USING PRINCIPLES AND POLICIES OF MARITIME ARBITRATION TO GUIDE RESPONSIBLE PARTIES IN OIL SPILL CLAIMS RESOLUTION

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I. INTRODUCTION

Arbitration has been a successful alternative to litigation for the maritime community for hundreds of years.[1] For example, organizations like the Society of Maritime Arbitrators have thrived as resources for alternative dispute resolution by adopting rules based in part on the Federal Arbitration Act ("FAA") to achieve the goals of cost efficiency, speed and fairness.[2] On the other hand, establishing fund instruments and creating a corresponding claims procedure has not been as successful an alternative to litigation in the context of oil spill claim resolution.[3] The creation of the Gulf Coast Claims Facility ("GCCF") to handle claims against and distribute awards from the fund[4] established by British Petroleum ("BP") in the aftermath of the Deepwater Horizon oil spill is an example of this failed form of alternative dispute resolution.[5] The

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1 *See* MARITIME ARBITRATION IN NEW YORK, http://www.smany.org/sma/about2.html (last visited Feb. 18, 2012) ("The origins of maritime arbitration can be traced back as far as the voyages of ships owned by ancient Phoenicians carrying the cargoes of Greek traders. Ever since, arbitration has played a significant role in waterborne commerce.").

2 *See* MARITIME ARBITRATION RULES, PREAMBLE: INTERPRETATION AND APPLICATION OF RULES, *available at* http://www.smany.org/sma/about6-1.html.

3 "Thus, after one year, the Gulf Coast Claims Facility has failed to garner credibility as a neutral forum that BP sought." George W. Conk, *Blowout: Legal Legacy of the Deepwater Horizon Catastrophe: Diving into the Wreck: BP and Kenneth Feinberg's Gulf Coast Gambit*, 17 ROGER WILLIAMS U. L. REV. 137, 143 (2012).

4 Though I refer to moneys set aside by British Petroleum ("BP") as a fund, Professor Conk correctly notes, "[T]here is no 'fund' if what one means by fund is an entity with meaningful jurisdictional independence, such as a trust fund. Here the obligations remain BP's and any funds that remain at the close will revert to BP." *Id.* at 158.

5 *Id.*; *see also* 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. Mar. 8, 2012) (order discussing proposed settlement

Oil Pollution Act of 1990 ("OPA 90") governs litigation and any alternative claims procedures following an oil spill.[6] OPA 90 does not require the creation of a claims facility or a fund for victim compensation; it is "entirely vague concerning how a responsible party must satisfy its duties."[7]

This Note will: 1) provide an introduction to maritime arbitration, 2) discuss an example of a challenged arbitration award in the maritime context, 3) provide a background on OPA 90 and the National Pollution Funds Center ("NPFC"), 4) discuss the claims procedure under OPA 90, 5) discuss an example of a challenged NPFC decision, 6) discuss the problems with the GCCF, and 7) propose amendments to OPA 90. This Note will argue that in order to avoid the complex litigation that ultimately dissolved the GCCF, with the goals of cost efficiency, speed and fairness in mind, amendments to OPA 90 should outline and mandate an alternative dispute resolution process modeled after the policies and procedures behind maritime arbitration.

II. Maritime Arbitration: Background and Context

When Congress passed the FAA in 1925, it ended a period of judicial reluctance toward enforcing arbitration provisions in admiralty contracts by validating such provisions in every area of commercial law subject to federal jurisdiction.[8] The reluctance had formerly been justified in England on the basis that admiralty courts could not grant equitable relief.[9] However, there was speculation that a declaration of an arbitration provision as void as against public policy reflected the judge's concern about his own income declining, as the provision essentially "oust[ed] the jurisdic-

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between BP and Plaintiff Steering Committee, dissolving GCCF for a court supervised alternative).

6 *See* 33 U.S.C. §§2701, 2705(a) (2012).

7 33 U.S.C. §2705(a) (2012) (merely stating that the responsible party must establish a procedure for payment or settlement of claims for interim, short-term damages); *see also* Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims – A Fund Too Far*, 71 La. L. Rev. 819 (2011); *see also* Conk, *supra* note 3, at 159 ("Although 'a procedure for the payment or settlement of claims for interim, short-term damages' is mandated by §2705 of the OPA, there is otherwise a regulatory vacuum.").

