

Diving into the wreck: BP and Kenneth Feinberg's Gulf Coast Gambit

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Torts Today

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100 years of tort reform

- 1900
- Fellow servant rule, assumption of risk, contributory negligence, and no privity defense rendered tort ineffective remedy
- 1906 – 1920
- FELA and Jones Act relaxed strictures for some workers
- Workers comp provided reliable quasi-tort remedy

Workers compensation laws

- All injuries “arising out of and in the course of employment”
- Medical benefits
- Temporary disability
- Scheduled awards for permanent disability
- No pain and suffering awards
- No jury trials

1960's & 1970's

- Automobile accident epidemic spurred expansion of product liability law
- Asbestos epidemic emerges
- OSHA bars use of asbestos, sets safety regulations - but provides no private right of action to improve workplace safety

Types of compensation funds

- **Bankruptcy**
- Johns Manville Products Co.
- **Statutory**
- Vaccine Injury Program
- September 11 victims compensation
- **Judicial**
- Class actions: funds in court
- MDL: settlement trusts



Vioxx®

Global settlement after bellwether trials in multi-state judicially managed product liability litigation against Merck

Vioxx cases settled after **18 bellwether jury trials**

- 2/3 trials won by Merck (12/18)
- Most defense wins based on individual causation
- 4 punitive damages awards
- 5 major awards of compensatory damages
- 3 awards of consumer fraud damages and attorneys fees

Official Vioxx Settlement Program (MDL Plaintiffs Steering Committee)

- **\$4.85 billion settlement fund**
- **Eligible claimants allege heart attack, stroke, or death**
- **85% minimum threshold set by settlement agreement**
- **93% of 47,000 eligible claimants enrolled**



9/11 victims compensation fund

Solomon in a business suit

ATSSSA – Special master shall compensate 9/11 victims for

- **Any pecuniary loss resulting from harm to deceased or injured person**
- **Noneconomic losses – pain & suffering, etc.**

(6) Collateral compensation

- --The Special Master shall reduce the amount of compensation... by the amount of all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments...

ATSSSA - 9/11 Victims retained right to sue airlines for negligence

- **But 97% accepted 9/11 Fund offer**
- NY state tort law applied to opt-outs
- SDNY federal court venue for jury trials
- Uncertain duty owed to ground victims??
- Proof of negligence and causation difficult
- Possible emergency immunity of NYC

9/11/ fund total payout \$7 billion

- \$ 5.9 billion pd on 2,880 death claims
- \$1.1 billion pd on 2,680 personal injury claims
- Average settlement \$1,000,000
- 43.5% paid to claimants whose deceased victims earned under \$100,000
- 30% paid to families with incomes in excess of \$200,000



