COMMENT

THE GULF COAST CLAIMS FACILITY AND THE DEEPWATER HORIZON LITIGATION: JUDICIAL REGULATION OF PRIVATE COMPENSATION SCHEMES

Colin McDonell*

This Comment analyzes the efforts of plaintiffs' lawyers and state attorneys general to regulate the administration of the Gulf Coast Claims Facility through the court system. Victims of the Deepwater Horizon oil spill have the option of seeking compensation from the Gulf Coast Claims Facility, a compensation scheme funded by BP, or joining one of the class action lawsuits against BP that have been consolidated in a multidistrict litigation in New Orleans, Louisiana. The Plaintiffs' Steering Committee and several Gulf States' Attorneys General have requested that the judge overseeing the litigation intervene in the administration of the claims facility, namely by invalidating or modifying releases of liability, monitoring communications between the facility and potential claimants, and even taking control of the compensation process itself. These efforts have met resistance not only from defendants but also from other plaintiffs' lawyers, raising the question as to what jurisdiction courts have to intervene in a private compensation scheme at the request of litigants seeking compensation through the courts.

The primary contribution of this Comment is demonstrating how inadequate causes of action, Article III standing requirements, and Federal Rule of Civil Procedure 23(a)'s adequacy requirement for class certification will in some cases deprive the court of jurisdiction to consider the requests. The Comment proposes a methodology by which courts should resolve requests for regulation that present standing and adequacy issues: dismiss any requests for regulation that create substantial disagreement among class members on the grounds that an adequate representative of the class could not have standing with respect to that

* J.D. Candidate, Stanford Law School, 2012. Many thanks to David Freeman Engstrom, Nora Freeman Engstrom, Robert Rabin, and Janet Alexander for their guidance and helpful suggestions.

issue, because the dismissal will preserve the ability of the class to gain certification and bring other claims.

INTRODUCTION

The explosion of the oil rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010 resulted in millions of barrels of oil pouring into the Gulf, making it the largest disaster of its kind to date.[1] On June 16, 2010, President Obama announced that Kenneth Feinberg, who had previously administered a fund to compensate victims of 9/11, would oversee a $20 billion fund to compensate victims of the Deepwater Horizon oil spill.[2] This fund, the Gulf Coast Claims Facility (GCCF), opened on August 23, 2010, and has since paid out billions of dollars to hundreds of thousands of claimants.[3]

But the GCCF is not the only route to compensation for Deepwater Horizon victims. Hundreds of actions filed in federal court, many of them class actions, have been consolidated in New Orleans. Of the thousands of briefs, motions, and orders filed in the court, several dozen of them have concerned efforts to regulate the administration of the GCCF. The Plaintiffs' Steering Committee (PSC), and the attorneys general of states bordering the Gulf, have urged the court to invalidate or modify releases of liability, monitor communications between the GCCF and potential claimants, and even take over the pri-

1. Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 3, 2010, at A14, *available at* http://www.nytimes.com/2010/08/03/us/03spill.html?ref=oilspills.

2. Remarks Following a Meeting with BP Leadership, 2010 DAILY COMP. PRES. DOC. 503 (June 16, 2010).

3. *Status Report*, OVERALL PROGRAM STATISTICS (Gulf Coast Claims Facility, Dublin, Ohio), Jan. 10, 2012.

vate compensation process itself. These efforts have met resistance not only from BP, which operated the rig, but also from other plaintiffs' lawyers. They raise questions about what jurisdiction a court has to intervene in a private compensation scheme at the request of litigants who choose to seek compensation through the courts.

The focus of this Comment is on these efforts to control the GCCF through the court system. The Comment discusses several barriers that might deprive the court of jurisdiction to consider the PSC requests to regulate the GCCF, namely that (1) there may not exist a proper cause of action that would allow the court to grant the requested relief, (2) even when such a cause of action exists, the putative class may not contain plaintiffs with standing to bring the claim before the court, and (3) if the class is broad enough to include plaintiffs with standing to raise the request, then there might be too much intraclass disagreement about the propriety of judicial regulation for the class to be certifiable under Federal Rule of Civil Procedure 23(a)'s adequacy requirement. This Comment argues that the court ought to resolve these standing and adequacy issues in a way that will preserve the ability of the class to gain certification and bring other claims: by dismissing any claims for supervision that create substantial disagreement among class members on the grounds that an adequate representative of the class could not have standing with respect to that issue.

Part I gives an overview of the Oil Pollution Act of 1990 (OPA),[4] which provides the statutory framework for both the GCCF and the litigation, as well as a summary of the creation and mechanics of the GCCF. It then discusses the portion of the litigation dealing with requests for judicial regulation of the GCCF, explaining the progression of the litigation, the major points of dispute, and which parties were on which sides of the issues. Part II examines the legal basis for the requests for regulation, examining possible causes of action and whether the court has jurisdiction to hear them. This Part does not examine all challenges to the legality of the requests or analyze them on the merits, but instead pays particular attention to the way in which Article III standing and Federal Rule of Civil Procedure 23(a)'s adequacy requirement may bar the PSC from properly bringing the requests before the court. Finally, the Comment concludes with some observations about the propriety of greater judicial regulation of private mass-compensation schemes going forward. Private compensation schemes may benefit defendants and claimants alike by offering victims a more efficient alternative to litigation. If judicial intervention makes the GCCF a slower and more expensive route to compensation, the benefits of having a private compensation scheme alongside the court system might be lost.

4. Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of the U.S. Code).

I. THE GULF COAST CLAIMS FACILITY AND THE DEEPWATER HORIZON LITIGATION

A. *The Oil Pollution Act of 1990*

OPA created both the statutory framework that governs the Gulf Coast Claims Facility as well as the primary causes of action on which plaintiffs in the Deepwater Horizon litigation rely. Congress passed OPA in response to the eleven-million-gallon oil spill from the tanker Exxon Valdez off the coast of Alaska, the inadequate government and industry response in containing the spill, and various legal barriers to victim recovery.[5] The purpose of the legislation was to adequately compensate victims, provide for quick and efficient cleanup, minimize damage to wildlife and natural resources, and internalize costs within the oil industry.[6]

Prior to the passage of OPA, it was difficult for victims to recover for economic losses caused by oil spills. Under federal maritime law, for example, plaintiffs could bring claims for economic loss only if the claims were accompanied by physical injury or property damage.[7] Under OPA, victims can recover lost profits or revenues without regard to any actual damage to their person or property.[8] OPA also imposes strict liability on responsible parties for recovery costs and six categories of damages.[9] In the absence of gross negligence or the violation of certain classes of federal regulations, however, total OPA liability of an offshore facility for a single oil spill is capped at $75 million.[10] But victims may be able to bring additional claims, as OPA does not preempt state laws that impose additional liability.[11]

After an oil spill, the Coast Guard designates one or more sources of the spill as "responsible part[ies]."[12] Within fifteen days of such a designation, a responsible party must advertise procedures by which victims can present claims.[13] While requiring that the responsible party establish a procedure for the payment or settlement of claims for "interim, short-term damages,"[14] OPA

5. *See* S. REP. NO. 101-94, at 2 (1989).

6. *Id.*

7. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 625 (1st Cir. 1994) (discussing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927)).

8. 33 U.S.C. § 2702(b)(2)(E) (2006).

9. *Id.* § 2702(a)-(b).

10. *Id.* § 2704(a)(3), (c)(1).

11. *Id.* § 2718(a).

12. *Id.* § 2714(a). The statute provides that the President designates responsible parties, but this authority was delegated to the Coast Guard by executive order. Exec. Order No. 12,777, § 7(d)(2), 3 C.F.R. 351, 358 (1991), *reprinting* 56 Fed. Reg. 54,757, 54,768 (Oct. 22, 1991).

13. 33 U.S.C. § 2714(b).

14. *Id.* § 2705(a).

does not specify any further requirements for the payment or settlement procedures that the responsible party must establish.

Before a victim can bring a claim in court under OPA, he must first present the claim to the responsible party in accordance with the advertised procedures.[15] Only if the responsible party denies all liability for a claim, or does not settle the claim within ninety days after the claim was presented, may the claimant then commence an action in court against the responsible party.[16] And if the claimant is paid only for interim, short-term damages, he retains the right to recover further damages in the future.[17]

If a responsible party alleges that damages were caused solely by a third party, the responsible party has two options. First, the responsible party can pay the claim; the party is then entitled by subrogation to the rights of the claimant to recover from the third party.[18] If the responsible party pays only an interim claim for less than the full amount of damages to which the claimant may ultimately be entitled, the responsible party is subrogated only to the extent of the portion of damages paid.[19] Alternatively, the responsible party can avoid liability for the claim by proving by a preponderance of the evidence that the third party was solely responsible for the damage.[20]

The scheme established by OPA reflects Congress's intent to facilitate speedy recovery and minimize litigation in a number of ways.[21] First, expanded liability allows victims to recover without proving negligence and, for economic damages, without proving accompanying injury to their person or property. Second, victims can seek recovery from any designated responsible party, generally leaving litigation over apportionment of blame to subrogation proceedings, and in any event placing the burden of shifting liability to a third party on the responsible party from whom the victim seeks compensation. Finally, by requiring that victims present claims to a responsible party before bringing a claim in court, OPA reduces litigation by giving the responsible party an opportunity to consider the victim's claim and settle.