8 *See* Benedict on Admiralty, Vol. 9 §101 (7th ed. 2010); *see also* Federal Arbitration Act, 9 U.S.C. §§1-11(2011).

9 *See* Benedict on Admiralty, *supra* note 8, at §101.

tion" of the court.[10] Although United States courts expressed similar sentiments early in the twentieth century, "courts are no longer 'jealous of their own power'" and arbitration provisions are relied upon for settling maritime disputes.[11] When passing the FAA, Congress intended to enforce arbitration clauses to which parties contractually agreed.[12] To recognize the preference of maritime parties to arbitrate and to ease court dockets,[13] admiralty law continues to encourage the use of arbitration.[14]

The goal of using arbitration in lieu of litigation, regardless of whether parties are in the maritime context or some other field, is to remain fair while expediting a resolution in the most cost efficient way.[15] Specifically, "the advantages of arbitration, in contrast to litigation in the courts, are that the parties may choose the arbitral forum and applicable procedure; the dispute is decided by experts in maritime law; and resolution of the dispute is generally faster . . . [and] less burdensome."[16]

To understand the maritime industry's particular inclination toward arbitration rather than litigation, it is useful to note the historical context out of which this tradition emerged. "Shipping and interport trade were centered not around ships per se, but around the transportation and delivery of commodities. Disputes had to be resolved as fairly and quickly as possible 'in the course of business' in order for this overall purpose not to suffer."[17] Uniformity in ancient international maritime law developed in response to inevitable disputes that arose in trade, in order to minimize surprises and support, rather than restrict, commerce.[18] Parties needed to know their rights and obligations in whatever port they might

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10 *Id.; see also* Richard H. Sommer, *Marine Arbitration – Some of the Legal Aspects,* 49 TUL. L. REV. 1035, 1037 (1975).

11 Sommer, *supra* note 10, at 1038.

12 *Id.* at 1038, *citing* 65 CONG. REC. 1931 (1924).

13 *See* Robert Force & Anthony Mavronicolas, *Two Models of Maritime Dispute Resolution: Litigation and Arbitration*, 65 TUL. L. REV. 1461, n.30 (1991), *citing* Wilfred Feinberg, *Maritime Arbitration and the Federal Courts*, 5 FORDHAM INT'L L.J. 245 (1982).

14 *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, Vol. 2 §§21-15 (5th ed. 2011).

15 *See* Michael Van Gelder*, Marine Arbitration: Quo Vadis? Have Delays and Costs Caused Us to Lose the Way?*, 12 J. OF INT'L. ARB. 79 (1995) (quoting DOMKE ON COMMERCIAL ARBITRATION, Chapter 2 (1968)). *See also* Force & Mavronicolas, *supra* note 13, at 1470.

16 SCHOENBAUM, *supra* note 14, at n.3. The same goals are at the heart of creating funds to settle mass tort claims. *See* Conk, *supra* note 3, at 180–81.

17 Gordon Paulsen, *Comparative Aspects of Current Importance: An Historical Overview of the Development of Uniformity in International Maritime Law,* 57 TUL. L. REV. 1065, 1067 (1983).

18 *Id.*

enter; "a port which had an understandable, urbane, and civilized method of resolving such disputes . . . would be attractive to international trade and to merchants from other ports."[19] The quoted author focuses on uniformity in international maritime law, but the same aspects of the industry contributed to its inclination toward arbitration.[20]

The nature of the industry in New York specifically gave rise to a system favoring arbitration:

> In the 1960's and earlier, the vast majority of the dry cargo chartering business was conducted within a mile of 17 Battery Place. . . . Most shipping men met for lunch and drinks at a few select clubs and restaurants. There was a great amount of personal contact on a regular informal basis among shipping people. . . . [sic]In such an atmosphere it was possible to amicably resolve disputes, to nip potential problems in the bud before they got in the hands of the "dreaded lawyers" and to generally promote commerce and shipping on a more or less commonly understood and orderly basis. If disputes could not be resolved in that manner then they could, for the most part, be resolved quickly through arbitration by men with particular expertise and generally with a minimum of paper work and according to a sense of "rough justice." There were no fundamental principles of law involved or needed.[21]