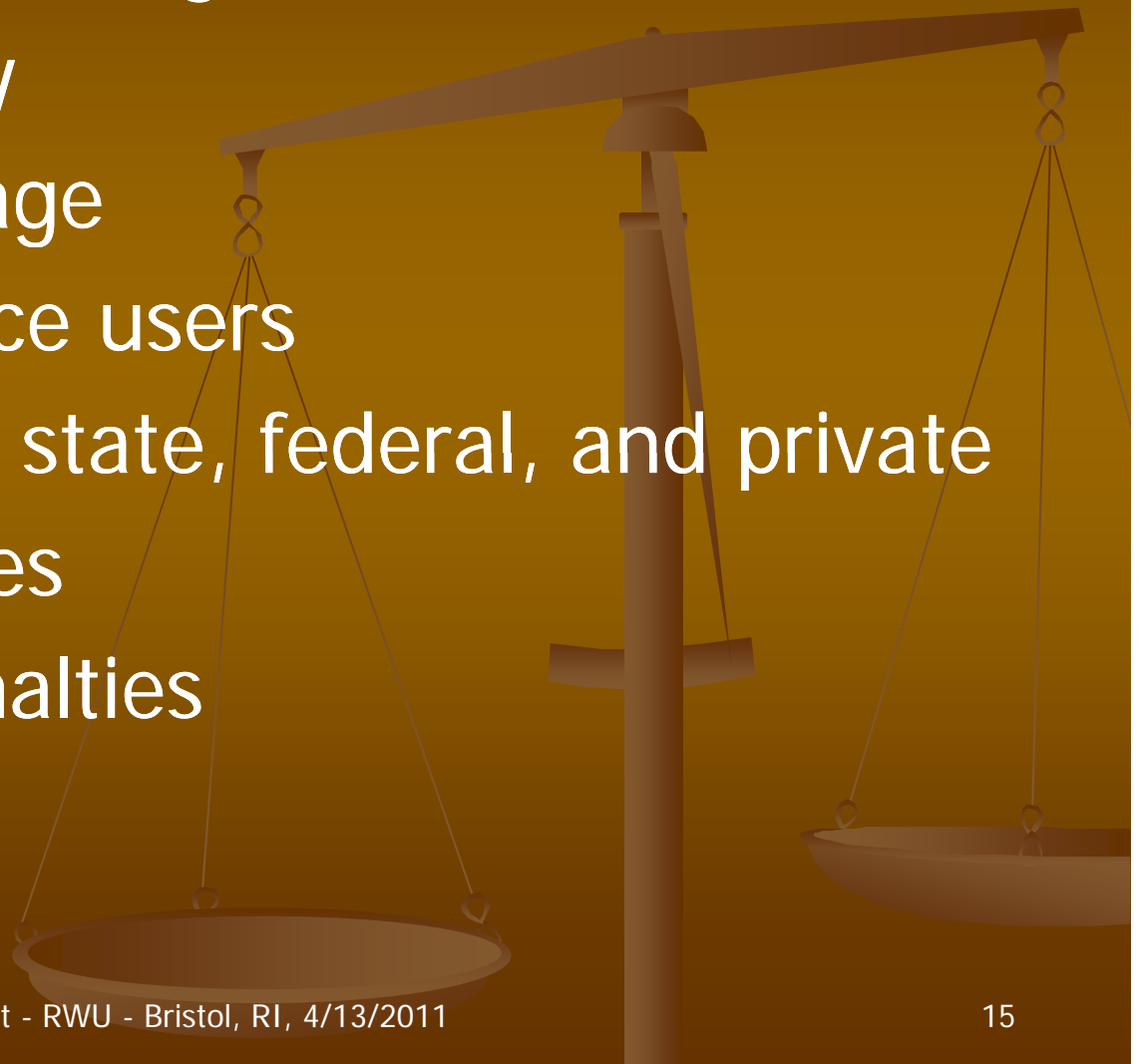
BP & Feinberg's gambit

It's not a fund

It's BP's set-aside for settlement

Types of claims BP faces under statutes, common law, and Oil Pollution Liability Act

- Compensatory damages for:
 - - personal injury
 - - property damage
 - - natural resource users
- Cleanup costs – state, federal, and private
- Punitive damages
- Civil fines & penalties



Oil Pollution Act (1990) 33 U.S.C. § 2702

- "...each **responsible party** for a vessel or a facility from which **oil is discharged**.... into or upon the navigable waters or adjoining shorelines **...is liable** for the removal costs and **damages** ...that **result from** such incident."

