Facility agreement. BP is the world’s fourth largest company.²⁸ It is unlikely that any amount of “raw presidential power” would lead it to make a decision totally contrary to the best interests of its shareholders.

One way in which the Facility might benefit BP is by reducing negative media coverage. This could explain, in part, BP’s voluntary commitment to the Facility--it has been pointed out that the Facility might earn BP goodwill.²⁹ However, the possibility of protecting BP’s image (or what remains of it) may be a necessary evil of creating a potentially superior compensation system. Defendants rarely look good when they are proven negligent and forced to pay damages, or when they are clearly culpable but avoid liability due to the inherently unpredictable nature of the legal system. One might argue that BP shouldn’t be allowed to escape the prospect of public shame by voluntarily making a lump payment; however, the grief that the Facility might save victims could well be worth it.

The Facility could benefit BP immensely if it eliminates the collateral source rule. The collateral source rule states that evidence of a victim’s third-party financial assistance--such as insurance and charitable contributions--cannot be introduced to reduce damages awards. Congress proscribed the rule in establishing the 9/11 fund, though Feinberg displayed dexterity in interpreting the enabling legislation to get around the prohibition.³⁰ The collateral source rule is criticized for purportedly allowing victims a “double recovery”--that is, the defendant will compensate the plaintiff for losses that are already paid for by insurance, or potentially in this case, federal relief payments. Efficiency hawks hail this as a way of reducing overall, big-picture costs, and given the financial enormity of this catastrophe, there will certainly be pressure on Feinberg to defy his demonstrated inclinations toward the rule.

Despite its perceived benefits, eliminating the collateral source rule will defeat the tort function of optimal deterrence. BP should have to incur all costs of the spill. The legal system, for the most part, favors the risk of overcompensation to the victim over the certainty of letting the defendant off the hook because of the victim's financial prudence. At any rate, this problem of "double recovery" is for the most part mitigated by subrogation, wherein plaintiffs have to repay their insurers to the extent they receive damages for insured losses. If the Facility fails to take into account the significance of the collateral source rule in its search for fairness and efficiency, it will be a failure in terms of incentivizing potential future polluters to adequately invest in accident prevention.

So Where Does the Facility Leave Us?

Bankruptcy, in a symbolic sense, would be an appropriate ending for BP; however, it is in everyone's interest that the company continues to generate revenue. As Congress acknowledged when it limited the airlines' liability and created the 9/11 Fund, it is difficult to pursue legal claims against a bankrupt company. Some have predicted that BP will go bankrupt nonetheless,³¹ but Feinberg has declared that bankruptcy is "not an option."³² It is unclear how the Facility could prevent BP's bankruptcy--BP's liability remains uncapped, victims may pursue traditional legal avenues, and the company faces record criminal fines--but the deftness with which King Solomon operated the 9/11 Fund suggests at least that BP will not go bankrupt on account of the Facility.

The Gulf Coast Claims Facility is an important and powerful new entity that will substantially affect the lives of millions for years to come. Aside from victim compensation, for the Facility to be truly successful, it must simulate one of the critical functions of tort: behavioral correction. The \$20 billion down payment should send a strong signal to other polluters that they must increase investment in safeguards, but ultimately, corporations make decisions based on financial calculations, not out of fear. If the Facility sets a precedent for relieving environmental marauders of full liability, it will not achieve optimal deterrence, and thus potentially open the door for future environmental disasters. To the extent the Gulf Coast Claims Facility shares similarities with the 9/11 Fund--most notably, its benevolent dictator--we can only hope that it attains the same level of success.

Footnotes

¹ Kenneth R. Feinberg, *What is Life Worth* 178 (2005).

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⁶ More recently, Feinberg was appointed by the Obama administration as the Special Master for TARP Executive Compensation (the "pay czar"). Interim Final Rule on TARP Standards for Compensation and Corporate Governance, U.S. Dept. of Treasury Press Room (June 10, 2009), <http://ustreas.gov/press/releases/tg165.htm>.

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- 17 *Id.*
- 18 FEINBERG, *supra* note 1.
- 19 MSNBC, *supra* note 5.
- 20 In fact, under the 9/11 Fund, the Special Master’s determinations were appealable to an administrative court. Kenneth Feinberg, *The Building Blocks of Successful Victim Compensation Programs*, 20 *Ohio St. J. on Disp. Resol.* 273, 275 (2005). Likewise, awards under the Facility will be appealable to a three-judge panel. Nathan Koppel, *Parsing BP’s \$20B Compensation Fund*, *Wall St. J. Law Blog* (June 17, 2010, 11:15 AM), <http://blogs.wsj.com/law/2010/06/17/parsing-bps-20b-compensation-fund/?KEYWORDS=bp+compensation+fund>
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