A. *Society of Maritime Arbitrators' Rules*

Despite the fact that present day disputes involve much larger sums of money and much more complex legal issues, maritime parties continue to incorporate arbitration clauses in their contracts.[22]

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19 *Id.*

20 There is not only an international element involved with shipping overseas, which creates a need for consistency as previously mentioned, but there is also an element of unpredictability and danger which creates a willingness to forego all the protections of due process that come with a litigated dispute in favor of a faster and cheaper dispute resolution process. This can be compared to the political philosopher John Rawls' "original position" in which parties decide the principles of justice from "behind a veil of ignorance," that is, without knowing what will happen to them or where they will end up in their societies. From this position, Rawls argues that parties will be inclined to develop a system of justice which would maximize the prospects for the least well-off, for fear that they themselves may end up in that position. *See* JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press of Harvard Univ. Press, 1999).

21 Force & Mavronicolas, *supra* note 13, at 1465–66.

22 *See id.* at 1466, 1472. *See also* MARITIME ARBITRATION IN NEW YORK, *supra* note 1 ("SMA MODEL ARBITRATION CLAUSE: Should any dispute arise out of this Charter, the Matter in dispute shall be referred to three persons at New York, one to be appointed by each of the

Nearly all of the maritime arbitration in the United States occurs in New York under the rules of the Society of Maritime Arbitrators ("SMA").[23] Since its establishment in 1963, the SMA has offered an "efficient, practical system for fair disposition of maritime disputes."[24] Since maritime arbitration is a "creature of contract," parties may negotiate the terms of their agreement "to shape the form and nature of their arbitration."[25] As noted in the SMA Rules of Arbitration ("Rules"), wherever parties have agreed to arbitrate with the SMA, they may mutually alter or modify the Rules, except those that empower the Arbitrators to administer the arbitration proceedings.[26] Members of the SMA are "commercial men," meaning they "are or have been actively engaged in the shipping business."[27] There are disclosure requirements for circumstances that may prevent a panelist from rendering an unbiased award based solely upon an objective consideration of the evidence.[28] Panelists are disqualified if they have a financial or personal interest in the outcome of the arbitration or have acquired, from an interested source, detailed prior knowledge of the matter in dispute.[29]

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parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. This Charter shall be governed by the Federal Maritime Law of the United States. The proceedings shall be conducted in accordance with the Rules of the Society of Maritime Arbitrators, Inc. The arbitrators shall be members of the Society of Maritime Arbitrators, Inc.").

23 *See* Force & Mavronicolas, *supra* note 13, at 1464, 1467.

24 WHY ARBITRATION IN NEW YORK UNDER SMA RULES?, http://www.smany.org/sma/about4.html (last visited Feb. 18, 2012).

25 *See* Force & Mavronicolas, *supra* note 13, at 1463–64. Parties are free to agree to a one- or two-person panel, and they may also modify the appointment procedure. *See* MARITIME ARBITRATION RULES, I§§1-2, II§3, IV§10 (2010), *available at* http://www.smany.org/sma/about6-1.html.

26 MARITIME ARBITRATION RULES, *supra* note 25, at I§1.

27 *See* Force & Mavronicolas, *supra* note 13, at 1467.

> Maritime arbitration panels normally are comprised of one's peers in the industry—commercial people who apply their knowledge and understanding in what are often specialized areas. The arbitral process encourages practical decisions by commercial people well-versed in such maritime areas as charter parties, vessel and terminal operations, ship sales and purchases, cargo sales and purchases, ship construction and repairs, stevedoring, cargo loss or damage, brokerage, agency, finance, engineering, naval architecture, surveying, salvage, towage, maritime insurance and general average, collisions, liner agreements, management agreements, small craft and offshore drilling, to name a few. Expertise in more obscure or specialized areas is more easily found from such a 'pool' of professionals.