Oil Pollution Act - 33 U.S.C. 2705

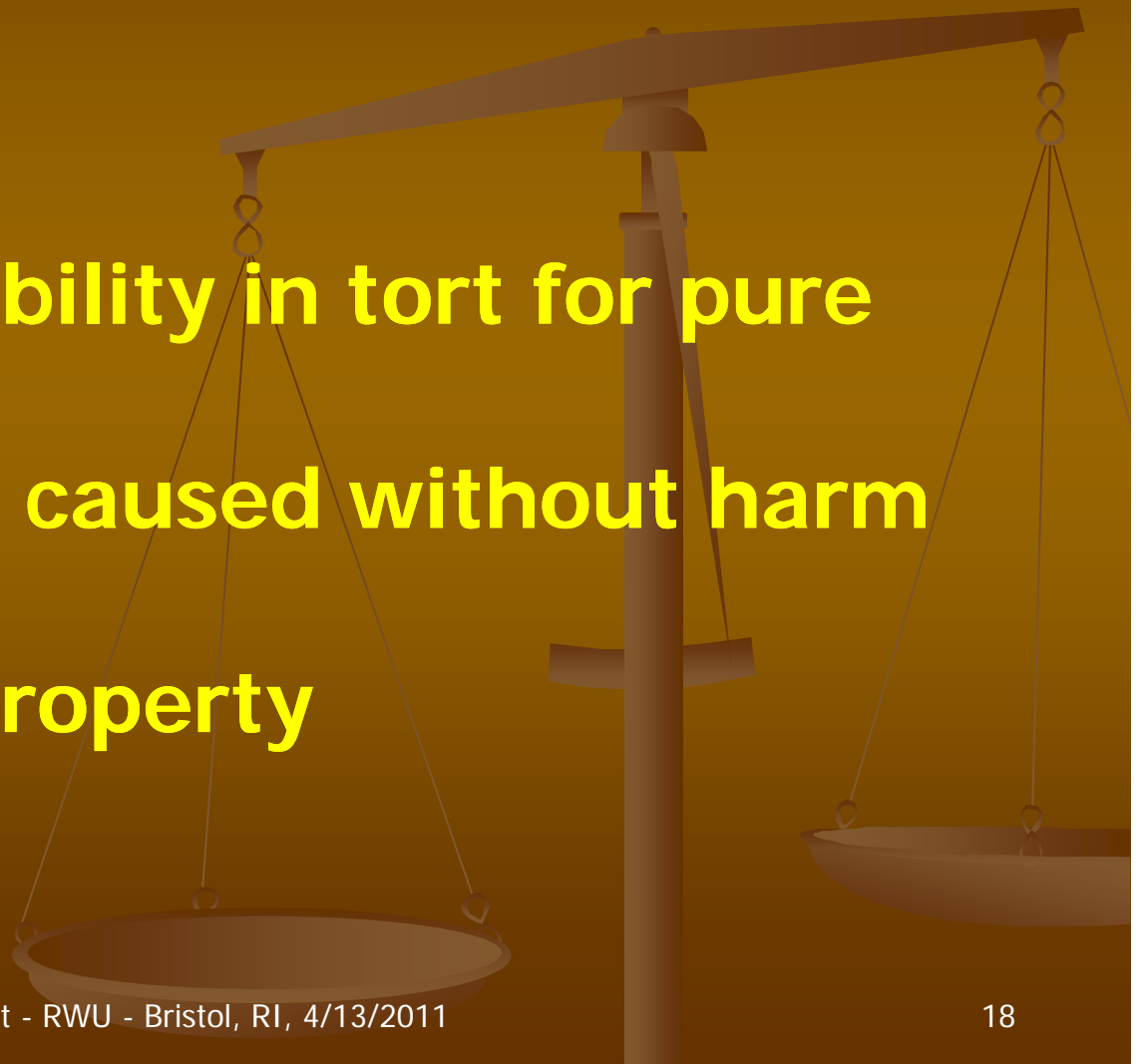
- “The responsible party **shall establish a procedure** for the payment or settlement of **claims for interim, short-term damages.**”

- No federal regulation governs the

“procedure”

