

## The BP Oil Spill Settlement and the Paradox of Public Litigation

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### ABSTRACT

*The streamlined administrative program that BP set up to pay claims arising out of the Deepwater Horizon oil spill—the Gulf Coast Claims Facility (GCCF)—promised a significant transaction-cost savings over litigation in the public court system. At least in theory, that savings should have worked to the benefit of BP and claimants alike, freeing up money to fund claimants’ recoveries that otherwise would have gone to lawyers and other litigation costs. But a comparison of the GCCF to the class action settlement that replaced it reveals that the class settlement will result in greater payments to claimants. Paradoxically, the dispute resolution system with the higher built-in transaction costs appears to offer the parties a superior result. This Article offers some hypotheses for why this might be the case. The central claim is that claimants did better under the higher-cost class action settlement because it allowed them to offer the defendant something it valued—a greater degree of finality than the GCCF could ever provide—in exchange for a “peace premium.” And this Article analyzes some of the features of the public system of class action litigation that enable parties to obtain a greater degree of closure than a purely private dispute resolution system like the GCCF, while at the same time providing guarantees of transparency, consistency, and equitable treatment of absentees.*

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## I. INTRODUCTION

After the Deepwater Horizon oil spill,<sup>1</sup> BP did something remarkable. It voluntarily (well, with a little prodding from President Obama<sup>2</sup>) set up an administrative program, the Gulf Coast Claims Facility (GCCF),<sup>3</sup> that aimed to fully compensate all of the victims of the spill. The GCCF's funding was uncapped. BP brought in the nation's preeminent independent claims administrator, Kenneth Feinberg, to run the program, free from BP's interference. BP paid all of the expenses. And it backed up all of this by setting aside \$20 billion in a trust fund, with an open-ended commitment should that amount prove insufficient.<sup>4</sup>

In theory, the GCCF should have resolved the private claims against BP in a streamlined and efficient manner. As envisioned under the Oil Pollution Act of 1990 (OPA),<sup>5</sup> the GCCF operated as a private dispute resolution process that would offer swift recompense in an informal administrative setting, allowing both claimants and BP to realize savings over traditional litigation. This settlement structure under OPA, again at least in theory, should have been the best of all worlds.

To make sure that compensation reaches victims without undue delay after an oil discharge, OPA makes the primary "responsible party," designated by the Coast Guard, strictly liable for all cleanup costs and resulting economic harms and only later allows that party to seek contribution from other potential wrongdoers in subsequent proceedings.<sup>6</sup> The statute requires the responsible party to set up and publicize a procedure for expeditiously settling and paying claims—including claims for interim, short-term damages—presented by

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1. For a dramatic account of the events leading to the explosion and sinking of the Deepwater Horizon oil drilling rig, see JOHN KONRAD & TOM SCHRODER, *FIRE ON THE HORIZON* (2011).

2. President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

3. See BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY REPORT OF FINDINGS & OBSERVATIONS TO THE U.S. DEPARTMENT OF JUSTICE, app. ex. L (Gulf Coast Claims Facility Protocol for Emergency Advance Payments) (June 5, 2012), *available at* <http://www.justice.gov/iso/opa/resources/66520126611210351178.pdf> [hereinafter DOJ AUDIT].

4. Press Release, The White House, FACT SHEET: Claims and Escrow (June 16, 2010), *available at* <http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow>.

5. 33 U.S.C. §§ 2712–13 (2006).

6. *Id.* § 2702(a), (d)(1)(B). See also *id.* §§ 2709, 2715; *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, 808 F. Supp. 2d 943, 959 (E.D. La. 2011).

individuals or businesses injured by the spill.<sup>7</sup> And the statute channels claims into this form of private dispute resolution by prohibiting claimants from suing in court without first exhausting the responsible party's administrative claims process.<sup>8</sup>

Though the statutory text provides next to no guidance on what the responsible party's claims process should look like, the intent of this scheme is clear: to promote settlement and discourage litigation.<sup>9</sup> OPA was born out of the 1989 *Exxon Valdez* oil spill in Prince William Sound, Alaska, and Congress sought to avoid the anguishing delays and protracted legal battles that followed that and other spills. The *Exxon Valdez* spill showed that beyond the immediate effects on the environment, a serious oil spill had the capacity to impede maritime and fishing activity. For many communities, such a disruption would have ripple effects into the attendant support economy, resulting in a wide-scale economic slowdown reaching well beyond those suffering the immediate contact with the spilled oil. OPA was intended to prevent a downward economic cascade by bringing a quick infusion of cash to the afflicted community. Accordingly, it reflects a congressional preference for informal private dispute resolution over litigation in the public court system. OPA's legislative history is replete with statements that the "system of liability and compensation" it creates "is intended to allow for quick and complete payment of reasonable claims without resort to cumbersome litigation."<sup>10</sup>

The GCCF was a manifestation of this statutory aim to streamline the process of recovery, though it went far beyond anything the statute actually anticipated. OPA simply was not designed to deal with a disaster of the scale or complexity of the Deepwater Horizon spill, as evidenced by its almost quaint \$75

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7. 33 U.S.C. §§ 2705(a), 2714 (2006).

8. *Id.* § 2713. *See also In re Oil Spill*, 808 F. Supp. 2d at 959, 964.

9. *See In re Oil Spill*, 808 F. Supp. 2d at 959 ("The intent is to encourage settlement and reduce the need for litigation."); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 310 (E.D. Va. 1993) ("The purpose of the claim presentation procedure is to promote settlement and avoid litigation. Congress believed that lawsuits against parties are appropriate only 'where attempts to reach a settlement with the responsible party . . . were unsuccessful.'" (quoting H.R. REP. NO. 242, at 66 (1989))).

10. 135 CONG. REC. H7954-02, at H7965, 1989 WL 187822 (Nov. 2, 1989) (statement of Rep. Hammerschmidt). *See also id.* at H7962 (statement of Rep. Lent) ("The thrust of this legislation is to eliminate, to the extent possible, the need for an injured person to seek recourse through the litigation process, which—as we all know—can take years."); S. REP. NO. 101-99, at 25 (1990) ("It is the intent of the Committee that claims should be expeditiously paid whenever possible, and that claimants should not be left with the courts as their only recourse . . .").

million limit on liability, which BP waived.<sup>11</sup> Ambitiously, the GCCF set out to expeditiously resolve all of the private oil spill related claims against BP outside of the court system. The combination of strict liability and a simplified claims procedure should have permitted claimants to proceed on their own, without the need for costly counsel. BP too could avoid the travails and costs of the court system.<sup>12</sup> And, in fact, through its streamlined procedures, the GCCF paid out an eye-opening \$6.2 billion to more than 220,000 claimants in just 18 months of operation.<sup>13</sup> Contrast this with the decades of costly litigation that followed the *Exxon Valdez* spill. What more could anyone possibly want?

The easy answer might be that lawyers, being lawyers, would find the lack of attorney involvement in the system suspect, both in theory and because it cost them business. And certainly there were plenty of lawsuits filed against BP, despite the availability of the GCCF, mostly on behalf of individuals or groups of clients, some on behalf of state and local governmental entities, along with a sprinkling of putative class actions thrown into the mix. Those lawsuits were consolidated in a multidistrict litigation (MDL) in front of Judge Carl Barbier in the Eastern District of Louisiana, either through the MDL pretrial transfer process or directly as venue transfers within the federal court system.<sup>14</sup> The consolidated action included hundreds of cases and thousands of individual claimants.<sup>15</sup>

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11. 33 U.S.C. § 2704(a)(3) (2006). Even OPA's back-up, government-created Oil Spill Liability Trust Fund for compensating claimants when the responsible party is unable was grossly inadequate at only \$1 billion. See 26 U.S.C. § 9509 (2006).

12. See, e.g., Byron G. Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 MISS. C. L. REV. 255, 256 (2011).

13. BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY EXECUTIVE SUMMARY 1 (Apr. 19, 2012), available at <http://www.justice.gov/iso/opa/resources/697201241917226179477.pdf>.

14. See 28 U.S.C. § 1407 (2006) (allowing the Judicial Panel on Multidistrict Litigation to transfer related claims to a single district court for pretrial purposes); *id.* § 1404 (allowing one district court to transfer venue to another for convenience of parties); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, 731 F. Supp. 2d 1352 (J.P.M.L. 2010) (centralizing claims for pretrial purposes in Eastern District of Louisiana); *In re Complaint and Petition of Triton Asset Leasing GmbH*, No. 10-cv-1721 (S.D. Tex. Aug. 16, 2010) (Docket Entry 207) (transferring venue of maritime Limitation Act claim from Southern District of Texas to Eastern District of Louisiana); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Aug. 24, 2010) (Document No. 62) (consolidating transferred limitation action with MDL proceedings).

15. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 900 (E.D. La. 2012).

The MDL proceedings were complex and costly, involving a web of defendants and third parties, overlapping bodies of law, scores of expert reports, hundreds of depositions, and more than 90 million pages of discovery documents.<sup>16</sup>

However, the challenge of the aftermath of the Deepwater Horizon disaster reveals something more fundamental about the multifaceted objectives of this kind of mass litigation. These mass harms take on the quality of public law litigation,<sup>17</sup> even if played out in thousands of claims for private recompense. The problem in these mass cases is “what do to about the manifestly public dimension of such private law disputes,”<sup>18</sup> even disregarding the actual public litigation against BP brought by the federal government and state and local public entities. In such polycentric disputes,<sup>19</sup> the task is not only to resolve the multiple individual claims but to provide a coordination mechanism that can bring finality to the dispute.

The history of the GCCF and the continuing litigation well illustrate this point. The GCCF was most successful in realizing the OPA objective of finding a quick payment structure designed to limit the dislocations experienced after the *Exxon Valdez* spill. To its great credit, the GCCF achieved one of OPA’s primary statutory objectives by quickly restoring billions of dollars into the crippled Gulf economy. And BP’s very public commitment to rapidly distribute payments through the GCCF may have alleviated some of the immediate political pressure it faced in the wake of the spill. But the incompleteness of this model of quick private resolution soon became apparent to all.