WHY ARBITRATION IN NEW YORK UNDER SMA RULES?, *supra* note 24.

28 *See* MARITIME ARBITRATION RULES, *supra* note 25, at IV §9.

29 *Id.* at IV §8.

Parties appoint arbitrators according to Parts II and IV of the Rules.[30] The Rules allow each party to the arbitration to select a panelist from the "Roster" of qualified maritime arbitrators provided and maintained by SMA.[31] Those two panelists then select a third panelist.[32] During the hearing, parties are entitled to have counsel represent them, and to make an opening statement of their claim.[33] Formal rules of evidence do not apply, and the Rules only call for "an orderly manner appropriate to judicial proceedings."[34] Discovery rules are similarly relaxed, but were revised in 1994 to "encourage parties to have a clear picture of each other's claims and counterclaims" and to foster efficiency.[35]

Many features ensure transparency in the process.[36] The Panel is required to decide by majority vote (unless parties have contracted such that a unanimous vote is required) and to submit a written decision to the parties within one hundred and twenty days.[37] The Panel is granted broad power and may reward specific performance, attorney's fees, and/or "any remedy or relief which it deems just and equitable."[38] To "give users an efficient system which can lead to quick, cheap and fair resolution of their disputes," the SMA has also created a Shortened Arbitration Procedure that requires parties to appoint Panelists within fifteen days of notice of demand for arbitration. The Shortened Arbitration Pro-

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30 *Id.* at II §§3-5, IV §§8-13.

31 *Id.* at II §4, IV §10.

32 *Id.* at IV §10.

33 *See* MARITIME ARBITRATION RULES, *supra* note 25, at V §§14, 21. Parties are also required to submit a pre-hearing statement of their position. *Id.* at V §21.

34 *Id.* at V §21.

35 Lucienne Carasso Bulow, *Revised Arbitration Rules of the Society of Maritime Arbitrators*, 12 J. OF INT'L ARB. 87 (1995). Section 21 requires,

> [c]opies of any documents, exhibits and accounts intended to be introduced at a particular hearing should be supplied to the other party or opposing counsel and to Panel members at least one week prior to the date of that hearing. Any fact or expert witness intended to testify before the Panel should likewise be identified at least one week in advance of the scheduled hearing date.

MARITIME ARBITRATION RULES, *supra* note 25, at V §21.

36 "All evidence shall be taken in the presence of the Arbitrator(s) and of all the parties, except in the case of depositions or where any of the parties is absent without reasonable cause, in default, or has waived its right to be present or where submission of evidence by mail or in other form has been agreed by both parties." MARITIME ARBITRATION RULES, *supra* note 25, at V §23. "Persons having a direct interest in the arbitration are entitled to attend hearings." *Id.* at V §17.

37 *Id.* at V §20, VII §§28, 29.

38 *Id.* at VII §30.

cedure also requires Panelists to render a decision within thirty days of receiving the parties' final statements.[39]

B. *Challenging a Society of Maritime Arbitrators' Award*

The Rules represent the "commercial efficiency model" of justice, where the formalities and protection inherent in litigation (causing slower speed and higher cost) are traded for efficiency.[40] The lack of an opportunity to appeal an arbitration panel's decision is an example of favoring efficiency over fairness or due process.[41] Once the Panel has issued its award, it is final, although section 30 of the Rules allows for modification of an award to correct an obvious clerical or mathematical error.[42] "[T]he right to correct substantial errors may be entirely lacking,"[43] as once the Panel issues the award it is "functus officio, and does not have the power to hear re-argument."[44] An unsatisfied party has the option to vacate the award pursuant to section 10 of FAA,[45] but a "mistake in law or fact is not a ground for vacatur . . . [and] [t]here is, effectively, no appeal to the courts on the merits. Federal policy strongly favors arbitration, and for this reason, the U.S. Congress has severely limited the opportunities for successful attacks upon arbitration awards."[46] As one scholar phrased it, "*de maximus non curat lex* – 'you can't complain after a stupid award.'"[47]

This extreme deference to the decision of the Panel supports and encourages alternative dispute resolution in the maritime con-

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39 RULES FOR SHORTENED ARBITRATION PROCEDURE OF THE SOCIETY OF MARITIME ARBITRATORS (2010), *available at* http://smany.org/sma/about6-2.html (this quicker option features limits on attorney and arbitrator fees).