---

15. *Id.* § 2713(a).

16. *Id.* § 2713(c). If a claimant presents a claim before the responsible party advertises procedures, however, he must wait until ninety days after the responsible party began advertising procedures. *Id.*

17. *Id.* § 2715(b). The Plaintiffs' Steering Committee, however, advanced the argument that this provision applies not just to interim payments but to all payments, in effect forbidding any settlement that contains a release of future claims. This argument, which conflicts with both the language and logic of OPA, is addressed in Part II.B.1.

18. *Id.* § 2702(d)(1)(B).

19. *Id.* § 2715(b).

20. *Id.* § 2703(a)(3).

21. *See* Boca Ciega Hotel v. Bouchard Transp. Co., 51 F.3d 235, 238-39 (11th Cir. 1995) (noting "congressional desire to encourage settlement and avoid litigation" (citing, for example, 135 CONG. REC. H7962 (Nov. 2, 1989) (statement of Rep. Lent))).

B. *The Gulf Coast Claims Facility*

On April 20, 2010, the oil rig Deepwater Horizon exploded, spilling nearly five million barrels of oil into the Gulf of Mexico in the ensuing months.[22] The Coast Guard designated BP as a responsible party, and BP established an internal claims process.[23] In the first four months after the spill, BP received over 150,000 claims and paid about 125,000 of them, constituting a total payout of over $395 million.[24]

After a meeting with BP's chairman on June 16, 2010, President Obama announced that BP had agreed to waive OPA's $75 million cap and set aside $20 billion in an escrow account for payment of claims, which would not represent a cap on BP's liability.[25] The funds would be distributed by an independent claims process administered by Kenneth Feinberg, who had administered the 9/11 Fund.[26] On August 6, BP executed a formal trust agreement, providing for contributions totaling $20 billion to pay claims resolved by the fund.[27]

On August 23, 2010, Feinberg announced the opening of the Gulf Coast Claims Facility. Claims previously filed with BP were transferred to the GCCF, and the facility began processing claims.[28] Between August 23 and November 23, 2010, claimants could apply for Emergency Advance Payments to recover damages incurred in the first six months after the spill. Claimants had to submit

22. Robertson & Krauss, *supra* note 1.

23. *See* Press Release, BP, BP to Appoint Independent Mediator to Ensure Timely, Fair Claims Process (May 26, 2010), *available at* http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062448.

24. David A. Fahrenthold & Joel Achenbach, *Gulf Coast on Edge as Sept. 11 Mediator Assesses Oil Spill Claims*, WASH. POST, Aug. 21, 2010, at A4, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/20/AR2010082005403.html.

25. Remarks Following a Meeting with BP Leadership, *supra* note 2. BP might still have been legally responsible for more than $75 million, however, even if it had not agreed to lift the cap. The cap is waived under OPA if there is gross negligence or willful violations of safety regulations, which some experts believed would be proven at trial. *See* Margaret Cronin Fisk & Laurel Brubaker Calkins, *BP Waiver of $75 Million Spill Damage Cap May Recognize Liability Reality*, BLOOMBERG (May 21, 2010, 8:50 AM PT), http://www.bloomberg.com/news/2010-05-21/bp-waiver-of-75-million-spill-damage-cap-may-recognize-liability-reality.html. Members of Congress, moreover, had already introduced legislation to increase BP's liability. *See, e.g.*, Blake Ellis, *Proposed Spill Penalty: A Year of Profits*, CNNMONEY (May 13, 2010, 7:04 PM ET), http://money.cnn.com/2010/05/13/news/companies/oil_spill_bill/index.htm (discussing bill introduced by Senators Vitter and Sessions that would have increased the cap on BP's liability to $20 billion).

26. Remarks Following a Meeting with BP Leadership, *supra* note 2.

27. DEEPWATER HORIZON OIL SPILL TRUST 2 (2010), *available at* http://motherjones.com/files/2010-8-9TrustAgreement.pdf.

28. Press Release, Gulf Coast Claims Facility, Gulf Coast Claims Facility Now Processing Oil Spill Claims (Aug. 23, 2010), *available at* http://gulfcoastclaimsfacility.com/press1.php.

documentation of losses to the GCCF, and could reapply for payments for additional losses on a monthly basis until the program ended on November 23. Emergency Advance Payments were "interim" payments under OPA, and thus claimants did not have to sign a release of liability for any future damages to receive payments.[29]

Since December 13, 2010, the GCCF has offered claimants the option of applying for three different types of claims: Interim Payment Claims, Quick Payment Final Claims, and Full Review Final Payment Claims.[30] Interim Payments cover only past damages and require documentation of loss.[31] Interim Payments do not require signing a release, and claimants can reapply for additional interim damages every quarter.[32] Quick Payment Final Claims pay $5000 for eligible individual claimants and $25,000 for eligible business claimants, and require that claimants sign a release and covenant not to sue.[33] Quick Payment Final Claims do not require submission of additional documentation and do not undergo additional review, but only claimants who have previously received an Emergency Advance Payment or been found eligible for an Interim Payment from the GCCF are eligible for a Quick Payment.[34] Finally, claimants can submit documentation of loss and apply for a Full Review Final Payment and receive a lump sum payment for all documented past and future losses.[35] Claimants are not obligated to accept a Final Payment offer, but if they do, they must sign a release and covenant not to sue.[36]

The release and covenant not to sue discharges BP, as well as any other party that might be liable, from liability arising from the oil spill. The release does not apply to claims for bodily injury or violations of securities law, but otherwise exempts potentially liable parties from any past and future liability arising from the spill. In addition to preventing an individual claimant from suing, the release also applies to his spouse, heirs, agents, and insurers. If a claimant is involved in litigation alleging anything other than bodily injury or securities law violations, the claimant must dismiss the litigation or withdraw from the class action after signing the release. The release also subrogates BP to all rights the claimant has arising from the spill.[37]

---

29. *Protocol for Emergency Advance Payments*, GULF COAST CLAIMS FACILITY (Aug. 23, 2010), http://www.gulfcoastclaimsfacility.com/proto_1.

30. *See* Press Release, Gulf Coast Claims Facility, Gulf Coast Claims Facility Announces Next Phase of the Compensation Program for Victims of the BP Oil Spill (Dec. 13, 2010), *available at* http://gulfcoastclaimsfacility.com/pressB.php.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, http://gulfcoastclaimsfacility.com/faq#Q5 (last visited Mar. 9, 2012).

37. GULF COAST CLAIMS FACILITY, RELEASE AND COVENANT NOT TO SUE, *available at* http://gulfcoastclaimsfacility.com/sample_release.pdf.

There is a limited appeals process in front of a panel of GCCF appeals judges, selected by the chancellor of the law school at Louisiana State University, Jack Weiss.[38] Claimants may appeal a Final Payment determination by the GCCF if the total amount of compensation (including past interim compensation) exceeds $250,000. BP may appeal if total compensation exceeds $500,000, and Feinberg also has discretion to grant appeals.[39] Decisions of the appeals panel are binding only on BP, and a claimant may reject the decision and pursue a claim in court.[40]

As of January 10, 2012, BP and the GCCF had paid over $5.5 billion to over 200,000 unique claimants. Roughly 169,000 claimants received Emergency Advance Payments, 126,000 received Quick Payments, 30,000 received Interim Payments, and 58,000 received Full Review Final Payments. Of the 397,000 claimants applying for Interim, Quick, or Final Payments, 215,000 claimants had received payment or an offer of payment, 137,000 claimants were notified that the GCCF required additional documentation or had denied their claims, and 28,000 claimants had claims still under review.[41]

C. *The Multidistrict Litigation*

On August 10, 2010, the United States Judicial Panel on Multidistrict Litigation[42] transferred actions related to the Deepwater Horizon spill that were pending in federal court to Judge Carl Barbier in the Eastern District of Louisi-

38. Press Release, Gulf Coast Claims Facility, Weiss Announces Appointment of Judges for GCCF Appeals Process (June 9, 2011), *available at* http://www.gulfcoastclaimsfacility.com/press21.php.

39. *Protocol for Interim and Final Claims*, GULF COAST CLAIMS FACILITY (Feb. 8, 2011), http://www.gulfcoastclaimsfacility.com/proto_4.php.

40. *Id.*

41. *Status Report*, *supra* note 3. Updated figures are available at *Overall Program Statistics*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf (last visited Mar. 9, 2012).