As the claims by numerous private and public parties were heading to trial, BP decided to shift strategies away from the GCCF model. Instead of the one-by-one offer and acceptance model of the GCCF, BP and the private lawyers organized as the Plaintiffs’ Steering Committee in the MDL proceeding reached an agreement on a plan to settle the economic and property damage claims, as well as claims for medical injury for individuals who were not on the Deepwater Horizon drilling platform (e.g., clean-up workers exposed to oil or chemical dispersants) on a comprehensive basis. The parties negotiated two class action settlements that, after notice

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16. *Id.* at 901.

17. The term is taken from the seminal article, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–83 (1976).

18. Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 205 (2008).

19. This term for broad-scale disputes with multiple interested parties draws from Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–405 (1978).

to class members and court approval, replaced the GCCF with a court-supervised claims resolution facility that, like the GCCF, also aimed to fully compensate victims of the spill. Unlike the GCCF, however, the class settlements were premised on the participation of lawyers, both in their creation and implementation. And those lawyers would have to be paid.

Although the overall administrative cost of the GCCF is not publicly available, it is certainly likely that the public litigation system was more costly in this case in the sense of having higher built-in transaction costs.<sup>20</sup> The class action settlements include a reserve fund of \$600 million that can be awarded as fees by the court to private counsel, not to mention the costs of notice to the class and the formalities and discovery procedures of litigation in federal court.<sup>21</sup> And both the class resolution and BP's voluntary efforts with the GCCF reached the same end result—an administrative claims resolution facility to provide compensation to victims without a trial. Indeed, the class settlement prompted accusations that “class counsel becomes unimaginably wealthy . . . and the class gets nothing they wouldn't have had before.”<sup>22</sup>

But by all appearances, claimants will be receiving *higher* payments under the class settlement than under the GCCF, and in some cases much higher payments. Paradoxically, the dispute resolution system with the higher transaction costs—the class action—appears superior in terms of what was achieved for the claimant population. For the purposes of this Article, we will assume that this is the case across the board, and we will offer some examples to show the significance of the increased payments available under the class settlements compared with the GCCF.

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20. See, e.g., Stier, *supra* note 12, at 256.

21. *Deepwater Horizon Economic and Property Damages Settlement Agreement as Amended on May 2, 2012* § 14.1 ex. 27 para. 2, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. May 3, 2012) [hereinafter *Class Settlement Agreement*], available at <http://www.deepwaterhorizonsettlements.com/Economic/SettlementAgreement.aspx> (follow “Amended Settlement Agreement” hyperlink). See also *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (noting the greater transaction costs of class action litigation in the form of attorneys' fees and cost of notice and suggesting that a representative who proposes to incur these costs when a defendant has already set up a voluntary compensation program is not adequately protecting the class's interests under Federal Rule of Civil Procedure 23).

22. Memorandum in Support of Objections to the Economic and Property Damages Settlement by Objectors Hunter Armour and Judith Armour at 2, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179, 10-cv-7777 (E.D. La. Aug. 31, 2012) (Document No. 86).

We then devote our primary attention to what appears paradoxical. Presumably in an exchange between two parties, the lower the transaction costs, the greater the joint welfare of the parties. In turn, economic theory would predict that lowering transaction costs would mean that both parties could profit from a mutually beneficial distribution of the surplus.<sup>23</sup> Assuming that the ensuing bargain would result in a shared distribution of this newfound surplus, then all parties should be better off in a system with lowered transaction costs. This is not a complicated insight. Anytime two parties must divide a fixed sum, say \$100, they will optimize their joint welfare if they can share the entire \$100. By extension, any transaction costs incurred by the parties in resolving the distribution—such as payments to lawyers to negotiate or litigate—reduces their joint welfare. Basically, every penny paid to outside parties in determining the distribution comes out of that \$100. The lower the transaction costs, the greater the resources for the parties to attend to their joint needs. Because claimants will be paid from the pot of money held by BP, it would seem that they would share with BP a desire to minimize transaction costs.

The apparent paradox is that the higher cost system in the BP oil spill controversy seems to have worked exactly to the contrary. Rather than the transaction costs reducing the claimants' eventual recoveries, the class settlement appears to have resulted in *greater* recoveries for those affected by the oil spill.

We offer some hypotheses for why this might have been the case. Our central argument is that the claimants did better under the class action settlement because it allowed them to offer BP something it valued—a greater degree of finality than the GCCF could ever provide—in exchange for a “peace premium.” At this level, the higher cost system almost appears to offer a win-win for claimants and BP. Additionally, other features of the public system of class action litigation, including guarantees of transparency, consistent treatment of similar claims, and the ability to bind absentees who do not affirmatively opt out, improved the efficacy of the settlement structure in terms of achieving closure and aided in satisfying the equitable concerns of the court in binding absent class members.

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23. For an extreme and unfortunate application of this economic logic in legal doctrine, see *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991). There, Justice Blackmun reasoned that, *ex ante*, passengers injured in a cruise ship accident could only benefit from a forum selection clause favoring the carrier, on the grounds that the lower costs of legal accountability would surely be passed on to the consumers of the services in terms of lower prices. *Id.* The Court did not explain whether the logic of that position would hold as well to the elimination of all tort liability.

## II. COMPARING PERFORMANCE: THE CLASS ACTION AND THE GCCF

We start by offering some examples of the ways in which the class action settlement provided claimants with greater compensation than they would have received from the GCCF. Our attention here is on the class settlement for economic claims because this allows a direct apples-to-apples comparison.<sup>24</sup> This is not meant to be a comprehensive comparison of the two programs. Rather, it is an illustration of how claimants fared in some major categories of relief under both approaches. In at least four important ways—higher damages multipliers, more flexibility in past economic loss calculations, huge sums devoted to the seafood industry, and payments for additional types of property damages claims—the class settlement favorably compares to the GCCF.

*A. Risk Transfer Premium Multipliers*

Neither the GCCF nor the class action settlement limited compensation only to past economic losses stemming from the oil spill. Both programs also paid damages multipliers to account for the risk of oil coming back, potential future economic losses, and other unknowns.<sup>25</sup> And both sought to compensate claimants for the prospect of punitive damages awards that BP would face at trial should cases not settle. The GCCF called these multipliers “Future Recovery Factors,”<sup>26</sup> the class settlement called them “risk transfer

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24. The benefits of the medical claims settlement include long-term monitoring, the opening of health resource facilities in the Gulf Coast region, and other mechanisms for health provision unlike anything anticipated in the GCCF process, which necessarily focused on efforts to resolve individual claims. See *Deepwater Horizon Medical Benefits Class Action Settlement as Amended* on May 1, 2012 §§ VII(B), IX(A), *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. 2012), available at [www.deepwaterhorizonsettlements.com/Documents/Medical%20SA/Medical\\_Settlement\\_Agreement.pdf](http://www.deepwaterhorizonsettlements.com/Documents/Medical%20SA/Medical_Settlement_Agreement.pdf). A comparison of the medical claims class settlement to the GCCF would be even more one-directional in favor of the terms of the class action. Such a comparison would be unfair to the GCCF, which did not endeavor to resolve such long-term needs.

25. *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 904 (E.D. La. 2012) (“The RTP compensates class members for potential future losses, as well as pre-judgment interest, any risk of oil returning, any claims for consequential damages, inconvenience, aggravation, the lost value of money, compensation for emotional distress, liquidation of legal disputes about punitive damages, and other factors.”); DOJ AUDIT, *supra* note 3, at 38.

26. DOJ AUDIT, *supra* note 3, at 38.

premiums” (RTPs).<sup>27</sup> The multipliers varied based on the category of claims, and of course, total compensation depended on the underlying loss calculation being multiplied. In practice, these multipliers made up a significant portion of the compensation that BP paid claimants in exchange for a final release.

From the very start of the GCCF program, there was uncertainty about the compensation that might ultimately be recovered from BP. Initially, the GCCF simply paid double the demonstrated past economic losses for all categories of claims, except for claims brought by oyster harvesters and processors to which it applied a Future Recovery Factor of four.<sup>28</sup> Later in its operation, the GCCF began paying four times past losses for crab and shrimp harvesters and processors, as well,<sup>29</sup> and increased the multiplier for certain leaseholders of oyster beds to as high as seven.<sup>30</sup> These multipliers were not, however, automatically applied to claims over \$500,000; the total compensation for such large claims needed individual approval by the claims administrator, Kenneth Feinberg.<sup>31</sup> We will return to the question of the variability over time of the recoveries, and the incentives that this fluctuation created for holdouts. For now, we address only the amounts at stake, not the strategic consequences of the lack of fixed payments.

In contrast to the GCCF, the class settlement was transparent and fixed on its payment schedule, again a point to which we will return. Of present concern, the class settlement risk transfer premiums were not only more finely grained, but in almost every category of claims, the class settlement was more generous—in some cases, *much* more generous. And, unlike the GCCF, there was no limit on the size of claims to which the risk transfer premiums would be applied. Figure 1 compares the effective multipliers paid by the GCCF and the class settlement for different categories of claims.

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27. Class Settlement Agreement, *supra* note 21, ex. 15. Under the class settlement, RTPs are applied and paid on top of demonstrated past losses. That is, if a business lost \$10,000 because of the spill and had an RTP of two, it would receive \$30,000 because the demonstrated loss would be multiplied by two, and the resulting \$20,000 would be added to the original \$10,000. Thus, an RTP of two (e.g., for tourism claims in Zones B and C) would translate to an effective multiplier of three.

