**Lecture**

# Handling "Mass Harms" Litigation through Consolidation

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The term "mass harms" is used in this article to describe the claims of many persons who are injured by the same product, conduct, or environmental condition caused by the same defendants.[1] Mass harms may arise from disasters – whether resulting from nature like hurricanes/tsunamis, floods, or earthquakes, or from human error like oil spills and air crashes. They may also arise from injuries suffered by multiple plaintiffs who were exposed to the same defective product, pharmaceutical drug, environmental hazard, or deceptive marketing (in such activities as insurance, banking, finance, or communications service). How to go about compensating the victims for their losses is a pressing question. In more developed countries today, compensation must usually come from such sources as the

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1) When injury to persons or property arises out of the same torious conduct, the multiple claims are commonly referred to as "mass torts." The term "mass harm" in this paper is intended to refer not only to "mass torts" but to all multiple claims arising out of the same conduct of the defendants based on such non-tort legal causes of action as contract, property, consumer, or environmental law.

government, insurance, corporations and entities found to be responsible, or private charities.

This article examines two recent severe mass disasters in the United States and how compensation for victims has been determined and delivered. Given the American policy preference for the market place and the widespread existence of insurance, there has been less government involvement than in mass disasters in other countries. Also given the centrality of litigation for resolving liability in the United Stated, legal proceedings have been the principal means of determining responsibility and compensation.

The American procedural system for aggregation of similar claims is especially well suited to resolving claims for compensation where private or governmental entities are alleged to be at fault in causing a mass harm. If each individual injured by a mass harm were required to litigate his own lawsuit, the courts would be swamped. Or, perhaps even more likely, many claimants could not afford to undertake the litigation and would have to "lump it."[2] The American Rules of Civil Procedure allow for aggregation of the claims of victims of mass harms through liberal joinder of similar claims, consolidation of similar suits, and class actions in which a class representative is allowed to sue on behalf of others similarly situated.

As with most human inventions, these aggregate procedures are not without their problems. American courts have been reluctant to certify class actions for "mass torts" and other "mass harms" because the circumstances under which each individual was

2) *See* Richard E. Miller & Austin Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 Law & Soc'y Rev. 525 (1980-81).

injured are often individualized, making a unitary trial impossible.[3] As a result, in recent years courts have increasingly looked to *consolidation* for managing multiple individual suits. A federal statute provides that all the cases in federal courts arising out of similar conditions can be transferred to a single federal judge.[4] Such "*Multidistrict Litigation (MDL)*" has become a principal procedure for disposing of large numbers of similar cases.

This article will consider two of such MDL litigations arising out of disasters – the *Katrina Canal Breach cases* resulting from Hurricane Katrina in August 2005, and the *BP Oil Spill cases* arising out of the explosion of an oilrig in the Gulf of Mexico in April 2010. These experiences may be instructive for legal systems in other countries, which, like Japan with the 2011 tsunami and Fukushima Daiichi nuclear disaster, have to consider how to assess responsibility and make compensation resulting from catastrophes.

## I. Katrina Litigation

Hurricane Katrina struck New Orleans on August 29, 2005, and, when levees on city canals broke, flooded 80% of the city. The city with a metropolitan-area population of over a million had to be totally evacuated and closed down for several months. The most severe hurricane in modern American history, it caused billions

3) *See* Edward F. Sherman, The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible, 82 TUL. L. REV. 2209 (2008); Eldon E. Fallon, Jeremy T. Grabill, & Robert Pittard Wynne, Bellwether Trials in Multidistrict Litigation, 82 TUL. L. REV. 2323 (2008).

4) 28 U.S.C. § 1407.

of dollars in property damage and some 3,000 deaths. Although the initial cause was an act of nature, many different parties and entities were alleged to be responsible for the canal breaches or for compounding the injuries. Within a couple of days, suits began to flood the courts, with some ten thousand ultimately filed in federal and state courts. There was great variety among the claimants who suffered harm and the multiple defendants alleged to be responsible. Most of the suits were filed in the federal court in the Eastern District of Louisiana, and ad hoc consolidation of those cases was ordered by the judges of that district. The case management techniques mirrored those experimented by MDL courts.

