

...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE &
DEMOCRACY
NEWS

Dear Friends,

Since its founding, the Center for Justice & Democracy has been dedicated to fighting very hard against attempts to weaken our civil justice system, so-called “tort reform.”

Unfortunately, another corporate movement is gaining ground that could be even more destructive – the movement to force disputes into alternative compensation systems. These new schemes resemble “tort reform” in that they protect businesses from liability exposure, compel victims to resort to processes where more powerful corporate interests can prevail and disrupt critical functions of the tort system.

With this issue of *Impact*, we take a look at the impact on victims of three different kinds of compensation schemes – BP’s highly controversial claims fund, the proposed fund for 9/11 workers, and the federal vaccine court, which was set up in the 1980s. We see that each one is vulnerable to money and politics, to the detriment of the injured.

It’s another cautionary tale, and one that CJ&D takes very seriously! We’ll keep you posted!

Sincerely,
Joanne Doroshow
Executive Director

IN THIS ISSUE: COMPENSATION FUNDS

BP’S CLAIMS FUND: JUSTICE DELAYED AND DENIED

Over the years, mostly due to pressure from corporations and their insurers but sometimes because of unusual national events, victim compensation funds are established. These funds are meant to provide monetary help for wrongly injured persons. However, rather than allowing them to go to court against the wrongdoer, disputes are resolved in some sort of administrative system. A victim’s right to trial by jury is eliminated. Legal accountability for those who commit wrongdoing is gone or severely weakened.

Sometimes, but rarely, these funds provide a valuable function as in the case of the 9/11 victims. However, they all carry risks. Once an area of law is removed from the civil justice system and is codified

by statute, it can be immediately and forever vulnerable to manipulation by political forces and can become a nightmare for those it was originally meant to help. The fund set up to handle claims resulting from the April 20, 2010, BP/Deepwater Horizon oil rig explosion appears to have quickly turned into such a nightmare.



After pressure from the White House, BP agreed to set up a \$20 billion no-fault fund for spill victims. To administer this fund, called the Gulf Coast Claims Facility (GCCF), the company hired Kenneth Feinberg, whose law firm, Feinberg Rozen, represents a large number of corporate clients as a self-described “foremost law firm for

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FORGOTTEN SEPTEMBER 11TH WORKERS

In the wake of the September 11th, 2001 terrorist attacks, Congress quickly passed the Air Transportation Safety and System Stabilization Act. This legislation simultaneously removed any possibility of liability claims against the airlines and, in exchange, provided compensation to victims injured or killed by the aircraft crashes through a September 11th Victim Compensation Fund (Fund). The Act became law on September 22, 2001.

The federal no-fault program, overseen by Special Master Ken Feinberg, had a narrow definition of eligibility. Only victims aboard the flights, those present at the World Trade Center, the Pentagon or site of the aircraft crash in Shanksville, PA at the time or immediately following the crashes and representatives of deceased individuals could participate. Fein-

berg’s narrow eligibility rules left no recourse for the thousands of 9/11 workers, many of whom volunteered for days or weeks after the 9/11 attacks, who became ill due to severe toxic exposure. These workers include traditional first responders, such as firefighters, police and paramedics, and a diverse population of construction, utility and public sector workers. Most never received proper respiratory gear or warnings about airborne dangers from the asbestos, mercury, lead, pulverized glass and other deadly substances that had been released into the air when the towers collapsed. As a result, they were unwittingly exposed to an estimated one to two million tons of toxic dust. Some have since died, are now sick or may become sick in the future. Similarly, recovery workers at the Fresh Kills

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mediation, arbitration, other forms of alternative dispute resolution, and negotiation strategy.” Feinberg was recently well-known as the Special Master of the federal no-fault September 11th Victim Compensation Fund.