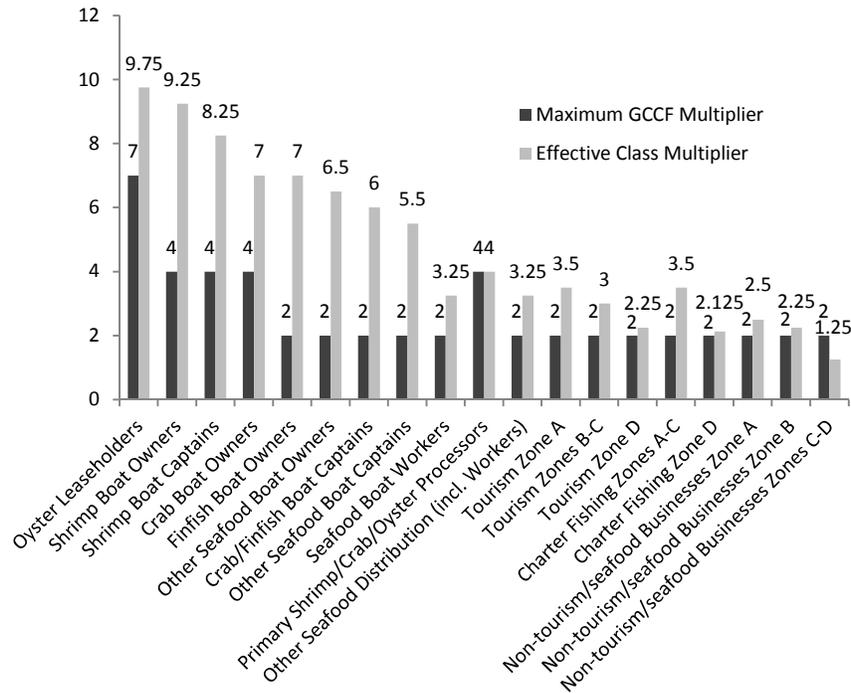
28. DOJ AUDIT, *supra* note 3, at 38.

29. *Id.*

30. *Id.* at 38 n.24.

31. *Id.* at 43 n.34.

Figure 1: Loss Compensation Multipliers Under GCCF and Class Settlement<sup>32</sup>



Take tourism, for example, because tourism claims made up a significant portion of compensable claims under both programs. The class settlement risk transfer premiums substantially increased total compensation for tourism claims. Under the class settlement, these claims were paid between 12.5% and 75% more than the GCCF would have paid depending on the tourism business's location.<sup>33</sup> And in many seafood categories, claimants were overwhelmingly better off under the class settlement's risk transfer premium

32. This chart is derived from data in the DOJ AUDIT, *supra* note 3, at 38–39 and Exhibit 15 of the Class Settlement Agreement, *supra* note 21. The multipliers for the class settlement reflect total compensation of  $((1 + RTP) \times \text{economic loss})$ .

33. The class settlement grouped claimants into geographical zones (A, B, C, and D) based on their proximity to the parts of the Gulf Coast most severely impacted by the spill. Zone A included the hardest hit areas of coastline. Zone B included some coastline and proximate areas. Zone C consisted primarily of areas just inland of Zones A and B, still relatively close to the coast. Zone D included areas in Gulf Coast states more distant from the shoreline. See Class Settlement Agreement, *supra* note 21, exs. 1A, 1B.

framework, with up to 250% increases over what the GCCF would have paid.<sup>34</sup>

These are potentially huge increases in compensation. Even if the underlying loss calculation proved less generous in the class settlement than the GCCF (and there is no indication that it did, in fact quite the contrary<sup>35</sup>), the increase in the damages multiplier would still result in substantially more compensation for most claimants.

### *B. Choice of Comparison Intervals for Calculating Economic Loss*

Any analysis of the damages multiplier under the two claims-resolution systems is necessarily incomplete without an analysis of the multiplicand. In addition to more generous damages multipliers, the class action settlement calculated past economic losses differently from the GCCF. Both programs began their computation of past economic losses (which would then be used as a base for the damages multiplier in determining total compensation) by comparing income after the spill with income in a defined benchmark period before the spill, but the class settlement gave claimants more flexibility. The key difference was the length of the comparison period.

The GCCF compared a business claimant's revenue for the remainder of the calendar year following the spill (from April 20, 2010, through December 31, 2010) with the claimant's revenue in a benchmark period consisting of those same eight months in the claimant's best year out of 2008, 2009, or projected 2010.<sup>36</sup> The result was then adjusted to account for expenses avoided as a result of diminished business activity, among other factors.<sup>37</sup> So, for example, a fisherman who was unable to fish in contaminated waters would have an offset for fuel and other expenditures that would normally accompany the economic activity.

The class settlement, on the other hand, allowed claimants to select a comparison interval as short as three months (or as long as eight months). That is, claimants could choose income from any three consecutive months between May and December of 2010 to compare with income in a benchmark period of the same three

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34. The only category in which the GCCF would appear to pay more than the class settlement is represented by the last bars on the right. This is for businesses in areas that are not adjacent to the Gulf and that were not connected to tourism or seafood.

35. See *infra* Part II.B.

36. DOJ AUDIT, *supra* note 3, at 42–43. See also *id.* ex. R para. III.4.a.

37. *Id.* at 42–43.

months in 2009, average of 2008–2009, or average of 2007–2009.<sup>38</sup> This flexibility to choose a shorter comparison interval let claimants take advantage of the natural variability in revenue and expenses over the course of a year.<sup>39</sup> Claimants could choose a three-month period in which their income was particularly bad in 2010 or particularly good in the benchmark period and exclude from the calculation other months in which their 2010 income might actually have been quite good. Indeed, even claimants who had a *better* year following the oil spill could still obtain compensation under the class settlement based on a few bad months.<sup>40</sup>

An example will help illustrate. Figure 2 shows retail sales data for Benton County, Mississippi, broken down into three-month rolling averages for the comparison and benchmark years. This particular illustration was presented at the fairness hearing on the class settlement by Halliburton Energy Services, Inc.—which was not a party to the settlement—in order to bolster its objection that the settlement was too generous and that Halliburton should not be held liable for contribution to the actual payments to the class. Under the Halliburton study, industry-wide data is used as a stand-in

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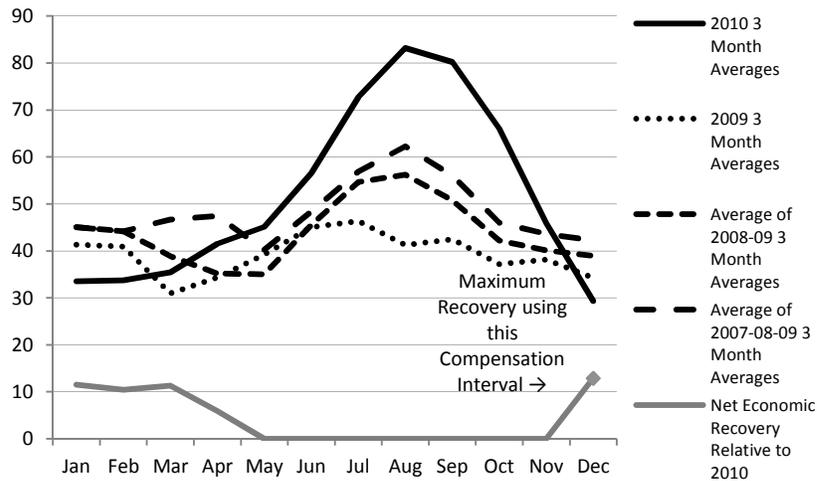
38. Class Settlement Agreement, *supra* note 21, ex. 4C.

39. BP has argued that this was not the intent of the class settlement in all cases, particularly for businesses with high variability in revenue and expense realization. The settlement claims administrator, Patrick Juneau, and the district court rejected BP's argument. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Mar. 5, 2013) (Document No. 8812), available at <http://www.deepwaterhorizoneconomicsettlement.com/docs.php> (follow "Review of Issue From Panel (Matching of Revenue and Expenses) (March 5, 2013)" hyperlink) ("Notably the Benchmark and Comparison Periods must be a minimum of three months. This demonstrates that the parties anticipated that too short a snapshot could create 'anomalies,' and the three-month minimum was the agreed-upon method for controlling for such anomalies."). In two separate orders so far, the Fifth Circuit has remanded the issue to Judge Barbier to determine how profits are calculated in light of when expenses are realized, *In re Deepwater Horizon*, 732 F.3d 326 (5th Cir. 2013), and subsequently to determine "those who experienced actual injury traceable to loss from the Deepwater Horizon accident," *In re Deepwater Horizon*, Nos. 13-30315, 13-30329 (5th Cir. Dec. 2, 2013) (Document No. 122). The center of gravity of the dispute has been over the proper interpretation of the terms "revenue" and "expenses"—essentially whether the terms should be understood on a cash or accrual basis. However this issue is ultimately resolved will not change the fact that the class settlement's shorter comparison interval gives claimants more flexibility to take advantage of fluctuations in revenue and expenses than the GCCF's longer comparison interval.

40. Declaration of Marc Vellrath Regarding the Proposed Economic & Property Damages Settlement Agreement para. 140, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179, 10-cv-7777 (E.D. La. Aug. 31, 2012) (Document No. 91-2) [hereinafter Vellrath Declaration].

for an actual retail claimant who would fit the “tourism” business definition under the class settlement, but it is not difficult to imagine claimants that had the same revenue patterns as the industry as a whole.<sup>41</sup> Retail sales in Benton County for 2010, the year following the spill, were actually about 32% higher than sales in 2009, but November and December of 2010 were particularly bad months, with sharp decreases from November and December in previous years.<sup>42</sup> By choosing October/November/December as a comparison interval, a claimant with Benton County’s revenue pattern could recover under the class settlement, even though it would not have been able to recover with the GCCF’s eight-month interval.