42. Multidistrict litigation is a procedure by which civil actions pending in different districts are transferred to a single district for consolidated pretrial proceedings, when the actions contain common questions of fact and consolidation would "be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a) (2006). The Judicial Panel on Multidistrict Litigation, which consists of seven district and circuit judges designated by the Chief Justice of the United States, may assign the consolidated actions to a transferee judge with the consent of his district. *Id.* § 1407(b), (d). The transferee judge conducting the pretrial proceedings may not assign the case to himself for trial, however, but must remand cases back to the districts from which they were transferred by the conclusion of pretrial proceedings. *Id.* § 1407(a); Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998). In practice, however, most cases end in settlement and thus never return to their original district courts for trial. *Cf.* Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 152 (D. Mass. 2006) ("[I]t is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial.").

ana for consolidated pretrial proceedings.[43] By June of 2011, the multidistrict litigation (MDL) consisted of hundreds of cases and over 100,000 claimants.[44] In addition to the class actions originally filed in district court and transferred to the MDL, the master complaints filed by the Plaintiffs' Steering Committee (PSC) assert class allegations.[45] None of the classes has been certified as of the time of this writing, as the court stayed motion practice and discovery on class certification until further order.[46]

1. *The parties interested in judicial regulation*

Of the thousands of motions, briefs, and orders filed in the MDL, roughly thirty directly concerned requests for various forms of judicial regulation of the GCCF compensation process.[47] The Plaintiffs' Steering Committee, and attorneys general from several states bordering the Gulf that filed as amici curiae, were the proponents of judicial regulation of the GCCF. The forms of intervention they requested fell into three categories. First, they called for judicial supervision of communications that BP, the GCCF, and Feinberg were making to potential claimants.[48] Second, they requested that the court modify the releases that claimants signed, either invalidating them entirely or reducing their scope.[49] Third, they asked the court to intervene directly in the administration of the GCCF to correct for alleged noncompliance with OPA.[50]

An unusual coalition opposed the requests for judicial regulation. Unsurprisingly, BP opposed the request for judicial intervention in its entirety, and both Feinberg and the GCCF filed briefs as amici curiae in which they argued

---

43. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 731 F. Supp. 2d 1352, 1356 (J.P.M.L. 2010). The Panel separately consolidated securities cases arising from the spill and transferred them to Judge Keith Ellison in the Southern District of Texas. *In re* BP p.l.c. Sec. Litig., 734 F. Supp. 2d 1376, 1379 (J.P.M.L. 2010). This Comment, however, is only concerned with the non-securities multidistrict litigation in the Eastern District of Louisiana.

44. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 792 F. Supp. 2d 926, 928 (E.D. La. 2011).

45. *See, e.g.*, Master Complaint, Cross-Claim, & Third-Party Complaint for Private Economic Losses in Accordance with PTO No. 11 [CMO No. 1] Section III(B1) ["B1 Bundle"] at 127-36, *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179 (E.D. La. Dec. 15, 2010) [hereinafter Master Complaint]. The PSC is a group of fifteen lawyers, appointed by Judge Barbier, responsible for coordinating pretrial proceedings on behalf of all plaintiffs in the consolidated cases. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, slip op. at 2-4 (E.D. La. Oct. 8, 2010) (order appointing PSC).

46. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, slip op. at 12 (E.D. La. Oct. 19, 2010) (case management order).

47. *See, e.g.*, *infra* notes 51-97 and accompanying text.

48. *See infra* Part I.C.2.

49. *See infra* Part I.C.3.

50. *See infra* Part I.C.3.

that the GCCF was compliant with OPA.[51] Cameron International Corporation, another defendant in the suit, filed several briefs opposing the requests to limit the scope of the releases by excluding non-BP defendants from release.[52]

But most interesting was the opposition from non-PSC plaintiffs' lawyers. Four law firms, as well as a number of individual plaintiffs in the MDL, filed briefs opposing requests to supervise communications and invalidate releases.[53] One of the law firms represented thousands of individuals, almost none of whom were parties in the MDL, who had filed or were planning to file claims with the GCCF.[54] These law firms had invested resources in pursuing claims via the GCCF and wanted to enter into agreements of their choosing without "micromanagement" from other attorneys.[55] They accused the PSC of viewing the GCCF "as nothing more than an obstacle to more fees," wanting to "limit the efficacy and power of the GCCF" to increase attorneys' fees at the expense of spill victims' opportunities for settlement.[56] The non-PSC plaintiffs and law

51. *See* BP's Supplemental Memorandum Regarding OPA & the GCCF, *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179 (E.D. La. Feb. 18, 2011), 2011 WL 1599385 [hereinafter BP's Supplemental Memorandum]; Brief Amicus Curiae of Kenneth Feinberg as Claims Administrator of the Gulf Coast Claims Facility in Response to Request for Briefing on Claims Processing Issues, *In re Oil Spill*, MDL No. 2179 (Feb. 23, 2011), 2011 WL 1599388; Response of the Gulf Coast Claims Facility as Amicus Curiae to the Supplemental Notice on Behalf of the State of Mississippi Filed on April 7, 2011, *In re Oil Spill*, MDL No. 2179 (Apr. 12, 2011), 2011 WL 1599497.

52. *See* Response of Defendant Cameron International Corp. to Motion of Plaintiffs to Supervise Communications Between Defendant & Putative Class Members at 1, *In re Oil Spill*, MDL No. 2179 (Jan. 7, 2011), 2011 WL 203655; Supplemental Brief of Defendant Cameron Concerning GCCF Release Practices at 1-2, *In re Oil Spill*, MDL No. 2179 (Feb. 17, 2011), 2011 WL 1599378.

53. *See* Opposition to Motion to Supervise Ex Parte Communications Between BP Defendants & Putative Class Members, *In re Oil Spill*, MDL No. 2179 (Jan. 4, 2011), 2011 WL 203653 [hereinafter Becnel Opposition] (filed by Becnel Law Firm); The Buzbee Law Firm's Objection to Plaintiffs' Motion to Supervise Ex Parte Communications Between Defendant & Putative Class Members, *In re Oil Spill*, MDL No. 2179 (Jan. 4, 2011), 2011 WL 203654 [hereinafter Buzbee Opposition] (filed by The Buzbee Law Firm); Lyons & Farrar Law Firm's Objection to Plaintiffs' Motion to Supervise Ex Parte Communications Between Defendant & Putative Class Members, *In re Oil Spill*, MDL No. 2179 (Jan. 4, 2011) (filed by Lyons & Farrar); Objection to Motion to Supervise Ex Parte Communications Between BP Defendants & Putative Class Members, *In re Oil Spill*, MDL No. 2179 (Jan. 7, 2011) (filed by Samuel T. Adams); Opposition to Motion to Supervise Ex Parte Communications Between BP Defendants & Putative Class Members, *In re Oil Spill*, MDL No. 2179 (Jan. 7, 2011) (filed by Parker Waichman Alonso LLP); Memorandum in Opposition to "Plaintiff's Motion to Supervise Ex-Parte Communications Between BP Defendants & Putative Class Members," *In re Oil Spill*, MDL No. 2179 (Jan. 7, 2011), 2011 WL 203657 (filed by Salas & Co.); Memorandum in Support of Motion for Reconsideration of February 2, 2011 "Order and Reasons" Regarding PSC's "Motion to Supervise Ex Parte Communications Between BP Defendants & Putative Class Members," *In re Oil Spill*, MDL No. 2179 (Feb. 24, 2011), 2011 WL 1599389 [hereinafter Motion for Reconsideration].

54. *See* Buzbee Opposition, *supra* note 53, at 1.

55. *Id.* at 2.

56. Becnel Opposition, *supra* note 53, at 6.

firms opposed judicial meddling with releases, and they argued that judicial supervision of communications was either unnecessary or should be limited to minimal ground rules for communications with unrepresented claimants.[57]

2. *Supervision of communications*

The litigation pertaining to judicial regulation of the GCCF began on December 21, 2010, when the PSC filed its Motion to Supervise Ex Parte Communications Between BP Defendants and Putative Class Members.[58] The PSC alleged that neither Feinberg nor the GCCF was independent of BP, and that they both represented themselves as independent entities in communications with the public.[59] They asserted that putative class members, believing that Feinberg was giving independent advice, may consequently have been misled when Feinberg told them that they would be better off accepting a GCCF payment than litigating.[60] Citing the power of courts to supervise communications to putative class members under Federal Rule of Civil Procedure 23(d)(1), the PSC asked the court to supervise statements between the GCCF and putative class members in the release and other communications. In particular, the PSC asked the court to prevent the GCCF from representing itself as independent, offering putative class members free legal advice, or advising putative class members not to retain counsel. The PSC also sought to require the GCCF to inform putative class members of the MDL and that Feinberg was hired by BP.[61]

The PSC also asked the court to substantively modify the terms of the release—to release only BP, to exclude claims for punitive or other damages that the GCCF does not pay, and to exclude relatives and business interests of the claimant from the release—but cited little law supporting the requests.[62] The PSC later submitted a revised proposed order to supervise, dropping the requests to void or limit the releases and making some modifications to the requested supervision of communications.[63]

One of the major points of dispute was the relationship of Feinberg and the GCCF to BP. The PSC, noting that BP paid Feinberg's salary and that Feinberg was acting like BP's defense attorney in attempting to secure final settlements

---

57. Buzbee Opposition, *supra* note 53, at 2.

58. Motion to Supervise Ex Parte Communications Between BP Defendants & Putative Class Members, *In re Oil Spill*, MDL No. 2179 (Dec. 21, 2010) [hereinafter Motion to Supervise Communications].

59. Memorandum in Support of Motion to Supervise Ex Parte Communications Between BP Defendants & Putative Class Members at 25, *In re Oil Spill*, MDL No. 2179 (Dec. 21, 2010), 2010 WL 5573198 [hereinafter Plaintiffs' Memorandum].

60. *Id.* at 2.

61. *Id.* at 1-2.

62. *See id.* at 2.

