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## AFTER DEEPWATER HORIZON: AN INTRODUCTION TO THE LEGAL SYMPOSIUM

*Jeffrey Jackson\**

Owned by Transocean Ltd. and operated under lease by BP Exploration and Production, Inc. (“BP”), the Deepwater Horizon oil rig exploded on April 20, 2010 tragically causing eleven deaths and numerous personal injuries.<sup>1</sup> Following collapse of the rig, which was located in the Gulf of Mexico some 50 miles from the coast, the rig discharged millions of gallons of oil in the Gulf waters and onto the Gulf Coast.<sup>2</sup> The subsequent oil pollution damaged natural habitats and caused economic injury and disruptions to persons, communities, and industries that rely on the Gulf for work, food, natural resources, tourism, recreation and the like.

This law review symposium examines the legal issues arising from this tragedy. This volume follows a program held at Mississippi College School of Law, which included two panel discussions of legal scholars whose work is presented here. Professors Kenneth M. Murchison and David Robertson participated in the first panel,<sup>3</sup> and Professors Edward Sherman, Byron G. Stier, and Jamison E. Colburn participated in the second. Although he did not participate in the panel discussions, we welcome, too, Professor John C.P. Goldberg, who has generously contributed an article to the symposium as well as his report to the Gulf Coast Claims Facility (“GCCF”), which is reproduced in the Appendix of this volume.<sup>4</sup> Issues considered in this symposium include the reform of regulatory process for offshore drilling,<sup>5</sup> appropriate measures for compensation for injured claimants under

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1. Cutler Cleveland, *Deepwater Horizon Oil Spill*, THE ENCYCLOPEDIA OF THE EARTH (Feb. 10, 2011, 12:21 PM), [http://www.eoearth.org/article/Deepwater\\_Horizon\\_oil\\_spill?topic=50364](http://www.eoearth.org/article/Deepwater_Horizon_oil_spill?topic=50364).

2. *Id.*

3. Trudy Fischer, Executive Director of Mississippi’s Department of Environmental Quality, also participated in the first panel, which was moderated by Betty Ruth Fox of the Watkins & Eager law firm in Jackson, Mississippi.

4. JOHN C.P. GOLDBERG, LIABILITY FOR ECONOMIC LOSS IN CONNECTION WITH THE DEEPWATER HORIZON SPILL 7 (Nov. 22, 2010), <http://www.gulfcoastclaimsfacility.com/Goldberg.Memorandum.of.Law.2010.pdf>, reprinted in 30 MISS. C. L. REV. 335 app. (2011).

5. Kenneth M. Murchison, *Beyond Compensation for Offshore Drilling Accidents: Lowering Risks, Improving Response*, 30 MISS. C. L. REV. 277 (2011); Jamison E. Colburn, *Necessarily Unpredictable?: Oil Spill Risks Beyond the Horizon*, 30 MISS. C. L. REV. 307 (2011).

the Oil Pollution Act,<sup>6</sup> and litigation<sup>7</sup> and non-litigation processes for claims resolution.<sup>8</sup>

The panel discussions at the law school were followed by a presentation by Kenneth Feinberg, former administrator of the 9/11 Compensation Fund and current administrator for the GCCF.<sup>9</sup> Mr. Feinberg discussed his professional history in administering compensation funds, and, too, the problem of identifying when the government would establish such compensation funds to respond to mass disasters—as our federal government did following 9/11 and as it did not do following the attack, years earlier, on the Oklahoma City federal building. Turning to the BP compensation fund, Mr. Feinberg acknowledged the problem of identifying which remote claimants—such as the Boston restaurateur who claimed economic injury due to his increased cost for Gulf shrimp—should be considered victims entitled to compensation under the fund.