Figure 2: Average Retail Sales for Three-Month Benchmark Periods for Benton County, Mississippi (in thousands)<sup>43</sup>



The flexibility to choose a shorter comparison interval under the class settlement allowed claimants to exploit short-term variability in their income streams. This is essentially the inverse of the law of large numbers. Fluctuations in revenue and expenses are more likely to even out over an eight-month period than over a three-month period. By allowing claimants to choose a three-month comparison period to calculate economic loss, the class settlement allowed them

41. See *id.* paras. 138–39.

42. *Id.* para. 141.

43. This chart is derived from data in the Vellrath Declaration, *supra* note 40, para. 141 based on retail sales data for Benton County obtained from the Mississippi Department of Revenue.

to take the maximum advantage of that variability, while the GCCF's formula compares revenue and expense information that has been smoothed out over an eight-month period.

### *C. Seafood Compensation Program*

Both the GCCF and the class settlement provided greater compensation to seafood claimants than to most other types of claimants. The reason is not difficult to discern, as the oiled waters of the Gulf were the most notorious manifestation of the environmental damage caused by the Deepwater Horizon explosion. Indeed, the image of the oil slick spreading as BP tried desperately to cap the gushing well riveted the nation and brought the Gulf's seafood industry to a grinding halt. But the seafood compensation program under the class settlement was extraordinarily generous, with guaranteed payments that exceeded the annual revenue of the *entire* Gulf seafood industry many times over.

Greater compensation for the seafood industry was inevitable under any settlement program. The public attention to the compromised fisheries meant that causation and proof of harm for seafood claims would be most easily established in any trial and would be the most likely source of punitive damages against the responsible parties. Although the GCCF treated seafood claims similarly to other economic loss claims, it provided additional compensation by offering the compromised fishing industry higher damages multipliers. The GCCF paid four times the demonstrable losses for most seafood claims and up to seven times the demonstrable losses for oyster bed leaseholders. And its funding was uncapped.

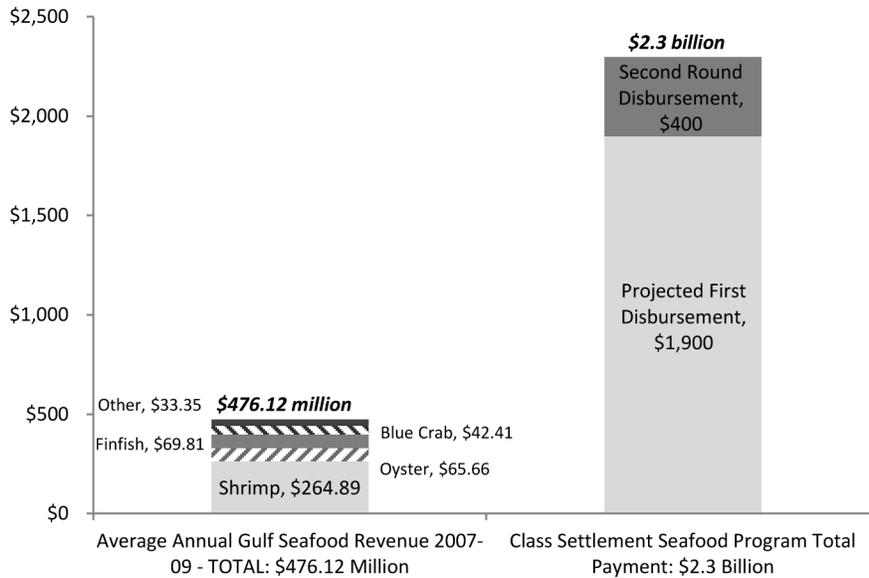
The class settlement, on the other hand, had a separate seafood compensation program that, as discussed above, applied greater damages multipliers than the GCCF (ranging from 3.25 to 9.75).<sup>44</sup> And compensation under the seafood program was set at a fixed amount of \$2.3 billion. This fixed fund is a departure from the structure of the GCCF and of the rest of the class settlement program; it sets not only a guaranteed payment but a cap on damages as well. But do not be fooled by the cap. As Figure 3 shows, the capped \$2.3 billion fund is approximately *five times* the total annual *revenue* (not lost profits) of the *entire* Gulf seafood industry.<sup>45</sup>

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44. See *supra* Part II.A.

45. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 909 (E.D. La. 2012) ("The guaranteed total of \$2.3 billion allocated to the SCP represents approximately five

Figure 3: Class Settlement Seafood Compensation Program Payments Versus Total Annual Gulf Seafood Revenues (in millions)<sup>46</sup>



This fund greatly exceeded the expected payments under the class settlement’s (already generous) compensation formula, which were projected to be approximately \$1.9 billion.<sup>47</sup> And the \$400 million left over would not revert back to BP. Instead, it would be paid out to class members pro rata in a second round distribution. So, the entire \$2.3 billion fund is guaranteed to be paid out to

times the annual average industry gross revenue for 2007 to 2009 of the Seafood industry in the region covered by the Settlement Agreement. \$2.3 billion also represents 19.2 times lost industry revenue in 2010, according to the evidence provided.”)

46. This chart is derived from Gulf seafood revenue data from NOAA ALS in the Class Presentation PowerPoint presented in court at the hearing on preliminary approval of the class settlement, Hearing on Preliminary Approval at the United States District Court for Eastern District of Louisiana 28–30, available at <http://www.cossichlaw.com/wp-content/uploads/2013/08/class-presentation.pdf>, and Exhibit 10 of the Class Settlement Agreement, *supra* note 21. Seafood revenue data excludes landings of menhaden, which were excluded from the settlement program.

47. *In re Oil Spill*, 910 F. Supp. 2d, at 908–09. See also Vellrath Declaration, *supra* note 40, paras. 231–32.

claimants—above and beyond their demonstrable losses and damages multipliers.<sup>48</sup> Even capped, the class settlement’s seafood compensation program put far more money on the table for seafood claimants than the GCCF.

#### *D. Additional Types of Claims Paid*

Finally, the class settlement paid some categories of claims that the GCCF did not. For example, the class settlement provided compensation for (1) the loss of use and enjoyment of coastal real property, (2) physical damage to property caused by cleanup operations, and (3) losses on the sale of residential property.<sup>49</sup> The GCCF did not pay any of these types of claims.

Overall, the class settlement appeared so generous that it created the unusual situation in which many of the objectors to its approval were non-class members trying to get *into* the class.<sup>50</sup> In addition, Halliburton, one of BP’s codefendants that was *not* a party to the settlement agreement, interposed a lengthy objection (complete with an economist’s 200+ page expert report) arguing that the settlement was paying class members too much money.<sup>51</sup>

### III. HOW COULD THE PROCESS WITH THE HIGHER TRANSACTION COSTS BE SUPERIOR FOR CLAIMANTS AND THE DEFENDANT?

We start from the supposition that both sides did better—The claimants got more money, and the defendant got more closure—under the public litigation system with higher transaction costs than

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48. *In re Oil Spill*, 910 F. Supp. 2d at 908–09; Vellrath Declaration, *supra* note 40, para. 232. It is also worth noting that the \$2.3 billion fund is not reduced by amounts that seafood claimants may have already received from BP through the GCCF as Emergency or Interim Payments because the entire remainder will be distributed in the second round. Vellrath Declaration, *supra* note 40, para. 233. Even claimants who took GCCF payments will receive the pro rata second round distribution based on the full value of their claims. *In re Oil Spill*, 910 F. Supp. 2d at 908–09.

49. Class Settlement Agreement, *supra* note 21, §§ 5.7–5.9, exs. 11A–13B.

50. See *In re Oil Spill*, 910 F. Supp. 2d at 922 (“This Settlement . . . is remarkable in that it seems to have resulted in large numbers of non-class members objecting to being excluded from the Settlement.”); *id.* at 934 (“[The settlement’s adequacy] is perhaps best illustrated by the extraordinary number of putative objectors (non-class members) who wish to be included within the Settlement . . . . ‘What the objections do illustrate—in vivid form—is the fact that this settlement is viewed as so desirable that people are clamoring to get in.’”).

51. See Halliburton Energy Services, Inc.’s Objections to Final Approval of Economic and Property Damages Class Settlement, *In re Oil Spill* by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179 (Document No. 91) (E.D. La. Aug. 31, 2012); Vellrath Declaration, *supra* note 40.

in the streamlined private dispute resolution system that BP set up under OPA. As the prior section shows, we believe that the facts fully bear this out. We have been unable to find any significant category of recovery in which claimants did better under the GCCF than under the scheduled payments of the class settlement. But our central hypothesis is not the empirical comparison; that proof is a matter of record in the ongoing litigation and appeals involving BP and other parties to the Deepwater Horizon disaster. Rather, we offer an explanation as to why this may be the case, an inquiry that has a distinct import well beyond the BP case. It is not a question, as is sometimes joked about by economists, that something working well in practice cannot be true unless there is an accompanying theory. Precisely because higher recovery with higher transaction costs is counterintuitive, there should be some account for why this might be. At bottom, a claimant's ability to obtain greater compensation under the class action settlement, despite its greater transaction costs, must reflect some factor in play that gave BP something it valued—and for which it was willing to pay—but could not get through the GCCF. We think that factor is peace. Below we sketch out some of the reasons why the class action settlement might have given all parties, including BP, a superior result than the GCCF and why BP might have been able and willing to pay more for a dispute resolution system with those features.