63. Submission of Revised Proposed Order, *In re Oil Spill*, MDL No. 2179 (Jan. 24, 2011).

on BP's behalf, argued that Feinberg was not independent.[64] BP argued that Feinberg was an independent contractor, because he was solely responsible for administering the GCCF, because BP in no way controlled his decisions, and because his salary was publicly disclosed.[65]

Several of the non-PSC plaintiffs' lawyers advanced the argument that Feinberg was an officer appointed by President Obama, that the GCCF was an executive agency, and that consequently *Marbury v. Madison*[66] and the political question doctrine shielded Feinberg's discretionary judgments from judicial review.[67] The argument was premised on the idea that President Obama's June 16 announcement that he and BP had "mutually agreed" that Feinberg would head the GCCF constituted a presidential appointment[68]—even though, in the same announcement, President Obama made clear that the fund would "not be controlled by either BP *or by the Government*."[69] No other parties advanced this argument, and the court rejected it.[70] The other major point of dispute was the authority of the court to supervise communications. The PSC cited the Manual for Complex Litigation for the proposition that Federal Rule of Civil Procedure 23(d) gives the judge "broad administrative powers" to protect absent class members, as well as cases in which the court supervised communications between defendants and putative class members.[71] In response, BP argued that courts refuse to limit communications without specific findings of abuse, and that the proposed order was an unconstitutional prior restraint on speech.[72] The PSC countered that specific showings of abuse were not necessary because Rule 23(d)(1) is an exercise of the court's case management authority, rather than a Rule 65 injunction.[73]

---

64. Motion to Supervise Communications, *supra* note 58, at 2-3.

65. BP's Memorandum in Opposition to "Plaintiffs' Motion to Supervise Ex Parte Communications Between BP Defendants & Putative Class Members" at 21, *In re Oil Spill*, MDL No. 2179 (Jan. 10, 2011), 2011 WL 203656 [hereinafter BP's Memorandum in Opposition].

66. 5 U.S. (1 Cranch) 137 (1803).

67. Becnel Opposition, *supra* note 53, at 10.

68. Motion for Reconsideration, *supra* note 53, at 2-3.

69. Remarks Following a Meeting with BP Leadership, *supra* note 2, at 1 (emphasis added).

70. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, slip op. at 1 (E.D. La. Feb. 28, 2011) (order denying motion for reconsideration).

71. Motion to Supervise Communications, *supra* note 58, at 16 (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.12 (2004)); *id.* at 17-19 & n.32 (citing, for example, *In re* Potash Antitrust Litig., 896 F. Supp. 916 (D. Minn. 1995)).

72. BP's Memorandum in Opposition, *supra* note 65, at 17 (citing, for example, Gates v. Cook, 234 F.3d 221, 227 (5th Cir. 2000)); *id.* at 14.

73. Plaintiffs' Reply Memorandum in Support of Motion to Supervise Ex Parte Communications Between the BP Defendants & Putative Class Members at 15, *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179 (E.D. La. Jan. 17, 2011), 2011 WL 203652.

On February 2, 2011, the court granted in part the PSC's motion to supervise communications.[74] The court found that while Feinberg and the GCCF were independent of BP with regard to the evaluation and payment of claims, they were nonetheless not fully independent of BP.[75] The default presumption is that a third party hired to fulfill a responsible party's OPA obligations is an agent of the responsible party, and BP had not disclosed enough information about the nature of Feinberg's obligations to BP to overcome the presumption.[76] The court further found that Rule 23(d)(1), the Manual for Complex Litigation, and the cases cited by the PSC supported the court's authority to supervise communications.[77] And so long as its order was narrowly tailored, such an order was consistent with the First Amendment.[78]

The court ordered that BP, Feinberg, and the GCCF refrain from referring to the GCCF or Feinberg as neutral or completely independent, from giving legal advice to unrepresented claimants or advising claimants not to hire a lawyer, and from directly contacting any claimant they know to be represented by counsel.[79] In any communications with claimants, moreover, BP, Feinberg, and the GCCF must state that an individual has the right to consult an attorney before accepting a settlement, that claimants may file a claim in the MDL in lieu of accepting a final payment from the GCCF, and that pro bono attorneys retained by the GCCF to assist claimants are compensated by BP.[80] While the court required that such disclosures appear on releases, it did not nullify the releases or substantively modify their terms.[81]

3. *Nullification of releases and intervention into the claims process*

At the end of the order granting in part the motion to supervise communications, Judge Barbier asked for additional briefing on whether BP was fully complying with the mandates of OPA regarding release forms, processing of claims for interim and final damages, and methodologies for evaluating claims.[82] But even before this invitation, the Attorneys General of Florida, Louisiana, and Mississippi had filed statements in the MDL alleging that BP and the GCCF were not compliant with OPA, and asking for corrective action

74. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, 2011 WL 323866, at *8 (E.D. La. Feb. 2, 2011).

75. *Id.* at *5-6.

76. *Id.* at *4-6.

77. *Id.* at *6-7.

78. *Id.* at *7.

79. *Id.* at *8.

80. *Id.*

81. *See id.*

82. *Id.*

from the court.[83] The Alabama Attorney General joined the fray shortly after Judge Barbier's order, and the PSC renewed its call for invalidation of releases.[84] All four states and the PSC argued for invalidation or revision of releases, and each urged some form of court intervention into the administration of the GCCF claims process.

The briefs were heavier on factual allegations than law, using anecdotes to paint a picture of a dysfunctional claims process and asking the court to correct it. Mississippi, for example, alleged that payments were paltry and that many were denied.[85] Because of the lack of transparency in the claim determination process, the State asserted, it was difficult to evaluate how the GCCF was evaluating claims and why it was denying them.[86] Moreover, Mississippi alleged that the GCCF was intentionally failing to process interim claims in an effort to encourage claimants to apply for a Quick Payment and sign a release.[87]

To address these deficiencies, Mississippi asked the court to compel the GCCF to pay all interim claims and to pay all currently due final claims without requiring a release.[88] The PSC asked the court to appoint a special master to develop a "legitimate" and transparent interim claims protocol.[89] Alabama noted that giving the GCCF the sole discretion to determine the claims protocol was "like asking an accused arsonist to determine at trial whether he intended to damage a house he engulfed in flames," and asked the court to impose on the GCCF a particular methodology for determining claims eligibility.[90] In an additional brief filed in April, the Mississippi Attorney General asked the court to order an independent monitor to oversee the claims process and to order an independent audit of the GCCF at BP's expense.[91] When the briefs mentioned a

83. Statement of Interest on Behalf of the State of Mississippi at 3, *In re Oil Spill*, MDL No. 2179 (E.D. La. Jan. 24, 2011); Memorandum of Authorities in Support of Statement of Interest on Behalf of the State of Mississippi at 1, *In re Oil Spill*, MDL No. 2179 (Feb. 1, 2011), 2011 WL 1599357 [hereinafter Mississippi Memorandum]; Notice of Joinder in Motion to Supervise Ex Parte Communications Between BP Defendants & Putative Class Members at 1-4, *In re Oil Spill*, MDL No. 2179 (Feb. 1, 2011); Statement of Interest by the State of Florida Related to the Plaintiffs' Motion to Supervise Ex Parte Communications Between BP Defendants & Putative Class Members at 1-2, *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179 (E.D. La. Feb. 2, 2011).

84. Plaintiffs' Supplemental Memorandum Concerning BP's Failure to Comply with the Mandates of OPA, *In re Oil Spill*, MDL No. 2179 (Feb. 18, 2011), 2011 WL 1599380 [hereinafter Plaintiffs' Supplemental Memorandum]; Brief of the State of Alabama Regarding the Gulf Coast Claims Facility, *In re Oil Spill*, MDL No. 2179 (Feb. 18, 2011), 2011 WL 1599382 [hereinafter Alabama Brief].

85. *See* Mississippi Memorandum, *supra* note 83, at 2-3.

86. *Id.* at 3.

87. *Id.* at 5-7.

88. *Id.* at 7.

89. Plaintiffs' Supplemental Memorandum, *supra* note 84, at 24.

90. Alabama Brief, *supra* note 84, at 5, 11.

91. Supplemental Notice on Behalf of the State of Mississippi Regarding Continued Violations of OPA by BP & Its Agents, Kenneth Feinberg & the Gulf Coast Claims Facility

legal basis for these orders, the legal basis was that OPA mandated that the responsible party pay interim claims, a requirement that the GCCF's nonpayment of interim claims violated.[92]

BP contested the allegation that it was not making interim payments, and argued that most denials had been for lack of documentation.[93] It also contested any legal basis for court intervention into the GCCF. While OPA requires that a responsible party establish a process for paying interim claims, it places few limitations on how the process will function, and even contemplates that interim claims will be denied because it authorizes claimants to litigate their claims only after a responsible party denies them.[94] And because none of the states had claims before the court seeking relief under OPA on behalf of their citizens—Alabama sought OPA remedies for injuries to the State of Alabama, but not in its capacity as parens patriae for its citizens—they consequently lacked standing to request relief.[95]

Finally, the PSC and Attorneys General argued that the releases were invalid. Mississippi argued that because the GCCF was not processing interim claims, the releases associated with final claims were obtained under duress and were thus invalid under state law.[96] The other legal basis for invalidation of releases was that OPA precludes releases of liability, an issue that this Comment analyzes in Part II.B.1.