The economic loss rule limits liability

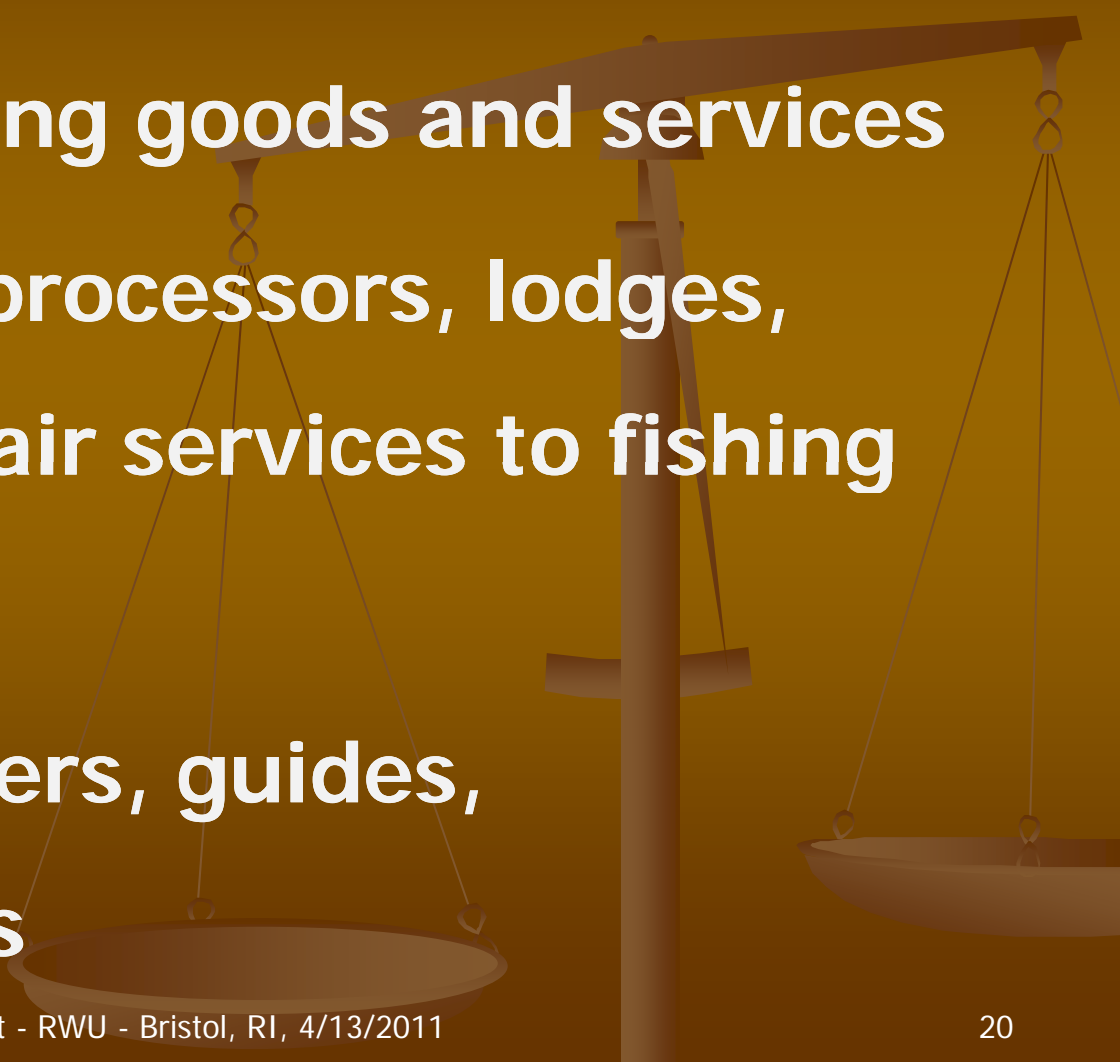
- **General Rule:**
- **There is no liability in tort for pure economic loss caused without harm to person or property**



Historic exceptions for fishermen

- 1943 – N.C. fishermen recover against pulp company
- 1945 – Mississippi fishing camp wins lost profits against Masonite for pollution
- 1974 – St. Barbara Channel Oil Spill: fishermen directly using the resource recover damages

Claims **DENIED** in Exxon Valdez cases

- Decline in fishing license value
 - Sellers of fishing goods and services
 - Wholesalers, processors, lodges, taxidermists, air services to fishing ports
 - Cannery workers, guides, photographers
- 

Judge John Minor Wisdom in dissent (5th cir)
(1985) rejected economic loss rule

- Compensation should be paid for all spill victims who suffer **“Particular damages”** affecting **“primary maritime activities”**

Who is engaged in “primary maritime activity”?