*A. Defendants Will Pay a Premium for Peace*

Defendants in mass litigation want peace, and they are often willing to pay for it. In a recent antitrust case involving multiple class action suits raising a variety of claims on behalf of thousands of claimants, the Third Circuit addressed the possibility that the claims had greater settlement value when they were joined together than they had separately: “From a practical standpoint . . . achieving global peace is a valid, and valuable, incentive to class action settlements . . . . [A defendant] may be motivated to pay class members a premium and achieve a global settlement in order to avoid additional lawsuits . . . .”<sup>52</sup> If true, part of the explanation for the higher sums available through the BP class settlement than

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52. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311, 339 (3d Cir. 2011) (Scirica, J., concurring). The World Trade Center Disaster Site settlement provides an excellent example of the peace premium. There, the defendant was willing to make sizable “bonus payments” to get the last 5% of plaintiffs to sign on to a global settlement. See *In re World Trade Center Disaster Site Litig.*, 834 F. Supp. 2d 184 (S.D.N.Y. 2011); World Trade Center Litigation Settlement Process Agreement, As Amended §§ II.A, IV, VI.E, available at <http://www.nysd.uscourts.gov/cases/show.php?db=911&id=540>.

through the GCCF might have to do with BP's willingness to sweeten the pot in exchange for greater closure. But if defendants are indeed willing to pay extra for a global settlement that resolves all claims in a single transaction instead of piecemeal serial litigation or settlements, we need to understand what underlies this "peace premium."<sup>53</sup>

First, and most obvious, are the lesser costs associated with fewer litigation or settlement transactions. Settling all of the claims in a single transaction allows the defendant to take advantage of economies of scale. Handling claims in bulk is simply more cost effective. The marginal cost of adding another claim to a group settlement is typically less than the cost of individually negotiating a separate settlement.<sup>54</sup> And if an incomplete settlement leaves the defendant litigating against a handful of non-settling plaintiffs, there are fewer cases across which to spread the costs of developing common factual and legal issues that will arise at trial.

Second, by settling all the claims at once, a defendant can avoid the risk of adverse selection. Plaintiffs (and the lawyers who represent groups of plaintiffs) tend to know more about the relative strength and value of their individual claims than the defendant, and if they are allowed to elect whether or not to participate in a group settlement, there is a danger that the plaintiffs with the strongest claims will opt out.<sup>55</sup> A defendant understandably does not want to pay top dollar to settle a collection of weak claims only to be left facing the strongest claims in continued litigation. Because it must hold back money to litigate against the opt-outs a defendant will inevitably pay less per claimant to settle an incomplete aggregation of claims than it would pay in a truly comprehensive settlement.<sup>56</sup>

And third, continued litigation against a handful of plaintiffs outside of a group settlement may impose disproportionate costs on a defendant. A global settlement that gives the defendant closure allows the defendant to eliminate contingent liabilities, put the dispute behind it, and focus on its business going forward. By contrast "continued litigation against even a handful of plaintiffs may result in additional negative publicity, attract unwanted regulatory scrutiny, and hamper access to capital markets."<sup>57</sup> And

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53. For a more detailed discussion of why defendants might be willing to pay a peace premium see D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192–98 (2013).

54. See, e.g., Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 761–62, 766 (1997).

55. Rave, *supra* note 53, at 1195.

56. *Id.* at 1194.

57. *Id.* at 1195. See also *Sullivan*, 667 F.3d at 339 n.9 (Scirica, J., concurring).

these costs may be greatly disproportionate to the number or value of remaining claims.

Indeed, these types of concerns were particularly salient for BP. The oil spill was a public relations disaster for BP, and the company's stock price plummeted in the aftermath of the Deepwater Horizon explosion, as investors sought more stable and predictable havens for their capital.<sup>58</sup> Perhaps even more importantly, BP's oil drilling operations in the Gulf of Mexico and elsewhere require federal regulatory approval.<sup>59</sup> BP's efforts to get emergency payments out through the GCCF may have helped to alleviate some political pressure in the short term, but additional negative publicity from continued litigation put those interests at risk. And even if only a handful of cases with a relatively small total damages exposure went to trial, a finding that BP was grossly negligent in any of those cases would adversely impact its position in still pending government enforcement actions under the Clean Water Act in which civil penalties and fines could exceed \$20 billion.<sup>60</sup>

Taken together, these three factors suggest that settlement of mass claims may be what economists would term a discontinuous, rather than continuous, function (Figures 4 and 5). The aggregation of claims is not simply additive. Just as class certification increases the litigation leverage of small value claims in a non-additive sense (e.g., two unviable \$10 claims do not have more litigation threat than one \$10 claim; a certain threshold of aggregation must be reached before any of the claims yield additional leverage), so too there may be compounding effects in the settlement of claims. The peace premium is a reflection that there may be thresholds that are critical to defendants. Such thresholds may include complete peace, the settlement of the claims held by major aggregators on the plaintiffs' side,<sup>61</sup> the specifics of regulatory compliance, or other potential case-specific factors. The premium comes from the realization of whichever threshold is of enhanced value to the defendant such that each individual plaintiff does not add very much

58. KENNETH R. FEINBERG, WHO GETS WHAT 129–30 (2012).

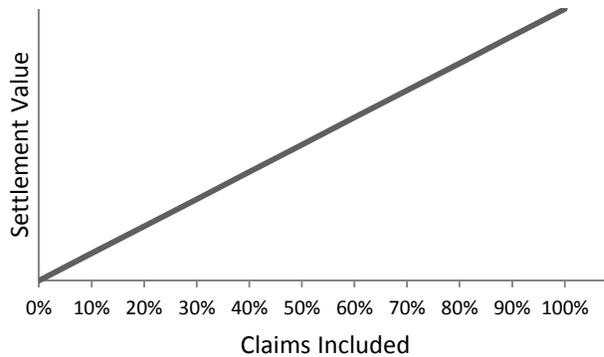
59. *Id.* See also David M. Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and Criminal Law*, 109 MICH. L. REV. 1413, 1416 (2011).

60. See, e.g., Barry Meier & Clifford Krauss, *As BP Trial Nears, Hints of Progress on a Deal*, N.Y. TIMES, Feb. 25, 2013, at B1.

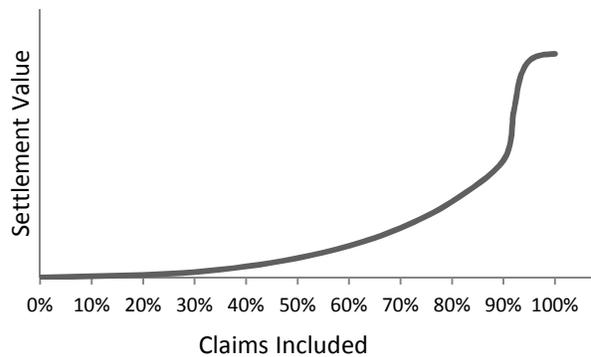
61. This is the best way to understand the Vioxx settlement, which paid a substantial price not for total peace but for peace with the law firms with credible litigation threats. See Settlement Agreement Between Merck & Co., Inc., and the Counsel Listed on the Signature Pages Hereto § 1.2.8 (Nov. 9, 2007), available at <http://www.officialvioxxsettlement.com/documents> (follow “Master Settlement Agreement” hyperlink); see also Issacharoff, *supra* note 18, at 215–19 (discussing the Vioxx settlement).

to the value of the potential settlement until a sufficient number of claims have been aggregated.

*Figure 4: Continuous Function (No Peace Premium)*



*Figure 5: Discontinuous Function (Peace Premium)*



Because of the peace premium, when many plaintiffs have similar claims against a common defendant, those claims are often worth more if they can be bundled up and sold to the defendant (i.e., settled) as a single package. The problem is that the rights to control those claims are dispersed among the individual plaintiffs, and it can be costly to assemble those rights into a more valuable collective. In other words, plaintiffs in mass litigation face an “anticommons” problem that can prevent them from maximizing the value of their claims.<sup>62</sup>

62. Rave, *supra* note 53, at 1190–1201.

An anticommons occurs when property rights are dispersed among too many owners, and transaction costs and strategic holdouts make assembling those rights into a more valuable whole difficult.<sup>63</sup> Individual plaintiffs in mass litigation, who tend to have no preexisting relationship with each other, face steep transaction costs to assembling their claims. Worse, because continued litigation against a handful of plaintiffs (whatever the number below important thresholds might be) imposes disproportionate costs and risk on the defendant, strategic holdouts can threaten to deny the defendant peace in the hopes of extracting a side payment. Even the mere anticipation of such strategic behavior may cause the defendant to withhold the peace premium in a mass settlement.<sup>64</sup>

In many ways, a class action settlement can be understood as a solution to the anticommons problem in mass litigation.<sup>65</sup> The class action mechanism offers plaintiffs (or, more realistically, a lawyer acting on their behalf) a relatively low cost method of overcoming this dynamic and assembling their dispersed rights of action into a single package for sale to the defendant.<sup>66</sup> A Rule 23(b)(3) class action, of course, allows individual plaintiffs to opt out of a class settlement,<sup>67</sup> so simply using the class action machinery does not guarantee complete closure. But there are reasons to believe that a class action settlement allows plaintiffs to credibly offer the defendant a much greater degree of finality than it could obtain through one-by-one private settlements. One unanticipated defect of OPA's attempt to incentivize private settlements was the inability to organize systematic closure, as through a class action. This proved a significant obstacle to a program like the GCCF, where plaintiffs must affirmatively opt in on an individual basis. As a result, if a class action settlement promises something approaching peace, the

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63. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

64. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 cmt. b (“Even the threat of such a holdout may cause the defendant to withhold the premium associated with complete peace, thereby inuring to the detriment of all the represented claimants.”).

65. Rave, *supra* note 53, at 1239–45.

66. *Id.* See also Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2144–46 (2000).

67. FED. R. CIV. P. 23(c)(3)(B), (e)(4). See also *Philips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985) (holding that “due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court”).

defendant may be willing to pay a premium over serial individual litigation or settlement.<sup>68</sup>

### *B. The Class Settlement Offered BP More Finality*

Several features of the economic and property damages class action settlement made it possible for plaintiffs to offer BP a greater degree of finality than it could ever have hoped to achieve through the GCCF. These features—a walk-away provision, a firm cut-off date, transparent and consistent procedures, and a shift from an opt-in model to an opt-out model—may have contributed to BP’s ability and willingness to pay claimants more under the class action settlement than through the GCCF.