All Katrina-related cases pending in the Eastern District of Louisiana that had a relationship to Hurricane Katrina were transferred to Judge Stanwood R. Duval for consolidated pretrial management. The transfer resulted in the consolidation of very disparate kinds of cases, for example:

- against the federal Corps of Engineers and local government levee, sewage and water boards for failure properly to construct and maintain the levees
- against private contractors and dredgers for faulty construction and work on the levees
- against the Corps of Engineers for destruction of wetlands arising out of a major project fifty years before that dug a ship channel (called MrGo) across the wetlands
- against oil and pipeline companies for drilling over many years that resulted in erosion of wetlands
- against insurance companies for refusing to recognize liability for flooding and storm surge

The suits were based on a wide variety of legal causes of action, including tort, contract, consumer law, state and federal statutes, and admiralty. There were a number of complex legal issues such as governmental liability and immunity, choice of law, and insurance contract construction. Somehow the tens of thousands of cases had to be put into categories and different procedures and time periods established for disposing of each category.

Judge Duval issued a series of opinions on motions to dismiss and for summary judgment determining central legal issues. He ruled against the U.S. and Army Corps of Engineers that was sued for negligence in the construction and maintenance of the Mississippi River Gulf Outlet. He found the claims for damages were not barred as a matter of law by an earlier federal statute, but was later reversed by the Fifth Circuit Court of Appeals, and the federal Corps was let off the hook. He also held that the local levee, sewerage, and water boards were not immune from suit under sovereign immunity, and they settled out most of the claims, usually through their insurance policies. Finally, he found that "all risk" homeowners insurance policies were ambiguous as to exclusion for flood and storm surge and refused to dismiss insurance companies. This ruling was also later reversed by the Fifth Circuit. The importance for case management purposes was that he isolated and ruled on key issues of law whose determination was standing in the way of settlement and grouped like cases for trial (although most were ultimately settled). He had the benefit of precedents established in MDL cases by Judge Eldon E. Fallon, also of the U.S. District Court for the Eastern District of Louisiana that utilized bellwether trials and other

techniques that could be looked to as models.[5)]

Having the full spectrum of the Katrina cases before a single judge who devoted most of his time over a period of years to the Katrina MDL enabled Judge Duval to see how different pieces of the litigation affected the totality of the cases. It also enabled him to master the highly technical scientific issues that arose in very different contexts and cases. The consolidation clearly reduced the costs of discovery which could be scheduled to avoid duplication and made available for all the cases.

## II. BP Oil Spill Litigation

The BP Oil Spill Litigation presents some of the most challenging issues for court administration of any piece of complex litigation. The explosion on the oilrig resulted in the escape into the Gulf of Mexico of large quantifies of oil for 87 days. This severely affected fishing, riparian property in four states along the Gulf (Texas, Louisiana, Alabama, and Florida), the tourist industry, and the livelihood of large numbers of individuals and businesses that depended on servicing those industries. Tens of thousands of claims were filed in suits in state and federal courts across the country, although most were in the four states directly affected. They asserted dozens of causes of action based on such areas of the law as tort, contract, consumer, environmental, statutory, and maritime law. Unlike most single event disasters like plane crashes, bridge collapses, or even the 9/11 attack on the World Trade Center, the BP Oil Spill Litigation

5) *See* note 3. *infra*.

involved a broad range of claims from death and personal injury to environmental and property damage to economic losses in a variety of occupations and commercial enterprises. Crafting manageable procedures for judicial resolution of such an amorphous collection of claims fell upon the judge to whom the federal court cases were transferred by the Panel on Multidistrict Litigation. This article will look at the still-developing procedures that take place under MDL and how court-administration techniques are being creatively used to establish a manageable process for payment of claims, settlement, or trial.

### A. Case Management

The Panel on Multidistrict Litigation assigned the litigation to Judge Carl Barbier, a federal judge in the Eastern District of Louisiana. Upon being appointed transferee judge, Judge Barbier began holding conferences with counsel to establish a framework for categorizing and organizing the cases. He appointed plaintiff and defendant liaison counsel, plaintiff and defendant steering committees, and a special master. The first status conference was held in September 2010, which about two hundred attorneys from all over the country attended, spilling over into another court room. They represented plaintiffs in the thousands of cases transferred to the MDL (both originally and as "tag along" cases filed after the original transfer order) as well as the defendants named up to that time in the various complaints. The principal defendants named in complaints were:

- the operator of the rig, British Petroleum;
- the owner of the rig, Transocean;
- the contractor that worked on the underwater operations

and did cement work alleged to have been defective, Halliburton;

- the parties to a joint operating agreement with BP, Anadarko E & P Company and MOEX Offshore 2007;
- the manufacturer of a safety valve, Weatherford International;
- the manufacturer of the blowout preventer, Cameron International Corp.[6)]

Case activity and proceedings since the initial conference included a large variety of discovery and managerial issues. An early central task for managing the litigation was how to divide up the widely varying claims into manageable groupings. The attorneys and court coined the phrase "pleading bundles" to describe the categories to which the cases were assigned. The court approved bundles for a number of claims.[7)]

The bundles were intended to be flexible and subject to change. They reflected recognition that while all the claims share some basic core issues, such as the liability of the various defendants

6) *See* Robert Force, Martin Davies & Joshua S. Force, Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases, 85 TUL. L. REV. 889, 898 (2011).