- **Fishermen**
- **Users of the waterways**
- **Suppliers of commodities or services vital to primary maritime activities**
- **Bait and tackle shops**
- **Drydocks**
- **Marinas**
- **Seafood wholesalers or processors.**



The GCCF

Who are Kenneth Feinberg and
the Gulf Coast Claims Facility?

Contract between BP and Feinberg

- “Feinberg Rozen shall **independently determine whether a given Claim is compensable** and, if so, the appropriate amount of compensation.”
- “Feinberg Rozen’s determinations with respect to OPA Claims will **be guided by OPA and federal law.**”
- “All claims payments shall be made from the Claim Fund.”

From the GCCF protocol - November 10, 2010

- The GCCF is administered by Kenneth R. Feinberg... a **neutral fund administrator** responsible for all decisions relating to the administration and processing of claims by the GCCF.

Feinberg & Rosen contractual duties to BP

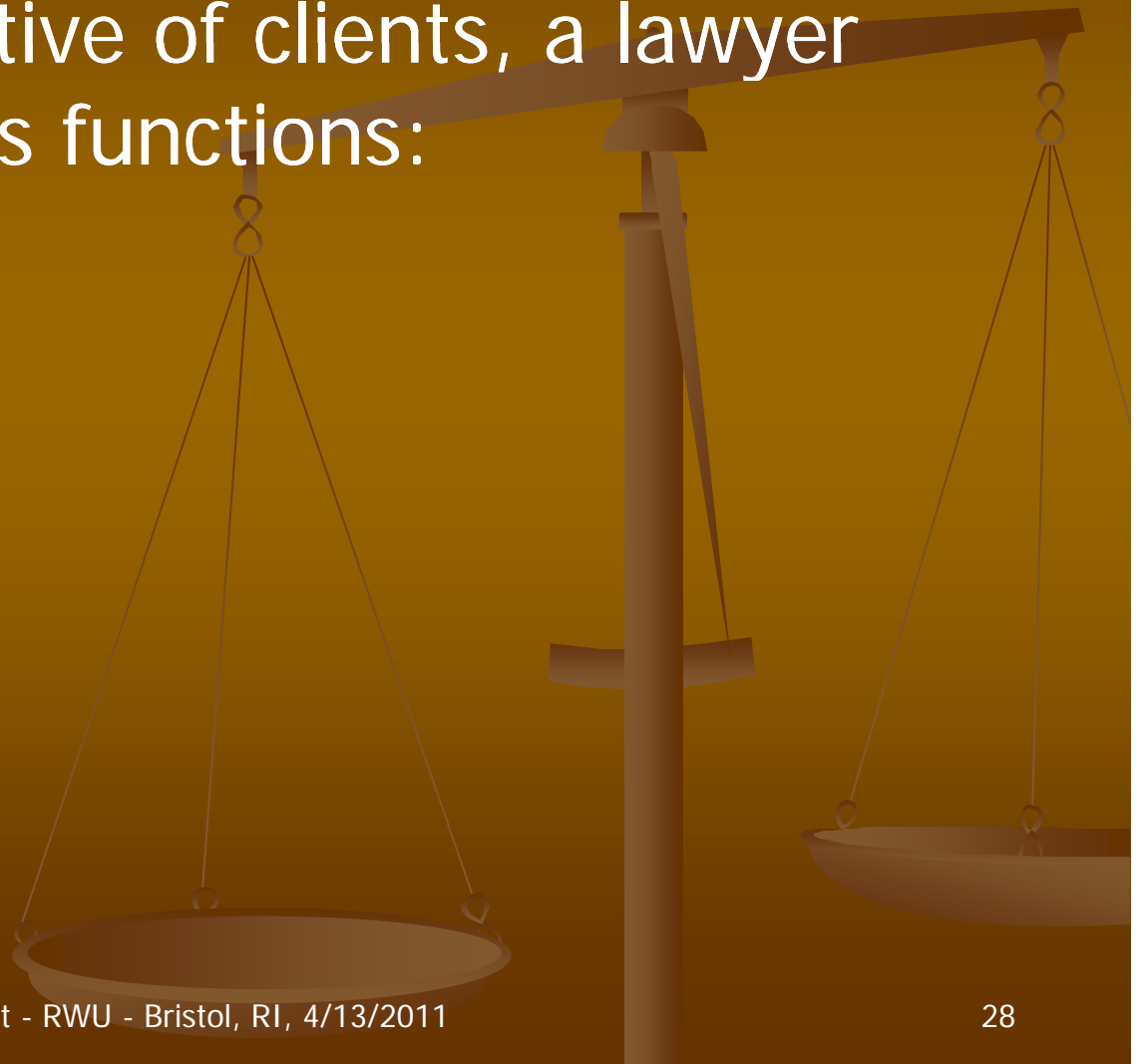
- **Claim intake services**
- **Claim review services.**
- **Claim evaluation services**
- **Claim settlement and payment services**
- **Claim administration and database management**