Feinberg, who is on BP’s payroll, was given power to decide how much compensation, if any, tens of thousands of businesses and individuals would receive for spill-related removal and clean-up costs, damages to real or personal property, lost earnings or profits, loss of subsistence use of natural resources and physical injury or death. According to the system set up by Feinberg, these payments can come in two forms: 1) emergency advance payment for up to six months, with November 23, 2010 as the deadline for filing these claims; and/or 2) a take-it-or-leave-it final settlement.

Feinberg decided, on his own, that victims who accept a final payment will lose their right to sue BP and possibly other defendants involved in the disaster, like Transocean, who owned and leased the Deepwater Horizon rig to BP, and Halliburton, the contractor responsible for cementing BP’s sub sea well. He reportedly has told victims that in his opinion, “It is not in your interest to tie up you and the courts in years of uncertain protracted litigation when there is an alternative that has been created.”

Yet many believe that Feinberg’s “alternative” has been a disaster itself. Emergency relief applicants, many of whom are struggling to pay their bills, have experienced long delays in payment and many have been denied altogether. As of September 25th, the Fund had paid only 33,025 of 76,831 emergency payment claims submitted. Over 8,700 emergency applicants currently have their claims under review. Even the U.S. Justice Department has been extremely critical of Feinberg’s performance. In a letter dated September 17th, Associate U.S. Attorney General Thomas Perrelli warned Feinberg that the present pace of claims is “unacceptable” and directed him to “speed up this process” since

many of the thousands of individuals and businesses affected by the spill “simply do not have the resources to get by while they await processing by the GCCF.”



Poor communication has also been an issue. Since Feinberg took over the BP Fund, local claims adjusters have been forbidden from contacting applicants with questions. That job is reserved for Feinberg’s Washington, D.C. employees — 25 in all, who review about 1,000 claims a day — which helps explain the bottleneck that’s delaying payments on claims. As one Gulf area claims staffer told the September 17th *Times-Picayune*, “The adjusters would like to talk to claimants,” adding that “they like a personal touch They say, ‘If I could just talk to this guy and verify this one point, I could get him paid, but I can’t talk to him.’”

Lack of transparency is another problem. For example, participants in ProPublica’s BP Claims Project said they are “unable to speak with adjusters who have direct knowledge or decision power over their claims, and that telephone operators in Feinberg’s organization have no more information than is available on the claims website.”

Emergency funds, even when paid, have also been woefully inadequate. Twenty-five-year-old Adrienne Trosclair, a deckhand on her father’s shrimp-boat — which had been unable to fish in months — received a \$300 check that was supposed to last six months. “I thought I wanted to die, because of thinking about all my bills, my back bills, especially my car note because I really do need my car,” Trosclair explained to local Louisiana station *WWLTC*. Alabama business owner Jeff Hardy had a similar story,

receiving only \$5,000 despite suffering more than \$1 million in losses and providing 1,700 pages to back up his claim. “I’m to the point now where I don’t know if my doors will be open in another month,” Hardy told Feinberg during a September town meeting. Sisters Sheila Newman and Sheryl Lindsay, who own and operate a destination wedding service that plans weddings on the beach, were paid about a tenth of the \$240,000 the spill cost them in lost weddings, forcing them into possible bankruptcy.

Victims who have filed claims for physical injury or death haven’t fared any better. As of September 25th, the GCCF had paid a total of only \$736.50 on 3 of 2,006 emergency claims submitted. Thirty-five-year-old Clayton Matherne is one of the many applicants who has yet to see compensation. The crew-boat worker became severely ill from chemical exposure while cleaning up the spill site; he can no longer work, takes medication and needs help bathing and

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FORGOTTEN SEPTEMBER 11TH WORKERS

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landfill spent countless hours without protection as they sifted through toxic wreckage in an effort to find the remains of those who were killed.

Death, illness or fears of developing illness, coupled with widespread government failures to provide health care and other vital support, prompted many Ground Zero workers and their families to turn to the civil justice system for help.