In addition to disputing the merits of the legal objections to the releases, BP argued that the court did not have authority to consider them. BP contended that there was no claim before the court by a plaintiff who had entered a release and sought to challenge it on the basis of duress, and even if there were, such claims would not properly be certified on a class-wide basis.[97]

In an order issued on August 26, 2011, the court refused to grant a request by the PSC for a declaratory judgment that certain settlement provisions releasing defendants from punitive damages were contrary to law.[98] The court reasoned that OPA does not clearly prohibit such releases, and that "one of the goals of OPA was to allow for speedy and efficient recovery by victims of an

---

at 1, 8, *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179 (E.D. La. Apr. 7, 2011).

92. *E.g.*, Mississippi Memorandum, *supra* note 83, at 5.

93. BP's Supplemental Memorandum, *supra* note 51, at 2, 8.

94. *Id.* at 4-8.

95. *Id.* at 17-18 & n.21.

96. Mississippi Memorandum, *supra* note 83, at 11, 15.

97. BP's Supplemental Memorandum, *supra* note 51, at 20-21 (citing Hall v. Burger King Corp., Civ. A. No. 89-0260-CIV-KEHOE, 1992 WL 372354, at *8-9 (S.D. Fla. Oct. 26, 1992)).

98. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, 2011 WL 3805746, at *18-19 (E.D. La. Aug. 26, 2011).

oil spill."[99] As of the time of this writing, the court has not issued any orders regarding intervention into the GCCF claims process.[100]

II. JUDICIAL REGULATION OF THE GULF COAST CLAIMS FACILITY

Each of the requested forms of judicial regulation requested by the PSC—nullification of releases, supervision of communications, and intervention into the claims process—raises substantial questions about the jurisdiction of the court to grant the requested relief. Part II.A describes the way in which the conjunction of Article III standing and Federal Rule of Civil Procedure 23(a)(4) adequacy might deprive the court of jurisdiction to grant the forms of intervention requested by the PSC. Part II.B suggests a methodology for resolving challenges to class claims implicating both standing and adequacy, and applies it to the PSC's requests for intervention into the GCCF.

A. *The Dual Requirements of Standing and Adequacy*

Even if we were to assume a proper cause of action exists for each form of relief sought, the substantial disagreement among plaintiffs about the propriety of judicial regulation of the GCCF may bar the court from considering the requests for relief. PSC attorneys, who represent a putative class whose members have presumably decided to seek compensation via litigation rather than the GCCF, are pushing for judicial regulation of a private compensation scheme over the strenuous objections of attorneys whose clients are seeking compensation through that scheme rather than litigation. On the one hand, if the putative class lacks plaintiffs who have been injured by the GCCF, the class may lack Article III standing to request regulation of the GCCF. On the other hand, if the putative class is broad enough to encompass those plaintiffs with standing, there might be too much intraclass conflict to meet the prerequisites for class certification.

In order for a federal court to have subject matter jurisdiction over a case, the plaintiff must have standing. The three constitutional standing requirements are the following: (1) injury, which requires that the plaintiff has suffered a cognizable "injury in fact" that is "concrete and particularized" and not "con-

99. *Id.*

100. On December 28, 2011, however, Judge Barbier issued a controversial order that, while not directly intervening in the claims process, affected payments by the GCCF. The order required that six percent of any settlement payments made by defendants in the MDL to claimants, which included payments processed by the GCCF, go to a common benefit fund from which the PSC might later receive payment for its work in the MDL. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, slip op. at 1, 6 (E.D. La. Dec. 28, 2011). Several weeks later, however, Judge Barbier amended the order to exempt GCCF settlements from the six percent "hold back" requirement in instances where the claimant had never had an action pending in the MDL. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, slip op. at 3, 4 (E.D. La. Jan. 18, 2012).

jectural or hypothetical"; (2) causation, which requires that the injury suffered is "fairly traceable" to the challenged action of the defendant; and (3) redressability, which requires that it is "likely" that the injury will be redressed by a favorable decision.[101] The plaintiff must establish standing separately for each particular claim, even if multiple claims arise from a common nucleus of facts.[102] The plaintiff must also establish standing for each form of relief sought.[103] In a class action, only if the named plaintiffs have standing may they bring a claim on behalf of themselves or other members of the class.[104] To establish standing, the named plaintiffs must show that they have personally been injured, rather than merely allege that unidentified members of the class have been injured.[105]

Class certification is proper only if the class can establish (1) numerosity, that the class is sufficiently numerous; (2) commonality, that questions of law or fact are common to the class; (3) typicality, that claims and defenses of the representative parties are typical of those of the class; and (4) adequacy, that "the representative parties will fairly and adequately protect the interests of the class."[106] While the adequacy inquiry may merge with the commonality and typicality inquiries to an extent, the adequacy requirement also serves to "uncover conflicts of interest between named parties" and the putative class.[107] In *Amchem Products, Inc. v. Windsor*, for example, the Supreme Court denied certification of a class containing both plaintiffs who had manifested injuries from asbestos exposure and plaintiffs who had been exposed to asbestos but had not yet manifested any injury.[108] Because the interests of injured plaintiffs, who preferred a generous immediate settlement, conflicted with the interests of exposure-only plaintiffs, who would benefit from funds set aside in case they developed injuries in the future, the Court held that the class failed the Rule 23(a)(4) adequacy requirement.[109] The adequacy requirement also ensures that there are no conflicts between class counsel and the class.[110] Counsel may be inadequate to represent a class, for example, if the attorneys face financial in-

101. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

102. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (citing Allen v. Wright, 468 U.S. 737, 752 (1984)).

103. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000).

104. O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

105. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) (citing Warth v. Seldin, 422 U.S. 490, 522 (1975)).

106. FED. R. CIV. P. 23(a).

107. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982)).

108. *Id.* at 628.

109. *Id.* at 626-28.

110. *See id.* at 626 n.20 (noting that Rule 23(a)(4) "factors in" conflict-free counsel).

centives to settle on terms that favor some class members at the expense of others.[111]

The PSC, in pressing for regulation of the GCCF, may face the impossible task of charting a course between the Scylla of Article III standing and the Charybdis of Rule 23(a)(4) adequacy. Define the class broadly enough to avoid standing problems, and the class contains too many disparate interests with respect to that claim to make certification proper.[112] Narrow the class to avoid problems with adequacy of representation, and in so doing excise the very plaintiffs with standing to bring the claim.

The Supreme Court has been less than clear on how to resolve class action claims that might fail either under Article III standing or Rule 23 requirements.[113] In some cases, such as *Lewis v. Casey*, the Court has dismissed class claims on standing grounds and without addressing certification requirements.[114] In *Lewis*, the Court held that named plaintiffs representing a class of prisoners challenging constitutionally deficient access to courts did not have standing to seek as broad an injunction as the district court had granted.[115] Because the injury suffered by the named plaintiffs was due to their illiteracy, they did not have standing to seek an injunction requiring additional services for non-English-speaking prisoners.[116] But in *General Telephone Co. of the Southwest v. Falcon*, the Court addressed Rule 23 requirements rather than

111. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 852-53 & n.30 (1999) (finding class counsel's incentives to reach a settlement that favored known plaintiffs at the expense of unidentifiable class members an "egregious example of the conflict noted in *Amchem*" (citing *Amchem*, 521 U.S. at 626-27)).

112. While the analysis in Part II.B focuses on the ways in which broadening the class might run afoul of the adequacy requirement, in some instances the commonality requirement will also prevent certification of a broader class. Many experts believe that the commonality requirement will be more difficult to meet after the Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which held that a class of 1.5 million female employees alleging gender discrimination had not met the commonality requirement because they provided "no convincing proof" of a companywide policy of discrimination. *Id.* at 2556-57; *see* Sergio Campos, *Wal-Mart v. Dukes and Commonality*, PRAWFSBLAWG (June 20, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/06/wal-mart-v-dukes-and-commonality.html (arguing that the Court's commonality analysis in *Dukes*, which required a merits analysis of whether plaintiffs had a common injury before certification, will not be limited to the employment discrimination context but will apply to all class actions); Nathan Koppel, *What Does Wal-Mart Ruling Mean for Class Actions?*, WALL ST. J. L. BLOG (June 20, 2011), http://blogs.wsj.com/law/2011/06/20/what-does-wal-mart-ruling-mean-for-class-actions (quoting experts who believe that *Dukes* will make class certification more difficult both in and outside of the employment context).

113. *See* Matthew R. Ford, *Adequacy and the Public Rights Model of the Class Action After* Gratz v. Bollinger, 27 YALE L. & POL'Y REV. 1, 9 (2008) (discussing the Court's inconsistent application of standing and adequacy principles to class actions).

114. 518 U.S. 343, 348-49 (1996).

115. *Id.* at 358 & n.6.

