

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

- 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