Since 2003, more than 10,000 firefighters, police officers, construction workers and emergency responders have filed lawsuits against 90 government agencies



and private companies, alleging that their illnesses and injuries were caused by exposure to toxic dust while working at the site. Victims claim the defendants failed to provide safety equipment and

supervision that would have protected workers as they responded to the catastrophe and removed debris.

To date only one settlement has been reached. On June 10, 2010, lawyers for New York City and nearly 10,000 rescue and cleanup workers announced a \$712.5 million settlement to be paid out by the city's insurer. Ninety-five percent of the plaintiffs must approve the agreement by November 8th for it to be valid. As of August 28th, over 50 percent of claimants had opted into the agreement.

Some in Congress would like to reopen the September 11th Victim Compensation Fund to take care of these sickened emergency responders and recovery and cleanup workers. A bill was voted out of the U.S. House during the last week of September 2010, with New York lawmakers vowing that they will "not rest



until we finally provide proper care for ailing 9/11 responders and survivors, and fill the last remaining gap in America's recovery from the attacks." President Obama has also pledged to sign the bill into law once it passes both the House and Senate, but it remains to be seen whether the Senate will act. If U.S. lawmakers fail to help, civil lawsuits against non-settling defendants and the \$712.5 million settlement — which, unfortunately, is far less than what supporters in Congress want to give victims — will be the only way for injured workers and their families to receive compensation and achieve justice.

THE FAILURE OF THE VACCINE COURT

The national Vaccine Injury Compensation Program is an example of an administrative compensation system that began with good intentions. However, like many such codified systems, it has become vulnerable to influence-peddling and budgetary considerations that were not contemplated by lawmakers at the time it was established.

In the early 1980s, parents across the nation began filing lawsuits against vaccine manufacturers and health care providers after their children suffered harmful side effects from the DTP (diphtheria, tetanus, pertussis) vaccine. Pharmaceutical companies responded with a threat — they would stop making vaccines unless federal lawmakers shielded them from liability.

As a result, in 1986, Congress created the Vaccine Act, which, among other things, set up the Fund, an administrative no-fault compensation scheme run by the federal government. As originally

contemplated, if you or your child receives a covered vaccine and then presents a covered injury from the vaccine, you or your child is entitled to compensation. However, as new political forces have modified this law's implementation, extreme problems with access and compensation for victims have developed. Though Congress intended claims to be handled "quickly, easily and with certainty and generosity," the Vaccine Court has failed in every respect, bringing further pain to victims who have sustained vaccine-related injuries and their families.

Burdens and Delays. The process for obtaining compensation was supposed to be simple. Applicants file a claim against the U.S. Department of Health and Human Services (HHS), which sets the covered vaccines, the covered injuries, the filing deadlines and the amount of compensation. The claim is then managed and adjudicated by a special master within a section of the U.S. Court

of Federal Claims commonly known as the "Vaccine Court." Lawyers from the U.S. Justice Department represent HHS in all proceedings. Victims can only seek redress in civil court after the special master issues a final judgment.



However, to qualify, the vaccine and the injury must be addressed in HHS's vaccine injury table. Individuals with non-table injuries can also receive compensation but must litigate fault in the Vaccine Court's administrative setting

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BP'S CLAIMS FUND: JUSTICE DELAYED AND DENIED continued...

dressing. "I'm afraid to fall asleep and scared not to wake up and afraid each breath I take could be my last," Matherne said in the September 19th edition *Houma Today*. Injuries like Matherne's raise questions about the health effects of the BP oil spill on clean-up workers, Gulf Coast residents and the public, who might develop exposure-related illnesses in the future, long after the deadlines for claims have passed.