116. *Id.*; *see also* Blum v. Yaretsky, 457 U.S. 991, 1001 (1982) (dismissing class claim on grounds of standing and not addressing adequacy).

standing.[117] There, the Court held that the district court erred in certifying a class encompassing both plaintiffs alleging racial discrimination in promotion as well as plaintiffs alleging racial discrimination in hiring, when the named plaintiff had suffered only discrimination in promotion.[118] Recent cases confronting the issue have not clarified how to resolve it. In *Gratz v. Bollinger*, the Court noted that its prior cases were in "tension" over whether a challenge to a lead plaintiff's ability to represent plaintiffs when his own claim has become moot was a question of adequacy or standing, but the Court declined to resolve the question.[119]

The method of disposition is important, because even if the class fails adequacy with respect to one issue, it might be a certifiable class with united interests on other issues. This is especially true in the Deepwater Horizon litigation. The putative class members may all have an interest in establishing that BP is liable, but may have divergent interests with respect to judicial intervention into the GCCF claims process. If the court decides the issue on adequacy grounds first, it might deny certification to a class that would have been certifiable but for its request for intervention into the GCCF.

This Comment argues that the best way to resolve standing and adequacy issues prior to certification may be to dismiss the claim that divides the class on the grounds that an adequate representative of the class could not have standing with respect to that issue, while preserving the ability of the class to bring other claims. That would allow the PSC to gain certification of the class for the purposes of the claims for damages against BP, but it would not be able to request intervention into the GCCF unless that intervention served the united interests of the class.

But determining whether a claim divides a class is difficult before certification. When the court certifies the class, it has discretion to define the class narrowly or broadly. So before certification, it is not yet clear which plaintiffs will constitute the class, and thus whether an adequacy problem will exist within the class. The following Subpart suggests a methodology to resolve this problem, and applies that methodology to the Deepwater Horizon litigation.

---

117. 457 U.S. 147, 155 (1982).

118. *Id.* at 155-59. Moreover, the Court noted in *Ortiz*, without further explanation, that while courts must normally address standing at the outset of litigation, class certification issues should be addressed first when they are "logically antecedent" to Article III concerns. Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997)). This cryptic instruction has caused much confusion among lower courts. *See generally* Linda S. Mullenix, *Standing and Other Dispositive Motions After* Amchem *and* Ortiz*: The Problem of "Logically Antecedent" Inquiries*, 2004 MICH. ST. L. REV. 703, 708 (discussing various ways lower courts have interpreted and applied the instruction).

119. 539 U.S. 244, 263 & n.15 (2003) (declining to resolve the standing or adequacy question because "whether the requirement is deemed one of adequacy or standing, it is clearly satisfied in this case").

B. *Possible Claims and Potential Conflicts*

In this Subpart, the Comment addresses each of the forms of judicial regulation sought by the PSC in turn.[120] Because the class has not yet been certified, the court has discretion in how broadly or narrowly it defines the class. The court's decision as to which plaintiffs constitute the class is determinative of both whether the class will have standing to bring certain claims, and whether the class will avoid intraclass conflict with respect to those claims. The following methodology seeks to preserve as broad a class as possible with respect to core claims against BP, such as finding liability, while narrowing the class to avoid defeating certification because of intraclass dispute over ancillary claims, such as requesting supervision of the GCCF.

First, this Subpart analyzes the causes of action asserted by the PSC to determine if any of them would allow any plaintiff to obtain the relief requested. Second, for each valid cause of action, it analyzes potential conflicts within the putative class with respect to the requested relief.

For these purposes, the starting assumption is that the class is defined as all individuals who have both suffered injuries cognizable under OPA as a result of the Deepwater Horizon spill and have at some point presented a claim to the GCCF. This is similar to the class definition in the master complaints,[121] and the caveat that class members must have presented a claim to the GCCF is added because OPA requires presentment before an individual can litigate.[122] The next step is to divide this broad class into groups that might oppose or support the requested relief—different constituencies within the class that might be affected in different ways by the requested form of judicial regulation.

Finally, this Subpart assesses whether the PSC and the court might define the class in such a way that includes a group of plaintiffs with standing to request the form of judicial regulation but also avoids an intraclass conflict that

120. This Comment will only analyze the ability of the PSC to request the various forms of relief on behalf of the putative class. While several states also filed briefs requesting intervention, none of them has asserted OPA claims on behalf of its citizens in this suit.

121. While the master complaints have defined some of the proposed classes more narrowly in some respects, such as all individuals suffering economic damages from the spill, distinctions based on type of injury are not important for the analysis below. *See* Master Complaint, *supra* note 45, at 127 ("Plaintiffs seek certification of the following class ('the Class'): All individuals and entities residing or owning property in the United States who claim economic losses, or damages to their occupations, businesses, and/or property as a result of the April 20, 2010 explosions and fire aboard, and sinking of, the Deepwater Horizon, and the resulting Spill."); *see also, e.g.*, Master Complaint in Accordance with PTO No. 11 [Case Management Order No. 1] Section III.B(3) ["B3 Bundle] at 41, 46, *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179 (E.D. La. Dec. 15, 2010).

122. OPA requires presentment of a claim to the responsible party before an individual can litigate. 33 U.S.C. § 2713(a) (2006). BP acknowledged that presentment of a claim to the GCCF, instead of presentment directly to BP, would satisfy the presentment requirement. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179 (E.D. La. Oct. 22, 2010) (order filing BP acknowledgment into the record).

would defeat adequacy. When plaintiffs have united interests with respect to core claims, but are divided on whether to seek intervention into the GCCF, the court should dismiss the claims seeking intervention.

1. *Nullification or modification of releases*

The two legal bases that the PSC and the attorneys general asserted for invalidating releases were (1) that they were inconsistent with state contract law, being contracts of adhesion or obtained under duress,[123] and (2) that releasing liability was forbidden by OPA.[124] The requests for particular modifications of releases, such as excluding certain claims or other parties from the terms of the release, were generally not accompanied by references to any legal basis for the request.[125]

The argument that releases are inconsistent with OPA is rooted in the section of the act dealing with subrogation.[126] Section 2715(a) provides that a party making a payment pursuant to OPA is subrogated to all rights the claimant has under any other law. Section 2715(b)(1) places a limitation on § 2715(a), providing that if a responsible party makes a payment for short-term, interim damages, the responsible party is subrogated only to the extent of the damages paid. Where BP and the PSC differ is in the interpretation of § 2715(b)(2), which provides that payment of "such a claim" shall not foreclose claimant's right to recover all damages to which she is entitled. Because the § 2715(b)(2) subheading reads "Final damages," the PSC argues that "such a claim" refers to final damages. A final damage payment, therefore, shall not foreclose a clai-

123. Mississippi Memorandum, *supra* note 83, at 13-14 (arguing that the contracts were obtained under duress).

124. *See* Plaintiffs' Supplemental Memorandum, *supra* note 84, at 2 ("The Releases represent a clear violation of the fundamental principles of OPA.").

125. *See*, *e.g.*, Plaintiffs' Memorandum, *supra* note 59, at 22-23.

126. To aid the reader in following the ensuing textual analysis, the relevant portion of the statute is reprinted below:

> § 2715. Subrogation
>
> (a) In general
>
> Any person . . . who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.
>
> (b) Interim damages
>
> (1) In general
>
> If a responsible party . . . has made payment to a claimant for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, subrogation under subsection (a) of this section shall apply only with respect to the portion of the claim reflected in the paid interim claim.
>
> (2) Final damages
>
> 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 this Act or under any other law.

33 U.S.C. § 2715.

mant's right to recover any other damages to which she is entitled, and releases to the contrary are void.[127]

But such a reading contravenes both the text and purpose of OPA. The more plausible reading of "such a claim" is that it refers to interim damages, meaning that the payment of interim damages shall not foreclose the right to recover additional damages. The heading for § 2715(b) reads "Interim damages," section 2715(b)(1) places a limitation on interim damages, and so it is logical to read § 2715(b)(2) as placing an additional limitation on interim damages. The § 2715(b)(2) subheading reads "Final damages" because the payment of interim damages ("such a claim") shall not foreclose the collection of any additional damages ("Final damages"). The PSC's interpretation, on the other hand, does not make sense of the placement of § 2715(b)(2) in a section dealing with interim damages. The purpose of OPA, moreover, is to encourage settlement and avoid litigation.[128] If OPA prohibited releases, responsible parties would have little incentive to offer claimants anything more than interim damages. Claimants wanting to collect future damages would have to resort to litigation or else repeatedly apply for interim damages.

The only plausible basis for requesting invalidation of releases, then, is state contract law. But whether the putative class can bring the issue before the court will depend on whether any class representatives have standing to bring a claim and whether their interests conflict with the interests of other class members. Starting with the assumption that the broadest possible definition of the class would include all individuals suffering from OPA-cognizable injuries who have also satisfied the claim presentment requirement, consider the following groups, summarized in Figure 1 below.

The first group consists of individuals who have not yet signed a release but who believe—based on factors such as the amount of money the GCCF offered them, what they expect they would earn in litigation, risk aversion, the time value of money, and other personal circumstances—that settling with the GCCF is preferable to litigation. These individuals would oppose invalidating releases, because the GCCF would have little incentive to offer the Final and Quick Payment options if it could not ask for a release, forcing the group members to opt for their second-best option, litigation. The victims represented by the non-PSC lawyers, who opposed release nullification and supervision of communications, fall into this group.

127. While the PSC and several attorneys general argued that the releases violated OPA, the textual argument outlined above is most clearly explained in Mississippi's brief. *See* Mississippi Memorandum, *supra* note 83, at 9.

128. *See* Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 238-39 (11th Cir. 1995) (discussing the legislative intent behind OPA).