#### *1. Walk-away Provision*

The class action settlement contained a walk-away provision that allowed BP to back out of the deal if too few plaintiffs participated. Walk-away provisions are typical in large-scale aggregate settlements, and they afford defendants some degree of protection from adverse selection and the loss of economies of scale. By including a walk-away provision in a settlement agreement, class counsel is guaranteeing the defendant at least a certain level of peace as a condition of settlement. If too many plaintiffs opt out, the defendant is not left in a situation where it has overpaid to settle a collection of weak claims only to face a substantial number of strong claims in continued litigation. Instead, the class settlement is nullified, and all parties continue to litigate.

In effect, walk-away provisions allow a settling defendant a second option once the entirety of the settlement structure becomes apparent. Each offer is made with the knowledge that if settlement is not reached with a sufficient number (or quality) of plaintiffs, then the initial offers may be rescinded. This frees a settling defendant from having to withhold money from early settlement offers for fear of not getting enough claims—or the right claims—resolved. Particularly if the litigation has been concentrated in the hands of major plaintiffs’ firms, a partial settlement can be the worst of all worlds: The weaker claims may settle, and the proceeds from those

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68. See Rave, *supra* note 53, at 1193–95 for an explanation of why a defendant might be willing to pay a premium even when a settlement does not include every single claim.

settlements may provide a war chest for the prosecution of the stronger claims.<sup>69</sup>

Paradoxically, however, the same mechanism that gives the defendant a second option may also compromise the parties' ability to achieve a comprehensive settlement. Walk-away provisions usually condition the settlement on a very high percentage of plaintiffs participating. A high participation threshold guarantees the defendant a sufficient degree of peace, but it also empowers strategic holdouts to threaten to derail the entire deal if they are not paid off. If a settlement is structured as an all-or-nothing deal, then any individual plaintiff is a potential holdout.<sup>70</sup> But even where the participation threshold is set lower—say, 95%—it is possible for a lawyer to coordinate a group of plaintiffs into a holdout bloc that can extort side payments or a disproportionate share of the settlement allocation by threatening to opt out en masse.<sup>71</sup> The potential for holdouts can threaten a settlement containing a walk-away provision and, therefore, the plaintiffs' ability to offer the defendant peace in exchange for a premium.

The BP class action settlement contained an innovative provision to deal with this problem. The settlement allowed BP to walk away if too many plaintiffs opted out, but the walk-away threshold that the defendant and the Plaintiffs' Steering Committee agreed upon was not made public. Instead, it was filed with the court in a sealed envelope.<sup>72</sup> Keeping the precise threshold confidential made it harder for any strategic player attempting to coordinate a holdout bloc to know whether he had assembled enough plaintiffs willing to opt out in order to make a credible threat to hold up the deal. Once the participation threshold was reached and the settlement became binding, BP could be sure that it had bought at least a certain degree of peace. It did not risk facing hordes of opt-outs in continued litigation.

Nothing in the OPA claims resolution process could provide this second-look protection to BP. A private claims facility like the GCCF, structured to meet the statutory requirements for a procedure for claimants to present their claims to the responsible party before obtaining the right to sue, was necessarily an open-ended offer that

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69. This dynamic was the downfall of the Owens Corning Fibreboard National Settlement Program. *See, e.g.*, RICHARD NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 111–12 (2007); Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation after Amchem and Ortiz*, 80 *TEX. L. REV.* 1925, 1936–38 (2002).

70. *See* Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 *KAN. L. REV.* 979, 981–82 (2010).

71. *See* Rave, *supra* note 53, at 1201.

72. Class Settlement Agreement, *supra* note 21, § 21.3.6.

facilitated adverse selection. Under the GCCF, BP had no advanced guarantee that it would achieve any degree of finality. The GCCF paid claims seriatim, without any assurance that later plaintiffs would be bound to the same procedures. BP did not know how many claimants would elect to participate or what percentage of total claims would be resolved through the GCCF's administrative process at the time it began paying claims. Because the claimants were not bound in advance to pursue their claims through the GCCF, there was a clear danger that those with weak claims would take the settlement offers made by the GCCF and those with strong claims would opt for litigation instead. The rational incentive for BP was to hold back payments to early settlers as a means to protect against later-filed, stronger claims. In turn, the vulnerability of being gamed in this fashion created a corresponding incentive to keep the details of settlement criteria and settlement amounts as secret as possible.

Indeed, even the GCCF's payment structure facilitated adverse selection. The GCCF generally offered claimants "Final Payments" for all of their documented past and future losses in exchange for a release and covenant not to sue.<sup>73</sup> The documentation requirements for Final Payments were fairly stringent. But the GCCF also allowed claimants to elect a one-time, fixed-sum "Quick Payment" of \$5,000 for individuals or \$25,000 for businesses based on a much more limited documentary showing.<sup>74</sup> Reducing the evidentiary requirements for small claims is not irrational; both claimants and BP may be quite willing to tolerate some loss of accuracy in the valuation of small claims in order to prevent the transaction costs of assembling and reviewing documentation from eating up the entire amount. But the availability of Quick Payments did make the GCCF relatively more attractive for low-value claims than for high-value ones. And it comes as no surprise that far more claimants accepted the fixed-sum offers of Quick Payments than Final Payments, with the strongest claims refusing to settle through the GCCF and instead retaining the right to sue.

Because the GCCF did not offer BP an opportunity to back out of the compensation scheme if too many claimants elected not to participate—BP could not even know how many opt-outs there would be until it had already paid those who opted in—and because adverse selection is predictable, BP had to hold back money to litigate or individually settle the strongest claims that were most likely to opt out. In other words, BP had to withhold the peace premium. The walk-away provision of the class action settlement,

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73. DOJ AUDIT, *supra* note 3, at 35.

74. *Id.* at 34.

on the other hand, reassured BP that if it was going to face a significant number of opt-outs in continued litigation, at least it would not have overpaid to settle a collection of weak claims. That guarantee allowed BP to commit more resources to the settlement that would only take effect if it reached a sufficient degree of finality.

## *2. Firm Cut-off Date*

The class action settlement also imposed a firm cut-off date by which claimants had to decide whether to participate in the settlement program or opt out and pursue their claims against BP in court. If claimants did not file a request to be excluded with the court by the opt-out deadline, they were bound by the settlement. The GCCF, on the other hand, was open-ended and allowed plaintiffs to take a wait-and-see approach, depriving it of the ability to offer BP finality. Moreover, a rational claimant could assume that payments would go up over time because the GCCF had to pursue holdouts against a backdrop of prior settlement amounts.

The GCCF further rewarded delay by allowing claimants to obtain compensation over an extended period of time without deciding whether to sue BP in court. Again, this was not necessarily a design flaw of the GCCF, but rather a function of OPA's statutory requirement that the responsible party set up a process to pay claims for interim, short-term damages, without precluding later recovery for full damages.<sup>75</sup> Claimants could obtain "Interim Payments" from the GCCF for documented past losses as often as once per quarter *without* signing a release.<sup>76</sup> While these payments did not include a damages multiplier to compensate for potential future losses, they allowed claimants to keep going back to the well for additional Interim Payments over the life of the GCCF, without giving up the right to later sue BP.

Interim Payments, thus, made the cost of holding out very low. Claimants could obtain much of the benefit of participating in the GCCF—compensation on an ongoing basis for past losses—without giving up the right to sue. A potential holdout would not have to forego these benefits to make a credible threat of litigation. As a result, BP could not make generous offers of Final Payment across the board because it had to hold back funds to litigate against and

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75. 33 U.S.C. § 2705(a) (2006).

76. DOJ AUDIT, *supra* note 3, at 35. *See also* FEINBERG, *supra* note 58, at 173 (noting that "claimant[s] could select an interim payment and take a 'wait and see' approach to the future").

pay strategic claimants who took Interim Payments but would reject offers of Final Payment and instead threaten to litigate in court.

By contrast, forcing claimants to choose whether to litigate or participate in the class action settlement by a firm deadline increased the cost of holding out. Strategic players would have to forego all of the benefits of the settlement and commit to go it alone in litigation in order to hold out. They could not take a wait-and-see approach. The predictable result is fewer holdouts and more certainty and finality for BP, especially when combined with the walk-away provision. The opt-out deadline provided a specific date by which BP would know whether it would obtain a satisfactory degree of closure through the settlement or should back out of the deal because of adverse selection. This certainty allowed BP to commit more resources to the class action settlement *ex ante*.

### 3. *Transparent and Consistent Procedures*

The class action settlement adopted transparent and consistent procedures to deal with all claims. The payment calculation methodologies were set out in full detail at the beginning of the settlement program and could not be modified for the program's duration.<sup>77</sup> This transparency marked a departure from the GCCF, which was designed to be flexible. As a result, it could not be transparent and frequently adjusted its procedures in response to changing circumstances.<sup>78</sup> The increase in transparency and consistency that accompanied the shift from the GCCF to the class action settlement made it harder for claimants to extract greater payments through strategic action.

The GCCF's lack of transparency was a familiar refrain among its critics.<sup>79</sup> The claims administrator, Kenneth Feinberg, retained

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77. See Class Settlement Agreement, *supra* note 21, § 4.4.7 (“The Settlement Program and its Claims procedures shall be subject to the ongoing supervision of the Court. The criteria, documentation, proof, and [compensation amount] provisions of each of the Claims categories shall apply equally to all Claimants regardless whether they are proceeding individually, represented by others, or proceeding as an assignee of an individual Claim. The claims administrator shall explore and consider the utilization of streamlined procedures to improve the efficiency of the Claims process, *without changing Claims criteria.*” (emphasis added)).

78. See DOJ AUDIT, *supra* note 3, at 8–9 (“[T]he GCCF’s approach to the development and implementation of its protocols and methodologies was, by necessity, a dynamic one. The GCCF constantly made adjustments and improvements as it gained a greater understanding of the myriad challenges that emerged during its operations.”).