Not everyone is waiting on Mr. Feinberg. At the time of publication, BP and other companies face about 400 federal lawsuits seeking compensation for lost business revenue, environmental cleanup

costs, personal injury and other damages. April 20, 2011 is the filing deadline for spill-related claims. U.S. District Judge Carl Barbier, who is overseeing the consolidated litigation, expects thousands of suits in his court. A key proceeding in the litigation — a trial to determine the proportion of fault among the corporate defendants, in addition to whether Transocean's liability can be capped at \$26.7 million (essentially the costs of the sunken rig) based on a 159-year-old maritime law — is scheduled for October 2011. Under current federal law, BP's liability for economic losses is capped at \$75 million unless its misconduct amounts to "gross negligence or willful

misconduct" or violation of "an applicable Federal safety, construction or operating regulation." While there seems to be ample evidence of "gross negligence" in this case, it should be expected that BP will try every conceivable legal maneuver to avoid fitting within this exception.

The BP oil spill is one of the worst environmental and economic disasters in our nation's history. Unfortunately, as it stands, many victims of this catastrophe stand to end up much worse off than the corporations that caused it.

THE FAILURE OF THE VACCINE COURT continued...

without the full procedural safeguards of the civil justice system. HHS's removal of table injuries over the years has morphed the Vaccine Court into an increasingly fault-based system, requiring costly and time-consuming causation hearings. According to a September 2010 report from HHS, it takes an average of two to three years to adjudicate a petition/claim after it is filed. When creating the no-fault program Congress expected claims to be processed in one year or less.

Adversarial process. In a November 18, 2008 statement, National Vaccine Information Center (NVIC) co-founder and President Barbara Loe Fisher told HHS's Advisory Commission on Childhood Vaccines how contentious the program had become. "What I heard most often when speaking with parents and plaintiff's attorneys was that the compensation process is filled with a 'mean-spiritedness' and a growing hostility on the part of DHHS, Justice and U.S. Court of Claims officials toward plaintiffs, their families, experts and attorneys. Whether that is true in every case, I don't know," Fisher added, "but there certainly is a sense that parents feel their children are pawns in a political tug of war that compels those in government responsible for

administering the compensation program to protect the reputation of the current vaccine system at all costs — even if it means denying compensation to vaccine victims in order to limit the numbers of children acknowledged by government as having been harmed by vaccines being promoted by government."

Compensation denied. According to the latest HHS statistics, 13,546 petitions have been filed since the program began yet only 2,503 awards have been made. As NVIC, its co-founders and 24 other organizations argued in a June 1, 2010 *amicus brief* to the U.S. Supreme Court, "The overwhelming majority of cases in vaccine court today are 'off-table,' unable to take advantage of presumptive causation and thus require costly and time-consuming causation hearings, are highly adversarial, and end without compensation."



Hannah Bruesewitz, who suffered a series of seizures within hours of receiving a DTP vaccine in 1992 when she was six months old, is among the many victims denied recovery. Hannah, now a teenager, continues to suffer from seizure disorder, is non-verbal, non-communicative and needs round-the-clock care. When Hannah was denied compensation under the federal program, her parents filed a

lawsuit against the vaccine maker, Wyeth, in state court, alleging that the company could have made a safer vaccine. On March 8, 2010, the U.S. Supreme Court agreed to decide whether the Vaccine Act immunizes vaccine manufacturers from state lawsuits alleging design defects. Oral argument is scheduled for October 12th.

Inadequate payments. Even when victims prevail, compensation is limited. As NVIC President Fisher explained to HHS's Advisory Commission in November 2008, "The Department of Justice can choose to make it less traumatic for vaccine victims and their families by including in compensation awards guardianship costs; fairly calculating lost future income and expenses for housing modifications and special education; and providing mental health counseling for parents coping with their vaccine injured child's 24-hour needs — instead of fighting most special needs costs identified by life care planners and doctors advising families."

The Vaccine Program clearly has not provided justice for many injured victims and their families, as it was designed to do. The Program's slow political capture and subsequent demise as an adequate alternative for victims prove why such systems are often utterly inferior to the civil justice system.