FIGURE 1
Class Groups with Respect to Nullification of Releases

Group	Status	Preferred Compensation	Interest in Nullification	Standing
1	Plan to settle	Settlement	Oppose	No
2	Plan to litigate	Litigation	Indifferent	No
3	Have settled	Settlement	Oppose	No
4	Have settled under duress	Litigation	Support	Yes

The second group consists of individuals who have also not signed a release but who, unlike the first group, believe that litigation is a more favorable option than accepting the GCCF offer. This group would likely be indifferent to nullification of releases. They believed that litigation was the best option before and—because the end of releases will certainly not induce the GCCF to make more generous settlement offers—continue to prefer litigation.

The third group consists of individuals who have accepted Final or Quick Payments because they preferred settlement to litigation. Since the normal remedy for duress is rescission and restitution, this group would oppose nullification.

The fourth group also consists of individuals who have accepted Final or Quick Payments and signed releases, but did so under duress and have regrets about not pursuing litigation. This group would support nullification.

Only the fourth group would have standing to sue with respect to the contract claim—no other group member has a cognizable injury from the releases. Therefore, the class would need a named plaintiff from the fourth group in order to have standing with respect to nullification of contracts. But inclusion of group four plaintiffs would create considerable conflict within the class. Indeed, lower courts have repeatedly denied certification on grounds of adequacy, and sometimes typicality, when the putative class consisted of plaintiffs who had signed releases as well as plaintiffs who had not.[129] Similarly, the D.C. Circuit refused to certify a class represented by plaintiffs challenging an alle-

129. *See, e.g.*, Melong v. Micr. Claims Comm'n, 643 F.2d 10, 13 (D.C. Cir. 1980) (noting that every court to address the issue has come out the same way); *see also* Bernard v. Gulf Oil Corp., 841 F.2d 547, 551 (5th Cir. 1988) (finding that plaintiffs who had not signed releases lacked standing to represent plaintiffs who had signed releases).

gedly coercive early retirement offer because many members were pleased with the offer.[130]

Since group four members support nullification, but most other class members are likely opposed or indifferent, adequacy poses a serious barrier to including in the class the only group with standing to challenge the releases. In order to preserve a certifiable class, the court should define it in such a way as to exclude plaintiffs who have signed releases. Without these plaintiffs, the class no longer has standing to challenge the releases.

It may be possible, however, to form a distinct class with standing to challenge the releases consisting solely of group four members. Such a class would have to meet the class certification requirements independently, and, to ensure adequacy of representation, would require counsel distinct from that representing the class of plaintiffs who had not signed releases. But even then, while treatment of the issue by lower courts has not been uniform, a number of courts have refused to certify classes in which plaintiffs had signed releases and sought to challenge those releases in order to proceed with their claim. Because these courts might have had to inquire into the circumstances surrounding the signing of each release to determine its validity, they have found such classes as running afoul of typicality or other certification requirements and thus unsuitable for certification.[131] Here, determining which of the releases at issue were signed under duress may require a large number of individualized inquiries, so even a class consisting solely of group four members may have trouble obtaining certification.

2. *Supervision of communications*

The request for supervision of communications relied not on a substantive cause of action, but rather on a procedural rule. Federal Rule of Civil Procedure 23(d)(1) authorizes the court to issue orders to "protect class members and fair-

130. *See* Phillips v. Klassen, 502 F.2d 362, 366-68 (D.C. Cir. 1974).

131. *See, e.g.*, Ciarlante v. Brown & Williamson Tobacco Corp., Civ. A. No. 95-4646, 1995 WL 764579, at *2-3 (E.D. Pa. Dec. 18, 1995) (excluding individuals who had signed releases from the class because the issue of whether those releases are invalid is an issue "ill-suited to class treatment" because it would require the exploration of "the state of mind of each individual signer"); Hall v. Burger King Corp., Civ. A. No. 89-0260-CIV-KEHOE, 1992 WL 372354, at *8 (S.D. Fla. Oct. 26, 1992) (refusing to certify a class in part on grounds of typicality because plaintiffs would have to challenge various releases, which "may necessitate examination of the circumstances under which each release was executed"); Ingenito v. Bermec Corp., 376 F. Supp. 1154, 1171 (S.D.N.Y. 1974) (refusing to certify class seeking certification under Rule 23(b)(3) in part because "plaintiffs' attack on the settlements or releases executed by them would clearly present individual issues as to the circumstances surrounding the obtaining of the release"). *But see* Wagner v. NutraSweet Co., 95 F.3d 527, 534 (7th Cir. 1996) (noting that the court below was overly concerned with the effect of releases on the propriety of class certification, because Rule 23(a)(3) typicality "should be determined with reference to the [defendant's] actions, not with respect to particularized defenses it might have against certain class members").

ly conduct the action" by "giving appropriate notice" to class members, "impos[ing] conditions on the representative parties or on intervenors," and "deal[ing] with similar procedural matters."[132] In *Gulf Oil Co. v. Bernard*, the Supreme Court noted that because of the potential for abuse in class actions, Rule 23(d) grants the district court "broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[133] The Manual for Complex Litigation affirms that Rule 23(d) authorizes the court to regulate communications with putative class members even before certification, including communications by the defendant.[134] While *Gulf Oil* requires that district courts support supervision orders with a "clear record and specific findings" demonstrating the need for the order, which should be narrowly drawn to restrict as little speech as possible,[135] lower courts have varied considerably in their treatment of the permissible scope of supervision orders.[136]

Rule 23(d), then, does give the court authority to supervise communications in appropriate circumstances. And because it is a rule of procedure, rather than a substantive right, it may seem that the application of the standing-and-adequacy framework to determine the court's jurisdiction to invoke Rule 23(d) power would be inapposite. After all, there is no dispute that the court has subject matter jurisdiction over plaintiffs' substantive claims, and so the court would not need additional subject matter jurisdiction to grant procedural orders relating to those claims. Lower court cases offer little guidance on the matter because parties rarely challenge Rule 23(d) orders on grounds of subject matter jurisdiction, instead challenging orders based on the record or First Amendment restrictions.

Nevertheless, several factors counsel in favor of applying the standing-and-adequacy framework to requests for supervision of communications under Rule 23(d). First, imagine if supervision of communications were a substantive right rather than a procedural tool. Because a plaintiff must have standing to bring each claim before the court in order for the court to have jurisdiction over that

132. FED. R. CIV. P. 23(d)(1).

133. 452 U.S. 89, 100 (1981).

134. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.12 (2004) (citing lower court cases upholding such limitations on communications).

135. *Gulf Oil*, 452 U.S. at 101-04 (prescribing weighing test for orders restricting communications between plaintiff's counsel and potential class members, and striking down such an order in that case).

136. *Compare* Cobell v. Kempthorne, 455 F.3d 317, 320, 325 (D.C. Cir. 2006) (striking down as beyond the court's Rule 23(d) power an order requiring defendant to state on any written communications to putative class members that the information it provides "may be *unreliable*"), *with* Abdallah v. Coca-Cola Co., 186 F.R.D. 672, 678 (N.D. Ga. 1999) (upholding limitations on defendant's direct communication with potential class members even though defendant did not give the court "any reason to suspect that it will attempt to mislead its employees and coerce them into non-participation in this case").

claim,[137] the fact that the court had subject matter jurisdiction to hear a plaintiff's OPA damages claim would not confer jurisdiction upon the court to hear the plaintiff's claim that Feinberg had lied to him—the plaintiff would have to demonstrate standing for that claim as well. Because a procedural rule cannot give courts subject matter jurisdiction beyond what is permissible under the Constitution,[138] it would be anomalous to allow a court to issue orders affecting the rights of parties under the guise of procedure when those same orders would be impermissible if they derived from a substantive cause of action. Second, to the extent that orders supervising communications affect parties' substantive rights rather than merely regulating procedure, they may exceed the bounds of Rule 23(d) authority and be properly analyzed as Rule 65 injunctions.[139]

Therefore, this Subpart analyzes the Rule 23(d) order using the same standing-and-adequacy framework used to address the jurisdiction of the court to nullify releases. What follows is a breakdown of all possible class members into groups based on their interest in supervising communications, summarized in Figure 2 below. Because of the conclusion of Part II.B.1 that claimants who have signed releases cannot be part of a class of claimants who have not signed releases, this Subpart will work with a modified version of the broadest definition of the class: all individuals who have suffered injuries cognizable under OPA as a result of the Deepwater Horizon spill, and who have at some point presented a claim to the GCCF, but who have not yet signed a release.

Group five consists of putative class members whose optimal form of compensation is a settlement with the GCCF and who are unaffected by supervision of communications. This group would settle whether or not the communications were supervised. Thus, this group would be indifferent to supervision.

Group six consists of members who, as with group five, would most benefit from settling and would settle in the absence of restrictions. But because overly burdensome restrictions on communication might make it difficult for this group to reach an agreement with the GCCF, or might prevent the GCCF from selling this group on the relative merits of settling, this group would end up litigating if the court supervises communications. This group would accordingly oppose court supervision of communications. The plaintiffs represented

---

137. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (citing Allen v. Wright, 468 U.S. 737, 752 (1984)).