7) Bundle A, Personal Injury and Death; B, Private Individuals and Business Loss Claims (broken down into B1, Non-Governmental Economic Loss and Property Damages; B2, RICO pleadings; B3, Post-Explosion Clean-Up Claims; B4, Post-Explosion Emergency Responder Clams); C, Public Damage Claims; D, Injunctive and Regulatory Claims (broken down into D1, Claims Against Private Parties, and D2, Claims Against the Government, Official, or Agency); and E, Designation of Subsequently-Added Cases. Pretrial Order No. 11 [Case Management Order No. 1] at 2-5, In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April. 20, 2010, MDL No. 2179 (E.D. La., Oct. 19, 2010), available at http://www.laed.uscourts.gove/OilSpill.Orders/PTO11.pdf.

for the explosion, they may have significant differences as to other issues and defenses. The bundles are an attempt to group claims with similar issues so that they might be addressed and possibly resolved independently of other bundles. A number of the bundles are characterized by the *type of claimant*, for example, private individuals, businesses, emergency responders, or governmental entities; or by the *nature of the injury*, for example, personal injury or death, property damage, economic loss, or clean-up expenses; or by the *cause of action*, for example, arising under the Oil Pollution Act of 1990 (OPA), state statutory and common laws, and maritime law.

Scheduling of a trial or trials in as complex cases as the BP Oil Litigation is a challenging task. Bellwether trials of a small number of individual cases have become a favored technique for giving parties in complex litigation a sense of the strength of their cases, hopefully to lead to settlement. Judge Barbier discussed use of bellwether trials, but the special circumstance of this case arising out of maritime law has led to a relatively early trial date for what could be a comprehensive trial of many of the issues.

Under maritime law, the owner of a vessel (which the BP oilrig is considered) is entitled to file a complaint for a "limitation" proceeding in which all persons with maritime or state law claims resulting from an oil spill must bring their claims against it in one proceeding. The liability of the owner for loss by any person of property, goods, or merchandise on board, or for any damage or injury resulting from collision, is limited to the value of vessel (which, in the case of the BP oilrig, was said to be about $27 million). Transocean filed a limitation complaint, and Judge Barbier set a trial date for February 2012. Thus instead of

dividing different issues into separate segments to be tried at different times, or into segments involving separate defendants, the limitation proceeding will determine in one massive trial which parties are liable and in what amounts. This provides a "comprehensive trial" model for MDL's that seems quite different from "segmented" approach used in other MDL's.

### B. Claims Process

The BP Oil Spill Litigation differs from many other MDL cases because settlement and claims processes began shortly after the accident and were in full swing by the time the case had been transferred to the MDL court. The reason is related to the provisions of the principal statutory cause of action, the Oil Pollution Act of 1990 (OPA) that created a cause of action for persons injured by oil spills. Once a party is designated by the President as a "responsible party" (as BP was early on), it must set up a claims process for those injured by its discharge of oil. Claimants have to submit a claim for removal costs or damages before filing suit under OPA. Consistent with OPA, BP set up a claims process and began making payments to claimants, and then created the "Gulf Coast Claims Facility (GCCF)," which assumed BP's claims responsibilities.

Claims facilities are of relatively recent origin, but they have become a central institution in the resolution of complex litigation. Professor Francis McGovern, of Duke University School of Law and Special Master in this litigation, has described the development:

> "Claims resolution facility" is a generic term used to describe a wide range of entities that process and resolve claims made against a potential funding source. In the context of a natural

disaster, for example, there might be facilities to process claims based upon insurance policies, federal or state statutory or administrative rights, international relief efforts, contractual obligations, or any other basis for receiving economic or noneconomic benefits. These facilities are generally characterized by a large number of claims that are in need of rapid and efficient resolution."[8)]

The structure and procedures of claims facilities can be quite different depending on the nature and circumstances involved. Claims facilities are frequently the product of a settlement, but they may also arise out of regulatory or legislative enactments (as in the case of the OPA) or of insurance, trust, or other contractual obligations. Claims resolution could be accomplished in litigation through appointment of a special master to serve as claims administrator. That the special master must be independent and neutral in regards to the parties goes without saying which is further ensured by the fact that the judge has the final decision-making authority.