79. See, e.g., Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71

the discretion to make changes to the GCCF's procedures and claims criteria on the fly.<sup>80</sup> Those procedures and claims criteria evolved throughout the GCCF's lifespan.<sup>81</sup> And the GCCF's claims adjusters were able to exercise discretion in evaluating and calculating losses suffered by business claimants.<sup>82</sup> This discretion and evolution in response to changing circumstances made the GCCF flexible, but it also facilitated strategic behavior by claimants and made it more difficult for BP to achieve closure.

As a result of evolving standards under the GCCF, the efforts at settlement created a dynamic of serial individual negotiations between a single repeat-player defendant and many single-shot claimants faced with a collective action problem. The claimants would maximize the collective value of their claims if they could coordinate to offer the defendant peace. But if the criteria for determining the compensation amount are up for grabs with each claimant, then each claimant is a potential holdout. No individual claimant internalizes all of the costs of adopting an unreasonable negotiating strategy. The GCCF's lack of transparency made it easier for strategic players to attempt to extract secret payoffs, and its procedural flexibility let holdouts bargain for prospective changes to the compensation criteria. This was not necessarily a failure of the GCCF; the lack of a closure strategy reflected an attempt to implement OPA's statutory preference for informal one-

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LA. L. REV. 819, 842 n.107, 881–86 (2011); George W. Conk, *Diving into the Wreck: BP and Kenneth Feinberg's Gulf Coast Gambit*, 17 ROGER WILLIAMS U. L. REV. 137, 141 (2012); Amicus Brief of the States of Alabama, et al. in Support of Appellees and Affirmance of the District Court at 6–13, *In re Deepwater Horizon*, No. 13-30315 (consolidated with No. 13-30315) 2013 WL 2474803 (5th Cir. May 31, 2013) (summarizing complaints made to the attorneys general of Alabama and Mississippi and the governor of Alabama about GCCF's lack of transparency and consistency).

80. See, e.g., FEINBERG, *supra* note 58, at 163, 173 (“I did promise that the GCCF would continue to monitor the Gulf and reserved the right to modify the recovery factor, up or down, as events unfolded.”); Mullenix, *supra* note 79, at 841–44.

81. See, e.g., DOJ AUDIT, *supra* note 3, at 72–76 (noting that similarly situated claimants were sometimes treated differently because of the evolution of GCCF's methodologies).

82. See *id.* at 43, 54 (noting discretion in calculating losses). In fact, for business claimants with more than \$500,000 in documented losses, the GCCF did not automatically apply the same damages multiplier for future losses but instead determined the final payment amount “on an individualized basis after analyzing input from the claimant as well as the expert.” *Id.* at 43 n.34. Thus, claimants with the largest claims and, therefore, the most credible threat to pursue individual litigation got the opportunity to negotiate their payments individually, outside of the normal protocol that applied to other claimants.

by-one claims resolution. But it made it impossible for claimants to offer BP finality with any credibility.

In the class action settlement, by contrast, all parties made a credible precommitment to consistently apply the *same* criteria to all of the claims made by all claimants over the entire duration of the settlement program, and those criteria were set out in advance for all parties to see.<sup>83</sup> This commitment to consistency and transparency raised the cost of holding out. Strategic players and “squeaky wheels” could not hope that their threats or protestations would cause the claims administrator secretly to offer increased payments to get them to go away. Nor could they lobby for prospective changes in the compensation criteria. The claims administrator’s hands were tied, and a strategic player’s only choices would be to take the amount dictated by the class action settlement’s terms or opt out and go it alone in litigation. Raising the cost of holding out reassured BP that the money it put into the settlement would buy it peace and that it would not have to hold back money to deal with an upward spiral where strategic players sought an ever increasing series of secret payments.

The adoption of transparent and consistent procedures may have been motivated by the need to comply with the dictates of Rule 23 and due process.<sup>84</sup> But those formal requirements of the public system of class action litigation have a certain mast-tying effect. Unlike a purely private arrangement, the parties are not free to simply renegotiate the terms of the claims resolution scheme as the process unfolds. Any modifications would need to secure the approval of a court tasked with protecting the interests of absentees and ensuring that the settlement is fair and reasonable.<sup>85</sup> Perhaps counterintuitively, this reduction in flexibility had the effect of making strategic action more difficult and therefore, making it easier for the plaintiffs to credibly offer BP peace in exchange for a premium.

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83. See *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 904 (E.D. La. 2012) (“The Settlement Program calculates awards using public, transparent frameworks that apply standardized formulas derived from generally accepted and common methodologies. This level of transparency permits class members to understand how their claims will be evaluated under the Settlement. It also ensures that similarly situated class members are treated similarly.”).

84. See, e.g., *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997).

85. See FED. R. CIV. P. 23(e). Indeed, the disputes in the Fifth Circuit over the proper damages calculation for business economic losses and causation illustrate this precommitment to consistent procedures. See *supra* note 39 (setting out Fifth Circuit rulings on this issue to date).

#### 4. Shift from Opt-in to Opt-out

Finally, the class action settlement shifted from the opt-in model of the GCCF to an opt-out model. Under the GCCF, a claimant affirmatively had to file a claim, accept the offer of Quick or Final Payment, and execute a release in order to be bound. Claimants who did not take these affirmative steps were free to bring suits in court, at least until the statute of limitations ran. Under the class action settlement, by contrast, the default rule was flipped. Claimants who did nothing are bound by the settlement, instead of not bound.

The shift from an opt-in rule to an opt-out rule takes advantage of claimants' inertia to achieve greater finality. Why do today what can be put off until tomorrow? People tend to value the present more than the future, and it always seems rational to do more pleasant things today and put off less pleasant chores—Watching football now is always better than mowing the lawn. People procrastinate unless there are intervening incentive structures that affect behavior.<sup>86</sup> One such behavioral trait is the propensity to conform behavior to default rules under conditions of uncertainty. Default rules tend to be “sticky,” and quite often, people do not make the effort—even a minimal effort like filing a request to opt out of a class action settlement with the court—to deviate from them.<sup>87</sup> Consequently, setting the default rule as participation with a right to opt out can be expected to achieve a greater degree of participation and, thus, finality than setting the rule as non-participation with a right to opt in.

Note that an opt-out rule combined with a requirement that claimants actually file a claim in the class action settlement program to receive compensation could, in theory, benefit the defendant by reducing the total number of claims the defendant ends up paying

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86. See, e.g., Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism”*, 151 U. PA. L. REV. 1211 (2003); Ted O'Donoghue & Matthew Rabin, *Choice and Procrastination*, 116 Q.J. ECON. 121 (2001) (discussing how procrastination may be more severe when pursuing important, rather than unimportant, goals). See generally CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

87. See Camerer et al., *supra* note 86. The procedures for opting out of the class action settlement were straightforward, well disclosed, and far from onerous. Claimants who wished to be excluded from the class simply had to submit to the court a written and signed request to be excluded from the class by November 1, 2012—six months after the court's preliminary approval of the class settlement. See *In re Oil Spill*, 910 F. Supp. 2d at 937.

compared with a pure opt-in rule.<sup>88</sup> But the reduction in the number of claims paid is not likely to be very large because those claimants who fail to file either a request to opt out or a claim in the class action settlement are unlikely to be the claimants who would have either opted in to a system like the GCCF or taken the much more onerous affirmative step of suing the defendant individually.

The shift from an opt-in model to an opt-out model does, however, force claimants with high value claims and strategic players to identify themselves to the defendant earlier in the process. Instead of biding their time on the sidelines—or taking the wait-and-see approach of filing for Interim Payments in the GCCF—under the class action settlement, claimants who intend to pursue individual litigation have to make their intentions known by the opt-out date.

The ability to bind absentees is the hallmark of the public class action litigation system. Thus, it is difficult or impossible to replicate an opt-out model in a private dispute resolution system as envisioned under OPA. Only a court's imprimatur—and a deal that comports with the formalities and safeguards of the class action system—can bind absentees without their affirmative consent. But this is one of the advantages of public litigation over private ordering in this case. By binding claimants who do nothing and forcing those who wish to litigate to identify themselves, the opt-out feature of the class action settlement removes the potential for surprise and gives BP a greater degree of closure and certainty as to its continuing exposure. Closure and certainty are valuable commodities to a defendant like BP—which faced regulatory, public relations, and capital markets pressures—and plaintiffs could demand a premium for delivering them.

### *C. The Shift from Private Alternative Dispute Resolution to Public Class Action Litigation Looked Like a Win-Win*

Taken together, these features of the class action settlement could give BP what it wanted—a greater degree of finality than it could get from the sort of private dispute resolution system envisioned by OPA. And the results appear to bear this out, as only a tiny fraction (about 1.2%) of plaintiffs opted out of the class action settlement.<sup>89</sup>

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88. For a comparison of opt-in and opt-out class action structures in the United States and Europe, see Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 204–05 (2009).

89. The opt-out rate for the class is derived from 13,123 timely, valid opt-out requests divided by the 1.2 million class notices sent. See *In re Oil Spill*, 910 F.

That finality worked to the benefit of claimants because it freed up more resources for BP to devote to the settlement. In essence, the public machinery of the class action, with its ability to bind absentees, requirements of transparency, and judicial assurance of equitable treatment, allowed the plaintiffs credibly to offer BP a greater degree of peace in exchange for more money. In other words, abandoning OPA's streamlined, non-adversarial, private dispute resolution scheme for the costlier public class action litigation system had the ability to leave both sides better off.

But it is also important to consider the additional leverage that class action aggregation gave the plaintiffs. Finality creates value for BP, and thus a surplus over which the parties can bargain. But it is the class action's ability to coordinate the efforts of a large and diverse population of claimants—to credibly threaten litigation and prevent holdouts from siphoning off value—that allows the plaintiffs to effectively bargain for a portion of that surplus. Defendants, thus, face a paradox. They need aggregation through the class action system to get the finality they desire and cannot get through a private dispute resolution scheme, but that same aggregation gives plaintiffs the leverage to negotiate for a higher return.

