RWU Oil Spill Conference
April 13, 2011

Sue or Settle?
The Problem

- Hundreds of thousands claim economic loss, damage, injury as a result of the BP Oil Spill.
- Claims include death, personal injury, property damage, loss to business, natural resources damage.
- Litigants include federal and state governments, individuals, businesses of various types in disparate industries and locations.
- There are over 300 separate cases (including class actions – and a consolidated MDL proceeding for pre trial purposes.
- The Gulf Coast Claims Facility has received over 500,000 claims.
What is the Solution?

- How can we address these claims?
- Individual claimants have real life issues and immediate needs
- Will the litigation system meet those needs?
- Is there an alternative?
- What alternatives have been employed in other mass claim situations?
What are the Alternatives?

• In the past ten to fifteen years, many parties involved in mass products liability actions/mass accidents/disasters have resolved their claims through some form of an alternative compensation program.
Mass Resolution Programs - Overview

• How are these mass resolution programs structured and how have these mass resolution programs worked?
  – Types of programs:
    • Court supervised settlements – class actions/bankruptcy trusts
    • Statutory programs
    • “Voluntary” programs
Overview

• Characteristics/Examples
  – Court supervised programs:
    • General characteristics: a settlement typically achieved in the context of a class action or perhaps a bankruptcy case. The settlement terms will outline general criteria for “eligible” claims, a “schedule” of or formula for determining compensation amounts; defined documentation to support claims.
    • Often designed to run for multiple years.
    • Typically plaintiffs’ law firms have a significant role in overseeing and implementing settlement terms.
    • Typically funded by the defendants that would be/have been sued
Overview

• Statutory Program
  – Few examples
  – Governed by terms of statute and implementing regulations
  – Time limits
  – May be funded by tax payers or possibly by entities that receive limitations on their exposure as a result of the statutory program
  – Might require a choice between litigation and settlement
Overview

• Voluntary/Private “Self Help”
  – No prohibition on entity providing voluntary claims resolution
    • Except in context of class litigation
    • Examples: breast implant companies maintained such programs – ultimately came under court scrutiny
Why Opt for Alternative Resolution Program

• Can provide quicker resolution
• Can incorporate mechanisms to treat like claims alike
• Can be flexible in some situations to provide emergency relief
• Can be administered at relatively lower cost than litigation
• Can provide relative certainty for all parties/limit risk
Alternative Compensation Programs

• What are the downsides?
  – Claimants may get lower recoveries (but more claimants might recover)
  – If the program is set up too soon, it may offer inappropriate compensation
  – Limits the discovery of information that might be pertinent to understanding the risks of a product or the cause of the disaster
  – If not well administered, can create inequities
Examples

• Examples:
  – Silicone Gel Breast Implant Settlement
    • Claims of disease and disfigurement injuries as a result of use of silicone gel implants
    • Product first marketed mid 1960s
    • Few claims until television program in 1991
    • Litigation – commenced in earnest in 1992; hundreds of cases filed/nearly two dozen class actions
Examples: Breast Implant Resolution

• Ultimately over 400,000 claims filed

• Resolved primarily through two administrative compensation programs – one a class action settlement and the other a bankruptcy resolution

• Created a schedule of compensable conditions, required documentation and compensation amounts

• Designed to run for 15 years from date of inception
Breast Implant Example

- Amount paid out in bankruptcy resolution since June 2004 - $1.16B
- Claims paid: 101,000 (claims – not claimants)
- Payment range: $600 to $300,000
Breast Implant Example

• Governance Characteristics
  – Court supervision
  – Court appointed administrator and advisors
  – Plan established representatives of both debtor and claimants with authority to participate in implementation of the plan
  – Disputes about interpretation of the plan and settlement criteria are litigated before the court.
  – Individual claim determinations are made by claims administrator and cannot be appealed to court.
  – Plan terms/criteria subject to provisions of bankruptcy code which prohibit material modification.
Asbestos Trusts

- Dozens of bankruptcy filings – resulting in compensation through trusts established under reorganization plan
- Trusts pay claims based on disease category
- Claim values established by historical experience
- Claimants retain right to litigate against trust but historically have not pursued that option
- High claim volume – Manville Trust has over 800,000 claims
- Estimated value of assets in the newer trusts: $40 B
Asbestos Trusts

• Supervised by Court

• Litigation continues against solvent defendants

• Issue of treatment of recoveries in bankruptcy trusts in connection with the claims in litigation

• Likely to continue operations until 2045
• Statutory Program: 9/11 Victims Fund
  – Enacted as part of Air Stabilization and Transportation Safety Act
  – Established administrative compensation program for victims of 9/11 attacks
  – Alternative to litigation – participation in process resulted in waiver of litigation right
  – Uncapped – i.e. no limit on aggregate compensation
  – Implemented through regulations that were subject to public comment process
9/11 Fund

- 9/11 Victims Fund
  - Regulations established compensation guidelines and concepts
  - Each claim reviewed and evaluated based on individual circumstances
  - Claimants were required to submit specific information: for those killed in the attacks, information required consisted primarily of compensation data, dependants, age, employment information. For those injured – medical documentation of injury and prognosis.
9/11 Fund - Duration/Results

- Program operated for under three years
- 7400 claims submitted
- 5560 claims approved and paid
  - 2880 death claims paid $5.9B
  - 2680 injury claims paid $1.05B
  - Less than 100 claims relating to those killed rejected the Fund and decided to litigate instead.
  - Last remaining claim about to start trial – ten years after the event – no other death claims have been tried.
9/11 - Results

• 9/11 Victims Fund
  – Payments ranged from $500 to over $8.5M
  – Compensation method based generally on tort system concept of computing damages – lost future wages, non economic loss, lost services but without requirement to show liability.
  – Consequently, all claimants received compensation (except those injury claimants who could not show that they were at the site or who did not seek medical treatment as required by the regulations.
  – Claimants received different amounts depending on their income levels, age, number of dependants
Gulf Coast Claims Facility

- The GCCF is a hybrid
- The obligation stems from a statute in part – but the origin of this “fund” is different in scope and structure.
- Requirement to establish compensation program in Oil Pollution Act of 1990. Gulf Coast Claims Facility has expanded scope to address claims not covered by OPA.
- There is no formal “oversight” of this Facility. However, the court overseeing the litigation has established certain guidelines
- The GCCF administrator operates under an agreement between BP and the DOJ. Presumably either of those entities could terminate the facility.
Gulf Coast Claims Facility

- Provides funds for short term loss
- Scheduled to run for at least three years

As of April 11 – the GCCF has received 502,774 claims (over 400,000 from individuals/the remainder from businesses)

The GCCF has paid 174,541 claimants $3.7 B. Of that, $2.5 B was paid for “emergency advanced payment.”

- 502
Gulf Coast Claims Facility

- Program covers claims for injury, death, property damage, clean up costs, lost earnings or profits, loss of subsistence use of natural resources
- The bulk of the claims paid fall into the “lost earnings or profits” category
- The payments range from under $5000 to over $500,000.
- The vast majority of payments are in the $10,000 to $25,000 range
Gulf Coast Claims Facility

- The largest number of paid claims for individual lost earnings come from the food beverage and lodging industry.

- The next largest category of paid claims for individual lost earnings is the retail, sales and service category.
Gulf Coast Claims Facility

• Issues Faced
  – Determining actual loss (documentation)
  – Determining “cause”
  – Determining future damages/loss
  – Should claimants accept final payments now with full releases?
  – Ethical issues
  – Effect on litigation