The history of and legislative responses to oil spills are chronicled in this symposium.<sup>10</sup> Passed after the environmental disaster caused by the wreck of the *Exxon Valdez*, the Oil Pollution Act of 1990 (“OPA”)<sup>11</sup> provides a scheme for responsible parties to compensate victims of the oil spill. Unlike the legislation creating the 9/11 compensation fund,<sup>12</sup> which provided little guidance for which injuries were compensable, the OPA has categories of damages for which responsible parties must provide compensation.<sup>13</sup> However, as the impressive academic debate here between Professors Goldberg and Robertson clearly illustrates, there is serious disagreement regarding the scope of BP’s liability under the OPA. The Gulf Coast Claims Facility has relied upon Professor Goldberg’s statutory interpretation in establishing its compensation protocol.<sup>14</sup> Claimants’ counsel, on the other hand, have relied on Professor Robertson’s broader interpretation of the governing statute to urge that a more generous compensation scheme is required of BP by federal law.<sup>15</sup>

Unfortunately, pollution from offshore drilling is likely, if not inevitable, as long as we drill offshore for the fuel our economy demands. Two

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6. David W. Robertson, *The Oil Pollution Act’s Provisions on Damages for Economic Loss*, 30 MISS. C. L. REV. 157 (2011) [hereinafter “Robertson I”]; John C.P. Goldberg, *OPA and Economic Loss: A Reply to Professor Robertson*, 30 MISS. C. L. REV. 203 (2011) [hereinafter “Goldberg Reply”]; David W. Robertson, *OPA and Economic Loss: A Response to Professor Goldberg*, 30 MISS. C. L. REV. 217 (2011); GOLDBERG, *supra* note 4.

7. Edward F. Sherman, *The BP Oil Spill and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C. L. REV. 237 (2011).

8. Byron G. Stier, *The Gulf Coast Claims Facility as a Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 MISS. C. L. REV. 255 (2011).

9. Mr. Feinberg’s remarks can be viewed at <http://law.mc.edu/current-students/student-orgs/law-review1/symposia/2011/>.

10. *E.g.*, Murchison, *supra* note 5, at 279–88.

11. Pub. L. No. 101–380, 104 Stat. 484 (1990) (codified at 33 U.S.C. §§ 2701–2730). *See* Murchison, *supra* note 5, at 278.

12. Air Transportation Safety and Stabilization Act, Pub. L. No. 107–42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 (2003)).

13. 33 U.S.C. § 2702(b); Robertson I, *supra* note 6, at 159–61.

14. GOLDBERG, *supra* note 4; Goldberg Reply, *supra* note 6, at 204.

15. Robertson I, *supra* note 6, at n. \* (noting retention by Plaintiffs’ Steering Committee).

authors in the symposium assess deficiencies in the regulatory structure governing oil drilling. Focusing specifically on decision making and risk assessment under the National Environmental Policy Act, Professor Colburn observes, among other things, that prior to the lease sale that included the BP Deepwater Horizon well, the Minerals Management Service failed to identify a possible event like the BP oil spill in its environmental assessment.<sup>16</sup> Instead, probably overly mindful of the disaster caused by Hurricane Katrina, the MMS' focus was on hurricane risk in the Gulf.<sup>17</sup> Professor Colburn offers an ambitious methodology of scenario planning to improve risk assessment by the MMS under NEPA.<sup>18</sup> Professor Murchison traces the history<sup>19</sup> of and critically evaluates various laws governing offshore drilling.<sup>20</sup> He then proposes a comprehensive reform program for lowering the risks of offshore accidents, and, too, for improving our response when these accidents do occur.<sup>21</sup>

Two other authors, Professors Sherman and Stier, examine the post-spill claiming environment for victims of the oil spill disaster in the competing processes in federal litigation<sup>22</sup> and in the GCCF. Professor Stier's focus is on the administration and, more specifically, the administrator, of the GCCF compensation fund.<sup>23</sup> He sensibly notes that, in order to create incentives for claimant utilization of the compensation fund, transparency is required regarding how the administrator is compensated.<sup>24</sup> Further, to ensure claim administrator independence that will promote claimant resort to the GCCF, he argues for prohibition of any monetary reward to the fund administrator for reducing claimant awards in order to return funds to BP.<sup>25</sup>

A leading expert on complex litigation, Professor Sherman examines the claiming mechanisms, which involve claimants proceeding both in formal litigation and before the GCCF.<sup>26</sup> He discusses Judge Carl Barbier's case management of the consolidated federal multi-district litigation ("MDL") against BP<sup>27</sup> and the "limitation" proceeding filed under maritime law by Transocean in the Eastern District of Louisiana.<sup>28</sup> Professor Sherman later identifies and defends the legal bases for Judge Barbier's

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16. Colburn, *supra* note 5, at 320.