When peace is valuable enough to the defendant—as it appeared to be for BP—the move from a private victim compensation scheme to the public class action system can generate extra value that exceeds the accompanying increase in transaction costs (e.g., attorneys' fees, notice, discovery, and agency costs). And the increased leverage that the class action gives the plaintiffs helps ensure that value is shared. In other words, the shift from the GCCF to the class action settlement looks like a win-win.

#### IV. CONCLUSION

The paradox of public litigation begins with the dispute resolution system with apparently higher transaction costs proving more efficient and more effective in providing compensation and closure in the Gulf. The deeper lesson is that the public civil justice system and its evolved procedures worked better than a jury-rigged alternative crafted from strict maritime liability, the presumed

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Supp. 2d at 937. Even this number overstates the true number of opt-outs because an unknown portion of those opt-out requests were submitted by parties who were not members of the class, and nearly 1,800 opt-outs later revoked their requests. *Id.* at 937–38.

damages cap of the Limitations Act, and the quick-pay approach to individual-by-individual harms.

Beyond the resolution of the Deepwater Horizon calamity lies a fundamental problem of how to remediate the scope of harms that routinely result from mass society. Our point is not to enter the debate over efficient deterrence and optimal compensation. Rather, we use the BP oil spill as a point of departure precisely because it was the largest environmental catastrophe in American history and because the scale of harm provided a critical test for the efforts to bypass the litigation system. Ultimately, class litigation—or more precisely, class settlement—provided the simplest and most effective way to manage the case. That lesson has significance well beyond the immediate events in the Gulf of Mexico, even as the class action remains legally problematic.

While the class mechanism proved effective in the Deepwater Horizon context, the broader prospects for such class resolutions remain unclear. Class actions are under significant assault.<sup>90</sup> Again and again in recent years, the Supreme Court has made it more difficult to use class action to resolve large-scale disputes arising out of mass injuries.<sup>91</sup> The pullback began with *Amchem Products, Inc. v. Windsor*<sup>92</sup> and *Ortiz v. Fibreboard Corp.*<sup>93</sup> and their restrictions on mass tort class action settlements. From there, the Court has introduced heightened requirements of “commonality” of claims under *Wal-Mart Stores Inc. v. Dukes*<sup>94</sup> and has allowed mandatory arbitration requirements to close out class treatment of even identical consumer claims under *AT&T Mobility LLC v. Concepcion*<sup>95</sup> and its progeny. The result is a pressure to find alternative means of effectively resolving mass disputes at a wholesale level outside of the courtroom. Idealized individual, case-by-case litigation in federal court is simply not a realistic option. Asbestos claimants and defendants have sought refuge in the bankruptcy code.<sup>96</sup> Mass torts have shifted into MDLs, where parties must rely on non-class aggregate settlements in their quest

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90. See, e.g., Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

91. See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013).

92. 521 U.S. 591 (1997).

93. 527 U.S. 815 (1999).

94. 131 S. Ct. 2541 (2011).

95. 131 S. Ct. 1740 (2011).

96. See 11 U.S.C. § 524(g) (2006); see also Troy A. McKenzie, *Bankruptcy and the Future of Aggregate Litigation: The Past as Prologue?*, 90 WASH. U. L. REV. 839, 842 (2013).

for global resolution.<sup>97</sup> The lawyers constructing these deals must use innovative and controversial contractual strategies to try to achieve full participation by claimants, as they did in the *Vioxx* settlement.<sup>98</sup> And judges are left to assert authority under a “quasi-class action” theory to provide even limited supervision and review.<sup>99</sup> At the same time, companies seek to bypass the litigation system entirely by setting up their own private alternative dispute resolution programs and incorporating mandatory arbitration clauses with class action waivers into their consumer and employment contracts.<sup>100</sup>

The latest such innovations are private claims facilities, modeled largely on the September 11 Victims Compensation Fund.<sup>101</sup> Defendants set up these private compensation or refund programs in attempts to resolve their liabilities, while avoiding the costs of the public litigation system. Instead of waiting to be sued, they craft streamlined, non-adversarial administrative schemes where victims of mass harms can obtain compensation without the need to file lawsuits or hire lawyers.

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97. See, e.g., Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after Ortiz*, 58 U. KAN. L. REV. 775 (2010).

98. For competing takes on the *Vioxx* settlement’s strategy for achieving closure by requiring participating lawyers to recommend settlement to all of their clients and to withdraw from representing those clients who decline, see Issacharoff, *supra* note 18, and Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011).

99. See, e.g., *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 196 (S.D.N.Y. 2011); *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 558–62 (E.D. La. 2009); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174 (D. Minn. Mar. 7, 2008), *amended in part*, MDL 05-1708 DWF/AJB, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006); see also Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

100. See, e.g., Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825 (2012).

101. See generally FEINBERG, *supra* note 58 (discussing 9/11 Fund, Hokie Spirit Memorial Fund for victims of the 2007 Virginia Tech shooting). A private fund run by Feinberg is available for victims of the sexual abuse scandal at Penn State. See *Penn State to Compensate Sandusky Victims*, *Erickson Says*, BLOOMBERG (Sept. 19, 2012), <http://www.bloomberg.com/news/2012-09-19/penn-state-to-compensate-sandusky-victims-erickson-says.html>; *Penn State Looking to Reach Accord on Abuse Claims*, USA TODAY (Feb. 23, 2013), <http://www.usatoday.com/story/news/nation/2013/02/23/penn-state-sandusky-lawsuits/1941057/>.

Some courts have bought into the logic that when they succeed in lowering transaction costs, such private arrangements for resolving mass disputes are superior to the public system of class action litigation. In *In re Aqua Dots Product Liability Litigation*, for example, the Seventh Circuit went so far as to hold that a class cannot be certified where the defendant has already set up a lower cost private compensation program to offer the same relief—in that case, a standing offer of a full refund to anyone who purchased a toy that turned out to be defective.<sup>102</sup> Judge Easterbrook explained: “A representative who proposes that high transaction costs (notice and attorneys’ fees) be incurred at the class members’ expense to obtain a refund that already is on offer is not adequately protecting the class members’ interests,” and thus no class could be certified under Rule 23(a)(4).<sup>103</sup>

But other courts have cautioned that this reflexive move away from the class action is a mistake because no other system yet discovered can offer parties the finality they seek with the same degree of transparency, consistency, and fairness. As Judge Scirica observed in *Sullivan v. DB Investments, Inc.*: “[O]utside the federal rules governing class actions, there is no prescribed independent review of the structural and substantive fairness of a settlement including evaluation of attorneys’ fees, potential conflicts of interest, and counsel’s allocation of settlement funds among class members.”<sup>104</sup>

OPA showed a preference for informality with its call for a streamlined, non-adversarial, administrative procedure for resolving disputes and providing compensation for oil spill victims. By shedding the formalities, the inevitable delays, and the need for

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102. 654 F.3d 748 (7th Cir. 2011).

103. *Id.* at 752. The district court was even more explicit in its comparative analysis of transaction costs, finding that class certification was not appropriate under Rule 23(b)(3) because the class action was not “superior to other methods of fairly and efficiently adjudicating the controversy,” namely the defendant’s voluntary refund program. *In re Aqua Dots Product Liab. Litig.*, 270 F.R.D. 377, 384–85 (N.D. Ill. 2010). *See also In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195–96 (5th Cir. 2010) (denying class certification where transaction costs of class settlement—attorneys’ fees and administrative costs—would “swallow the entire settlement” leaving no benefit for the class over other means of adjudicating the dispute (quoting *In re Katrina Canal Breaches Consol. Litig.*, 263 F.R.D. 340, 358 (E.D. La. 2009))).

104. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 334 (3d Cir. 2011) (Scirica, J., concurring) (citations omitted). Similarly, Judge Barbier found that the class settlement was “superior to the GCCF at the very least because it is judicially supervised, meaning that it is a program that must meet heightened guarantees of consistency with due process and fairness.” *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 961 (E.D. La. 2012).

costly legal representation that are part and parcel of the public litigation system, Congress hoped that OPA would lead to a transaction-cost savings that would work to the benefit of claimants.

But even with a defendant like BP, able and willing to fund a massive private claims resolution facility and to enlist the nation's preeminent claims administrator with an unquestioned reputation for independence, that approach has been unable to recreate the features of the class action that work best—the ability to provide peace in exchange for a premium and the guarantees of consistent, transparent, and equitable application to all claimants. The GCCF, for all its efforts to rapidly provide compensation to an astounding number of claimants in a streamlined, low-cost process, could not measure up to the class action settlement's ability to deliver finality—even at a greater cost—in a fair and equitable manner. In the end, the public dispute resolution system proved more effective in serving the public interest in effective dispute resolution.

#### AFTERWORD

This Article uses the huge BP settlement of claims for economic harm following the Deepwater Horizon oil spill to illustrate a point about the advantages offered by public dispute resolution. We set about to address the paradox of why parties might find the apparently higher cost use of the litigation forum to provide more efficient closure than private agreements with apparently lower transaction costs. As this Article goes to press, the amicable resolution of the private economic claims has broken down into acrimonious charges over the scope of the business claims outside of the immediate proximity to the Gulf that should be covered by the settlement, as well as charges of misbehavior in the settlement administration.

While perhaps unfortunate for the parties involved, the post-settlement disputes do not alter the basic inquiry of this Article. The current disputes are about the boundaries of the settlement. Whatever those boundaries may ultimately prove to be, the parties entered into a resolution of litigation that proved more comprehensive and more generous than that afforded by the GCCF under OPA's mandate of quick, informal claim resolution. That the once-unified settling parties subsequently had a falling out only makes the story more intriguing. As Leo Tolstoy once noted of what makes human drama interesting, "All happy families are alike; each unhappy family is unhappy in its own way."<sup>105</sup>

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105. LEO TOLSTOY, *ANNA KARENINA* 1 (Richard Pevear & Larissa Volokhonsky trans., Viking Penguin 2001) (1886).