Prof. Stephen Gillers

- **“You are not in an attorney-client relationship with BP. You are an independent Administrator and owe none of the attributes of the attorney-client relationship (e.g., loyalty, confidentiality) to BP.”**

ABA Model rules of professional conduct - Preamble

- As a representative of clients, a lawyer performs various functions:
 - **As advisor**
 - As advocate
 - **As negotiator**
 - **As an evaluator**



GCCF homepage – after MDL court-ordered changes

- **Mr. Feinberg and the GCCF are acting for and on behalf of BP Exploration & Production Inc. in fulfilling BP's statutory obligations as a "responsible party" under the Oil Pollution Act of 1990.**

GCCF homepage after MDL court held Feinberg must not claim to be independent

- **The Gulf Coast Claims Facility ("GCCF") is the official way for Individuals and Businesses to file claims for costs and damages incurred as a result of the oil discharges due to the Deepwater Horizon Incident on April 20, 2010**

Homepage – after MDL court-ordered changes

- **The GCCF is administered by Kenneth R. Feinberg... who is responsible for all decisions relating to the administration and processing of claims submitted to the GCCF.**

Homepage – after MDL court-ordered changes

- **You have the right to consult with an attorney of your choosing before accepting any settlement or signing a release of legal rights.**

Regulatory lacuna

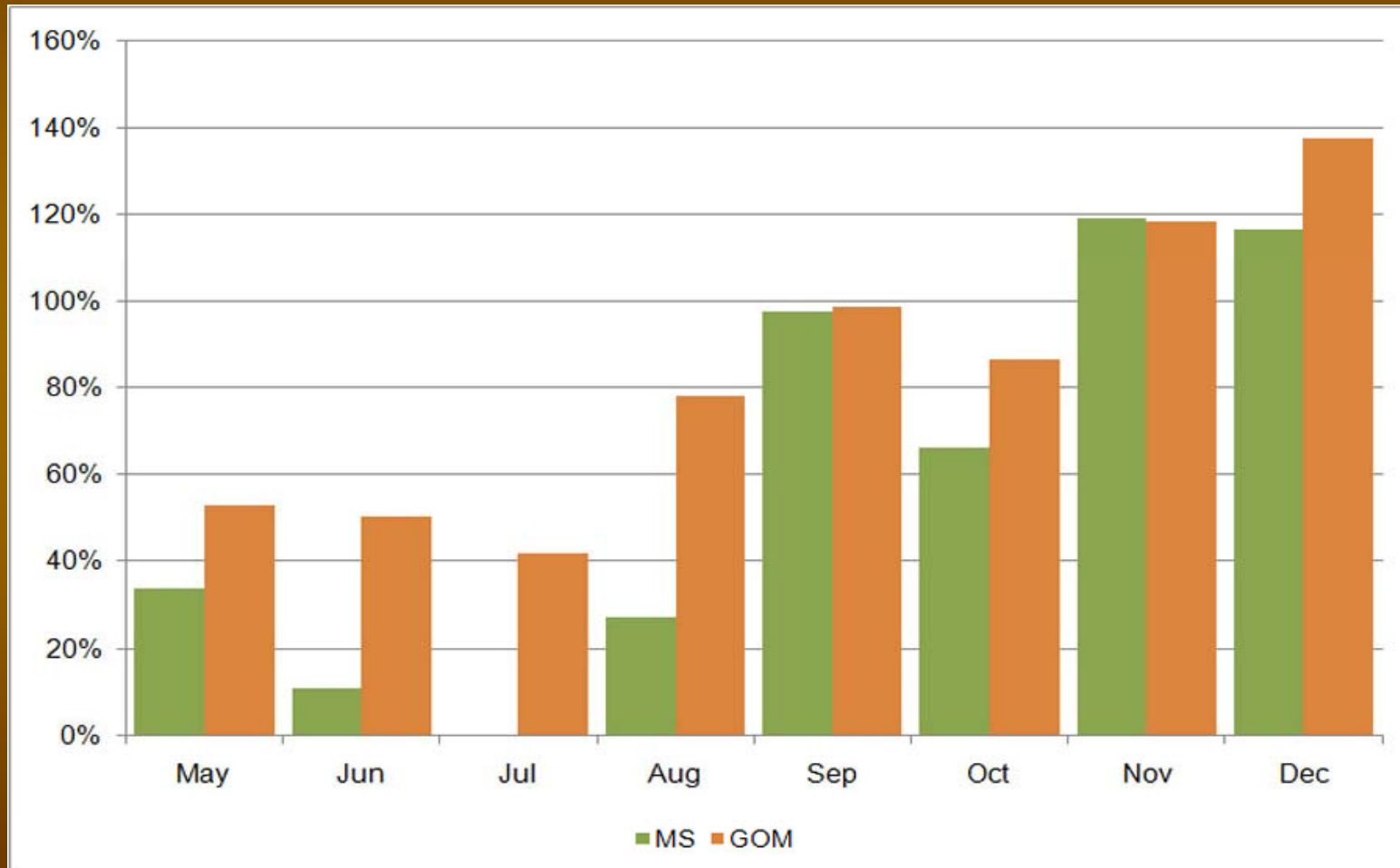
- Who should oversee GCCF in its exercise of BP's statutory duty as a responsible party?
- MDL judge in New Orleans?
- Special master appointed by court?
- Minerals Management Service?
- Dept. of Commerce/NOAA?



Settling with BP

How GCCF/BP proposes to value
past and future losses

Gulf shrimp landings 2008-2009 compared to 2010



GCCF proposed final rule

- Experience with other unanticipated and catastrophic events suggests that for all businesses other than oyster harvesting and oyster processing, recovery will continue in 2011, with full recovery reasonably expected in 2012.

GCCF proposed final rule

- Recovery over this time period would result in a **Final Payment Offer of two times the actual documented losses in 2010.**

BP objects to Feinberg plan

- December 2010 was the best shrimping season in five years
- Fall 2010 tourism was comparable to 2009
- There is no basis for “adopting an **artificially high future loss factor** based purely on the inherent degree of uncertainty in predicting the future”