17. *Id.* at 321–22.

18. *Id.* at 325–31.

19. Murchison, *supra* note 5, at 279–88.

20. *Id.* at 285–88.

21. *Id.* at 289–303.

22. Sherman, *supra* note 7.

23. Stier, *supra* note 8.

24. *Id.* at 271–72.

25. *Id.* at 272–75.

26. Sherman, *supra* note 7, at 240–44.

27. *Id.* at 239–43.

28. *Id.* at 241–43.

supervision order of February 2, 2011,<sup>29</sup> over the non-litigation settlement process of the GCCF.<sup>30</sup>

Issued shortly before the panel discussions held at the law school, Judge Barbier's order<sup>31</sup> illustrates the connection and tension between the formal litigation, now in the MDL and elsewhere, and the non-litigation claiming process at the GCCF. In that order, Judge Barbier enjoined the GCCF from representing to claimants its independence from BP and from giving legal advice to claimants, including advice that claimants not hire counsel.<sup>32</sup> Further, he ordered the GCCF to begin communications with claimants with a statement of claimants' right to hire counsel, to advise claimants of rights to assert claims against BP through the pending MDL litigation, and to disclose that BP will compensate any counsel provided by the GCCF.<sup>33</sup>

The motion to Judge Barbier seeking restraint of the GCCF's contact with represented claimants asserted that the administrator, Kenneth Feinberg, had made statements to the effect that claimants "will be much better off accepting what he offers rather than going to court."<sup>34</sup> Certainly, if that statement were false, Kenneth Feinberg and other lawyers working for the GCCF would be unprofessional in making it under any rules governing professional conduct of lawyers on the Gulf Coast.<sup>35</sup> A federal district judge can enjoin false and misleading speech by defendants<sup>36</sup>—or in this context, speech by the GCCF that acts for the defendant, BP. Too, if plaintiffs' lawyers solicit claimants with assertions that claimants are in fact better off litigating rather than claiming before the GCCF, their statement—if

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29. Transfer Order, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Feb. 2, 2011), available at <http://www.laed.uscourts.gov/OilSpill/Orders/222011OrderonRecDoc912.pdf>.

30. Sherman, *supra* note 7, at 246–59.

31. Transfer Order, *supra* note 29, at 13.

32. *Id.* at 13–14.

33. *Id.*

34. *Id.* at 13.

35. For the moment, at least, we can put aside the choice of law issue of what professionalism rules to apply to Mr. Feinberg's communications because in all of the states on the Gulf Coast at least, and in the federal courts sitting in those states, false statements by a lawyer to a person he or she does not represent would be considered unprofessional. ALA. RULES OF PROF'L CONDUCT R. 4.1 (2009); FLA. RULES OF PROF'L CONDUCT R. 4–4.1 (2010); LA. RULES OF PROF'L CONDUCT R. 4.1 (2010); MISS. RULES OF PROF'L CONDUCT R. 4.1 (2011); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 4.01 (2005).

By local federal court rule, these state ethics rules are applied in federal courts of the Gulf Coast states, at least to the extent that they are not inconsistent provisions of federal law. M.D. ALA. CIV. R. 83.1(g) (2010); N.D. ALA. CIV. R. 83.1(f) (2010); S.D. ALA. CIV. R. 83.5(f) (1997); M.D. FLA. R. 2.04(d) (2009); N.D. FLA. R. 11.1(E)(1) (2005); S.D. FLA. R. 11.1(c) (2011); E.D. LA. R. 83.2.3 (2011); M.D. LA. R. 83.2.4 (2011); W.D. LA. R. 83.2.4 (2011); N.D. MISS. R. 83(c)(1) (2010); S.D. MISS. R. 83(c)(1) (2010); E.D. TEX. CIV. R. AT–2(a) (2011); N.D. TEX. CIV. R. 83.8(e) (2010); S.D. TEX. CIV. R. 83.1(L) app. A (2009); W.D. TEX. CIV. R. AT–7(a) (2009).