Not all claims facilities operate under court supervision, but since they may serve as an alternative to litigation, they operate in the shadow of the law, and judicial approval may be involved. Where, as here, a claims facility operates as a pre-litigation device, an MDL court having jurisdiction over cases in which claimants are parties or potential parties may have to exercise supervisory or remedial authority to ensure fairness in the litigation before it.

The BP Oil Spill Litigation raised questions as to how a claims facility should be set up. In June 2010, British Petroleum

8) Francis McGovern, The What and Why of Claims Resolution Facilities, 57 STAN. L. REV. 1361 (2005).

announced the appointment of Kenneth Feinberg, an attorney with extensive experience in claims administration, as administrator of an "independent claims process" for individuals and businesses injured by the oil spill. The announcement was made by President Obama at a press conference following a meeting at the White House with BP representatives that resulted in BP establishing a $20 billion fund for claims. The agreement between Mr. Feinberg and BP was not memorialized in detailed contractual terms, but the Gulf Coast Claims Facility (GCCF) was established under his control and supervision, assuming the duties of administering the claims process. Mr. Feinberg apparently consulted with BP concerning both the substantive and procedural standards for the payment of claims. Although he did not draw a salary, his law firm would be paid $950,000 a month, in addition to expenses and the possibility of further compensation. This fee arrangement was not publicized, and most claimants would not have been aware of it.

The sizable fee arrangement is not objectionable in itself; a corporation can enter into a contract with a private entity to pay well for it to carry out the resolution and payment of claims on behalf of the corporation. However, the fee arrangement does reveal a relationship which claimants who are encouraged to go through an "independent" claims process would have an interest in knowing. Knowledge of the arrangement may or may not make a difference to any particular claimant, but it could be a factor in a claimant's decision as to whether to accept an offer by the GCCF. Highly publicized statements by Mr. Feinberg and BP that he and the claims facility were independent and only had an interest in compensating claimants properly should have been

capable of being balanced with this information.

**1.** Court Supervision over Communications with Claimants by Claims Facility

In December 2010, the Plaintiffs' Steering Committee filed a motion with the court to limit certain conduct of the GCCF concerning public statements and communications with claimants. It objected to a number of features of the claims process being administered by Mr. Feinberg, including encouragement of filing a claim in lieu of participating in the court litigation, failure to disclose the relationship between Mr. Feinberg and the facility and BP, and requiring releases of all responsible parties if a claim offer were accepted.

Concerns about defendants' communications with potential litigants or class members in an effort to reach settlement or dissuade from litigating are not new. Defendants who are sued in a class action may attempt to settle as many of the cases as possible. Settlement may not even be necessary in a class action if putative class members can be persuaded to opt out of the class action if it is certified. In Kleiner v. First National Bank of Atlanta,[9] the President of a bank that was sued on behalf of a class of borrowers concerning discriminatory rates organized a campaign to contact their borrowers by telephone. The loan officers were directed to "do the best selling job they had ever done" to persuade the borrowers to opt out of the class action. In a few days, 3,000 borrowers were contacted and 2,800, representing total loans of almost $700 million, opted out.

When this was brought to the attention of the trial court, the

9) 751 F.2d 1193, 1197 (11th Cir. 1985).

bank claimed these were purely informational contacts with its borrowers. The court invalidated the opt outs, held the bank's lawyer in contempt, and imposed costs on the bank and a $50,000 fine on its counsel. The Eleventh Circuit affirmed, stating "it is obviously in defendants' interest to diminish the size of the class and thus the range of potential liability by soliciting exclusion requests." It found that such "unsupervised, unilateral communication with the plaintiff class sabotage[s] the goal of informed consent" and the effectiveness of a class action and was not protected by the First Amendment. It also acknowledged the power of a court to ensure the fairness and integrity of the litigation process and "to respond to an unfolding and often unpredictable sequence of events."

*Kleiner* was an egregious case in which a court had to act in the face of actions that would directly undermine the opt-out process being administered by the court. The objections of the PSC in the BP Oil Spill Litigation addressed more subtle influences by a private claims facility that is not under the authority of the MDL court. However, Judge Barbier had precedents close to home in which Judge Fallon, as an MDL transferee judge in the Eastern District of Louisiana, had found inherent judicial power to ensure the integrity of settlement processes relating to attorneys' fees[10] and communications with potential claimants.[11]

**2.** Order regarding Communications in BP Oil Spill

The Plaintiffs Screening Committee petitioned Judge Barbier to

10) In re Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 617 (E.D. La. 2008).