138. *See* 28 U.S.C. § 2072(b) (2006) (providing that procedural rules "shall not abridge, enlarge or modify any substantive right"); Hudson v. Parker, 156 U.S. 277, 284 (1895) ("This court cannot, indeed, by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States, or of a justice or judge of either, under the Constitution and laws of the United States."); Fleming Cos. v. Abbott Labs. (*In re* Infant Formula Antitrust Litig.), 72 F.3d 842, 843 (11th Cir. 1995) (per curiam) ("Rule 23(d) is only a procedural law; it is not a grant of subject matter jurisdiction.").

139. *See Cobell*, 455 F.3d at 325 (striking down an order granted under Rule 23(d)(2) that went beyond giving notice of procedural matters and protected substantive rights of parties).

by non-PSC attorneys who opposed most restrictions on communications would fall into this group.

FIGURE 2
Class Groups with Respect to Supervision of Communications

Group	Optimal Compensation	Choice of Compensation in Absence of Supervision	Choice of Compensation with Supervision	Interest in Supervision	Standing
5	Settlement	Settlement	Settlement	Indifferent	No
6	Settlement	Settlement	Litigation	Oppose	No
7	Litigation	Settlement	Litigation	Support	Yes
8	Litigation	Litigation	Litigation	Indifferent	No

Group seven consists of members whose optimal form of compensation is litigation, but who would settle in the absence of supervision of communications. In the absence of supervision of communications, these individuals may not be aware of the MDL proceedings or may be misled about the neutrality of the GCCF, as alleged in the PSC's motion to supervise. Because supervision of communications might allow this group to make a more informed decision and choose litigation, this group would support supervision of communications.

Finally, group eight consists of members whose optimal form of compensation is litigation and who are unaffected by supervision of communications. This group would litigate in the absence of supervision, and would continue to choose litigation even if the court restricted the ability of the GCCF to communicate with it. This group would be indifferent to supervision of communications.

Only group seven might have standing with regard to this issue—this is the only group potentially injured by GCCF communications. This is precisely the group that the PSC's Motion to Supervise Communications sought to protect. But it would be difficult to define the class in such a way as to include group seven but exclude group six. And as exemplified by the clash over supervision between the PSC and non-PSC plaintiffs' attorneys, groups six and seven have differing interests with regard to supervision of communications, which might constitute sufficient intraclass conflict to defeat adequacy.

The putative class might avoid the adequacy problem, however, if the supervision of communications is very narrowly tailored to avoid opposition from group six. For example, if the supervision order merely requires disclosure of noncontroversial information—such as requiring the disclosure of the MDL proceedings on releases—and does not restrict the ability of the GCCF to make

potential claimants aware of the benefits of settlement, then group six might not have a problem with the order. Indeed, some of the briefs from non-PSC plaintiffs' attorneys indicated that they would not object to a narrowly drawn order of supervision.[140] Such an order might thus avoid intraclass conflicts, thereby avoiding adequacy problems. This would also allow the inclusion of group seven in the class, and thus avoid standing problems.

3. *Intervention into the GCCF claims process*

The requests for direct intervention into the GCCF claims process were premised on the argument that OPA requires that a responsible party pay interim claims, that the GCCF was not paying interim claims, and therefore only judicial intervention would achieve compliance with the law. The first problem with this argument is that while OPA requires that a responsible party establish a procedure for payment of interim damages,[141] it does not specify any particular form that those procedures must take. OPA even contemplates that the responsible party will refuse to pay at least some interim damage claims, in allowing a claimant to sue for losses only after a responsible party refuses to pay the claimant the full amount of losses alleged.[142] The second major problem is that the statute contains no express cause of action for challenging the claims procedure. Because the text offers no guidance as to how a court would remedy noncompliance, an implied right of action seems inappropriate as well—the court, in effect, would be acting as an administrative agency in issuing regulations for the GCCF to follow.

Moreover, even if there were an implied cause of action to challenge the claims procedure, standing and adequacy would make it difficult for the PSC to bring the challenge. The putative class contains groups with very different interests with respect to judicial intervention in the claims process, summarized in Figure 3.

Group nine consists of members who are negatively impacted by intervention. Before intervention, they would prefer settlement to litigation. But if intervention slows down or imposes additional costs on the GCCF, then these individuals might either receive settlements that are less valuable—in terms of total payout or the time value of money—or they might be driven to what was previously their second-best option, litigation. These members would thus oppose intervention.

140. *See, e.g.*, Buzbee Opposition, *supra* note 53, at 2.

141. 33 U.S.C. § 2705(a).

142. *Id.* § 2713(c).

FIGURE 3
Class Groups with Respect to Intervention in the GCCF

Group	Optimal Compensation Before Intervention	Optimal Compensation After Intervention	Effect of Intervention on Compensation	Interest in Intervention	Standing
9	Settlement	Settlement or Litigation	Reduces	Oppose	?
10	Settlement or Litigation	Settlement	Increases	Support	?
11	Litigation	Litigation	No effect	Indifferent	?

Group ten consists of members who are positively impacted by intervention. Before intervention, some of them chose to litigate because their claims were denied or because they received an undervalued offer. Some of them might have received an undervalued offer but nonetheless preferred it to litigation. To the extent that intervention results in a compensation methodology that is more generous with payments, these members would support intervention.

Finally, group eleven consists of class members who are unaffected by intervention. Their optimal form of compensation is litigation either with or without judicial intervention into the GCCF's settlement process. Consequently, they are not concerned one way or another with intervention.

It is unclear who would have standing to bring the claim, as the cause of action does not exist, and standing would depend on the nature of the right asserted. But assuming that some class members had standing, adequacy would pose a substantial obstacle to bringing the claim absent a way to define the class such that groups nine and ten were not both in it. These groups, like the non-PSC plaintiffs and the aggrieved citizens the attorneys general discussed in their briefs, have directly conflicting interests with respect to judicial intervention into the claims process. Therefore, in order to preserve a certifiable class, the court should not permit the class to bring claims requesting judicial intervention into the claims process.

CONCLUSION

This Comment has argued that the court should not grant most of the forms of judicial regulation of the GCCF requested by the PSC. There is no cause of action that would permit the court to intervene in the administration of the GCCF, and the putative class cannot meet the requirements of both adequacy for class certification and constitutional standing in pressing the court to invalidate releases. While the court did not lack jurisdiction to order supervision of communications, there remain other legal challenges to the order that this

Comment did not address, such as First Amendment issues and questions on the merits of the court's findings.

But would greater ability of the courts to regulate private compensation schemes benefit victims? Congress can create new causes of action to facilitate judicial oversight. Jurisprudence with respect to Rule 23(a) certification may evolve. And other parties before the court may have an easier time than class plaintiffs in asserting jurisdiction. But because greater judicial regulation of private compensation schemes diminishes the opportunity for victims to choose between two unique systems of compensation, such developments would harm victims.

The benefit of having two compensation institutions is that each caters to victims with different needs and preferences. Victims who would prefer faster payment, are averse to the risks of litigation, or otherwise believe that they will receive greater net compensation by avoiding litigation costs will choose the private compensation scheme. Victims who suffered losses that are difficult to prove, seek types of damage that the compensation scheme will not pay, or otherwise believe they will fare better in court have the option of litigation. The GCCF is expeditious and has low overhead, but lacks both transparency and a process with public legitimacy; the court is expensive and cumbersome, but is transparent and offers victims the opportunity to present claims that the private system refuses to recognize. To the extent that judicial regulation makes the two systems converge—by making the private scheme more open to public inspection but also more expensive to administer, for example—the benefits of having two unique systems diminish.

Another benefit to having two separate compensation tracks is that the option of litigation works to keep the private compensation scheme honest. The private scheme must offer benefits that the public scheme does not, or else victims will choose the latter. Because the defendant funding the private compensation scheme hopes to avoid the costs of litigation, it is in its interest to make offers to injured parties that are attractive enough to lure them from the courts.

Some forms of regulation to ensure healthy competition between the two systems may benefit victims. As discussed in the analysis of class groups in Part II.B, the constituencies of victims who favor judicial regulation of the GCCF will often be those who lacked good information when deciding which system to choose. Unrepresented victims may not have understood the releases, for example, or may not have been aware of the existence of the option of the MDL when they signed it. Regulation of private compensation schemes, to the extent that they cure these deficiencies, may be beneficial. Then again, such information deficiencies may be mostly hypothetical, given that plaintiffs' lawyers—both those who worked with the GCCF and those who filed in the MDL—had every incentive to find victims and offer them their services. And

even when some form of regulation is beneficial, the question remains what government institution is best situated to carry it out.[143]

The manner in which private mass-compensation schemes are regulated will help determine whether the GCCF model serves as a viable choice for private entities responsible for large disasters in the future. The right kind of regulation should allow private compensation schemes to exist alongside the tort system as an advantageous alternative for certain plaintiffs. Overly restrictive regulation, on the other hand, might raise the costs of such schemes and dilute their distinct advantages. The interest that corporate defendants, plaintiffs' lawyers, victims, and state politicians have shown in the regulation of the GCCF suggests the debate will be a lively one.

143. The United States Department of Justice, for example, selected a firm in December of 2011 to conduct an independent audit of the GCCF. *DOJ Taps NY Firm to Audit Oil Spill Claims*, WALL ST. J., (Dec. 21, 2011), http://online.wsj.com/article/APbca0d5382ea949cab203cf27ad9aa3fa.html.