36. *In re School Asbestos Litig.*, 842 F.2d 671, 680 (3d Cir. 1988); Order & Reasons at 4, Turner v. Murphy Oil USA, Inc., No. 05–4206 (E.D. La. Nov. 14, 2005), available at [http://www.laed.uscourts.gov/MurphyOil/Orders/OR111405\\_39.pdf](http://www.laed.uscourts.gov/MurphyOil/Orders/OR111405_39.pdf).

false and misleading<sup>37</sup>—would likewise be unprofessional, and presumably could be judicially enjoined.

However, at this stage of the BP claiming processes, there is no evidence that claimants with or without counsel who settle early with the GCCF will be any better *or any worse* off economically than claimants before Judge Barbier in the MDL. When the dust finally settles some years from now, empirical research can compare the benefits enjoyed by claimants before the GCCF and by litigants before our courts. What we do know now is that many claimants who accepted interim or permanent settlements from the GCCF received compensation earlier than most other claimants. Whether they are better off taking compensation now, or waiting for compensation later, is a matter of speculation at this juncture in these competing claiming processes.

Judge Barbier's supervision order did not address the propriety of statements that the GCCF's non-litigation alternative would leave claimants better off than will the MDL. Instead, his order skirted the issue by imposing other requirements—such as preventing the GCCF from giving advice not to hire counsel and requiring it to advise claimants of their right to get counsel and of the availability of a litigation process for claiming through the MDL.<sup>38</sup> That ensured his order complied with *Gulf Oil v. Bernard*,<sup>39</sup> which requires judicial restraints of speech in the pre-certification class action context to be narrowly drawn and “to limit speech as little as possible.”<sup>40</sup>

Judge Barbier's order expresses a laudable concern for candor, full disclosure, and truthful speech by the GCCF and surely improved the processes of the claims facility. The order imposes on Kenneth Feinberg and the claims facility obligations of candor and disclosure that professionalism rules already impose on lawyers representing BP claimants.<sup>41</sup> Professionalism rules require lawyers to communicate sufficient information to allow clients to make informed decisions on matters affecting client interest.<sup>42</sup> Although it is against counsel's economic interest to do so,<sup>43</sup> we

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37. ALA. RULES OF PROF'L CONDUCT R. 7.1 (2009); FLA. RULES OF PROF'L CONDUCT R. 4-7.2(b) (2010); LA. RULES OF PROF'L CONDUCT R. 7.1 (2010); MISS. RULES OF PROF'L CONDUCT R. 7.1; TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.02 (2005). See *supra* note 35 (discussing applicability of state ethics rules in the federal courts of the Gulf States).

38. Transfer Order, *supra* note 29, at 13-14.

39. *Gulf Oil v. Bernard*, 452 U.S. 89, 101-02 (1981).

40. *Id.*; MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.12 (2004).

41. The candor and disclosure requirements for lawyers for claimants arise from their professional obligation as counsel for the claimants. See *infra* note 42. However, the restraints placed on Kenneth Feinberg and the GCCF, on the other hand, are imposed to limit BP's potential overreaching of third parties—claimants—whether or not those claimants are represented by counsel.

42. Louisiana Rule of Professional Conduct 1.4(b) provides: “The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.” LA. RULES OF PROF'L CONDUCT R. 1.4 (2010). The rules of Alabama, Florida, Mississippi and Texas are identical to each other, and similar to the Louisiana rule. Those rules each provide: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” ALA. RULES OF PROF'L CONDUCT R. 1.4 (2009); FLA. RULES OF PROF'L CONDUCT R. 4-4.1 (2010); MISS. RULES OF

should expect claimants' counsel to advise that clients consider the non-litigation alternative of the GCCF. Certainly, plaintiffs' lawyers have their clients in formal litigation in the MDL or elsewhere because counsel believe that in the long run their clients are better off litigating for compensation later rather than settling for GCCF compensation now. However, the GCCF seems to have some *potential* advantages not currently present in the MDL or other litigation. It can provide early compensation, without the transactional and emotional costs that accompany protracted litigation in an MDL.