11) Judge Fallon had issued an order as MDL judge limiting statements and communications by defendants concerning claims and settlement in Order and Reasons at 4, Turner v. Murphy Oil USA, Inc., No. 05-4206, dated Nov. 14, 2006.

clarify and limit public statements by Mr. Feinberg and the GCCF concerning the independence of the facility and claimants' need for a lawyer in resolving their claims and deciding whether to accept any offer. It cited statements by Mr. Feinberg to the effect that claimants would be better off by not litigating and instead resolving their claims through the GCCF. The PCS also cited the fact that after criticisms were raised, BP, in an apparent attempt to ensure that claimants had access to attorneys, hired several private law firms to consult with claimants. The retained firms maintained that they were independent of BP and that the fact that they were paid by BP would not mean that they would abrogate their ethical responsibilities to the client. Finally, the PSC sought court intervention concerning the kind of release required by the GCCF in order for a claimant to receive a final payment. Claimants were required to release all possible responsible parties, not just BP. As a private claim facility, the GCCF has a right to impose such restrictions on payouts, but the requirement of a global release is heavily weighted in favor of the interests of the defendants. If the facility is to be viewed as a neutral entity with fair procedures, requiring a release of all possible defendants may be unfair to claimants with genuine claims against other defendants.

Judge Barbier granted a good part of the relief sought.[12] First he found that the GCCF and its administrator, Mr. Feinberg, were not independent of BP, but rather a hybrid entity. The opinion focused on such factors as the appointment of the administrator

12) Order at 13-15, In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D La. Feb. 2, 2011), available at http://www.laed.uscourts.gov/OilSpill.OrderonRecDoc912.pdf.

by BP without input of claimants or the court, the difference in the administrator's role from a "true third-party neutral" such as a mediator, arbitrator, or special master, the fact that the GCCF and the administrator were not government agents, and the fact that the GCCF sought settlement of claims that fell outside OPA. It relied on precedents recognizing the authority of a court to control communications relating to pending MDL litigation while upholding First Amendment principles. He ordered the GCCF and Administrator to:

(1) Refrain from contacting directly any claimant that they know or reasonably should know is represented by counsel, whether or not said claimant has filed a lawsuit or formal claim.

(2) Refrain from referring to the GCCF, Ken Feinberg, or Feinberg Rozen, LLP (or their representatives), as "neutral" or completely "independent" from BP. It should be clearly disclosed in all communications, whether written or oral, that said parties are acting for and on behalf of BP in fulfilling its statutory obligations as the "responsible party" under the Oil Pollution Act of 1990.

(3) Begin any communication with a putative class member with the statement that the individual has a right to consult with an attorney of his/her own choosing prior to accepting any settlement or signing a release of legal rights.

(4) Refrain from giving or purporting to give legal advice to unrepresented claimants, including advising that claimants should not hire a lawyer.

(5) Fully disclose to claimants their options under OPA if they do not accept a final payment, including filing a claim in the pending MDL 2179 litigation.

(6)Advise claimants that the "pro bono" attorneys and "community representatives" retained to assist GCCF claimants are being compensated directly or indirectly by BP.

Judge Barbier made no ruling on the request to prevent BP from requiring a release of all parties as a condition of receiving a final claim payment. Judge Fallon had also not addressed the release issue in *Murphy Oil*. The release issue is complicated; courts are hesitant to interfere with the bargaining behavior of parties in advance of a settlement, and the point at which the terms of a settlement become so unfair as to be "unconscionable" is often difficult to draw. These court orders instead sought to ensure transparency and prior legal advice so that claimants can appreciate the significance of signing a global release.

In March 2012, just before the trial of the case was to begin, BP and the PSC reached a settlement. It created a court-supervised settlement program that replaced BP's claims facility. Two classes were created. One was an "economic loss" and "property damage" class of individuals and businesses affected by the oil spill (such as the fishing and tourist industries and property owners along the Gulf). The other was a "medical" class of persons who suffered injury from contact with oil or dispersants (including some 90,000 workers involved in the clean-up). More precise criteria for payments were set out (including drawing of zones based on proximity to the oil spill) and consideration of individual factors that could justify more compensation. Thus through trial and error, a more transparent compensation and claims process evolved out the BP-controlled facility that has resulted in more accurate payments for the harm suffered as under a court-supervised facility.

## III. Conclusion

The Katrina Levee Breach and the BP Oil Spill litigations are a gold mine for studying the administration of complex litigation. The MDL judges were confronted with a host of challenging issues relating to the proper role of a transferee judge, case management techniques, and the conduct of a claims process. Particular questions as to overreaching by a defendant in the conduct of its claims process and as to the authority of MDL judges over a private claims process that is independent of the MDL were raised in BP Oil Spill. These MDL cases represent a further development in the evolving supervisory powers of MDL judges and their role in shaping the process in the interests of a fair and efficient settlement.