Under the settlement protocol of the GCCF, any claimant can “test the water” by applying for compensation from the fund. In the event the client finds the GCCF settlement offer inadequate and rejects it, she is still entitled to pursue her claim in litigation.<sup>44</sup> Short of settlement and release of claims, her claiming with the GCCF is without prejudice to her claiming in the MDL. Since the decision on whether to settle a civil claim is the client's,<sup>45</sup> it seems more clients would be directed by counsel to file claims with the GCCF—or at least to consider filing—to see whether that facility can provide compensation acceptable *to the client*.

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PROF'L CONDUCT R. 1.4 (2011); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.3 (2005). *See supra* note 35 (discussing applicability of state ethics rules in the federal courts of the Gulf States).

43. *See Stier, supra* note 8, at 262 (noting “many claimants fired their attorneys after the fund's announcement, and pursued fund compensation without counsel”).

44. Under the protocol of the GCCF, a claimant may reject interim and final payments and then proceed to litigation. Likewise, if the claimant's claim is rejected by the GCCF, the claimant retains a litigation claiming option. The protocol provides:

#### V. Review Procedures

##### D. Rejection of Interim or Final Payment Determination

A Claimant may elect to reject an Interim or Final Payment determination and, as permitted by law, either present the claim to the National Pollution Funds Center or commence an action in court, including in the multidistrict litigation pending before the United States District Court for the Eastern District of Louisiana, titled, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 MDL No. 2179*. The multidistrict litigation is a consolidated grouping of federal law suits arising out of the Spill. A claim for physical injury or death is not a claim under OPA and therefore cannot be submitted to the National Pollution Funds Center.

##### E. Denial of Interim or Final Claim

If an Interim or Final Claim is denied, or if the GCCF has not acted on the claim within 90 days of the date the claim was presented under OPA to BP or to the GCCF, the Claimant may, as permitted by law, either present the claim to the National Pollution Funds Center or commence an action in court, including in the multidistrict litigation pending before the United States District Court for the Eastern District of Louisiana, titled, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 MDL No. 2179*. The multidistrict litigation is a consolidated grouping of federal law suits arising out of the Spill. A claim for physical injury or death is not a claim under OPA and therefore cannot be submitted to the National Pollution Funds Center.

Gulf Coast Claims Facility Protocol for Interim and Final Claims § V(D)–(E), Feb. 8, 2011, [http://gulfcostclaimsfacility.com/proto\\_4.php](http://gulfcostclaimsfacility.com/proto_4.php).

45. ALA. RULES OF PROF'L CONDUCT R. 1.2(a) (2009); FLA. RULES OF PROF'L CONDUCT R. 4–1.2(a) (2010); LA. RULES OF PROF'L CONDUCT R. 1.2(a) (2010); MISS. RULES OF PROF'L CONDUCT R. 1.2(a) (2011); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02(a)(2) (2005). *See supra* note 35 (discussing applicability of state ethics rules in the federal courts of the Gulf States).

The GCCF discloses litigation alternatives to GCCF claimants on its website.<sup>46</sup> We should also expect litigation counsel in the BP MDL and elsewhere likewise to advise clients that another process exists where their claims might be settled sooner, rather than later. Of course, as noted, only time will tell whether claimants who settled with the GCCF are better off than those who resorted to the claiming through litigation. Judge Barbier's order makes clear the claimant's decision on whether to claim with the GCCF is one that clients might make better if fully informed of all possible claiming alternatives. The same must also be true of a claimant's decision to litigate with BP in the MDL and elsewhere.

Proposals for improvement of our policy and process are many in this volume. It is hoped that readers will find this symposium a significant contribution to the literature on the regulation of offshore drilling, as well as on the legal problems and claiming processes that arise following a major pollution disaster. On behalf of the Law Review, I thank these scholars for their sharing their expertise in these pages.

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46. See Frequently Asked Question # 53, <http://www.gulfcoastclaimsfacility.com/faq> (last visited Aug. 15, 2011). Judge Barbier's order is posted on the GCCF's website at [http://www.gulfcoastclaimsfacility.com/EDLA\\_Order\\_in\\_MDL.PDF](http://www.gulfcoastclaimsfacility.com/EDLA_Order_in_MDL.PDF).