40 *See generally* Force & Mavronicolas, *supra* note 13.

41 "It is in the opportunity for appellate review or lack thereof that the differences between the due process model and the commercial efficiency model are most marked." *Id.* at 1505–06.

42 MARITIME ARBITRATION RULES, *supra* note 25, at VII §30; *see also* Force & Mavronicolas, *supra* note 13, at 1505.

43 Force & Mavronicolas, *supra* note 13, at 1505.

44 SOCIETY OF MARITIME ARBITRATORS, INC., PRACTICAL GUIDE, *available at* http://www.smany.org/sma/about3.html.

45 9 U.S.C. §10 (2012).

46 SOCIETY OF MARITIME ARBITRATORS, INC., PRACTICAL GUIDE, *supra* note 44. *See also* Force & Mavronicolas, *supra* note 13, at 1506 ("Power to vacate an award is limited . . . interpretations of the law by the arbitrators . . . are not subject, in federal courts, to judicial review for error in interpretation. The United State Arbitration Act contains no provision for judicial determination of legal issues.").

47 Force & Mavronicolas, *supra* note 13, at 1506, *citing* Joseph C. Sweeney, *Judicial Review of Arbitral Proceedings*, 5 FORDHAM INT'L L.J. 253, 273 (1981).

text.[48] The FAA establishes a federal policy that favors arbitration, requires courts rigorously enforce arbitration agreements, works toward the goal of relieving congestion in courts, and allows parties a faster and cheaper alternative method of dispute resolution.[49] Although there are several procedural points at which parties to arbitration have an opportunity to call upon the courts to interfere, this Note will focus on the court's involvement after the arbitration panel has issued its award and the unsatisfied party moves to vacate.

Section 10 of the FAA provides four instances where a court, upon application of any party to the arbitration, may vacate the award: 1) instances of fraud, corruption, or undue means in obtaining the award; 2) evidence of partiality or corruption amongst the panel; 3) evidence of misconduct amongst the panel in refusing to postpone the hearing, hear evidence or other misbehavior indicating prejudice; or 4) where the panel exceeded its powers or so imperfectly executed its powers as to render the award neither mutual, final nor definite.[50] Review is governed by an extraordinary level of deference to the underlying award; the award will be upheld if the arbitrator's interpretation can be derived from the agreement in any rational way.[51] This standard is necessary in order to preserve the benefits of reduced delay and expense and to

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[48] *See* 9 U.S.C. §2; *see also* Harrington v. Atlantic Sounding Co., Inc., 602 F. 3d 113, n.5 (2d Cir. 2010).

> In [the foreword to the SMA's 1988 edition of MARITIME ARBITRATION IN NEW YORK], I noted some decisions of the United States Supreme Court favoring and enhancing arbitration as a means of alternative dispute resolution - alternative, that is, to litigation, with its attendant trial and appellate delays, onerous discovery procedures, and greater legal costs. I concluded those remarks by observing: "Judges and arbitrators work together as laborers in the same vineyard of Justice. The procedural differences are less important than the substantive common purpose."

Hon. Charles S. Haight Jr., FOREWARD TO MARITIME ARBITRATION IN NEW YORK, *available at* http://www.smany.org/sma/foreword.html.

[49] *See* 9 U.S.C. §2; *see also* Haight, *supra* note 48.

[50] 9 U.S.C. §10.

[51] *See* Vertical UK LLP v. Dundee Ltd., No. 10 Civ. 1173(DAB), slip op. (S.D.N.Y., June 13, 2011) (citing Rich v. Spartis, 516 F.3d 75, 81 (2d Cir. 2008)) ("[A]ppellate review exists primarily to review procedural errors rather than the merits of an arbitration award . . . . The thrust of the review of arbitration awards seems to be that courts are able to circumscribe the parameters of acceptable arbitration procedures by scrutinizing the arbitrators' conduct within certain limited spheres. In doing so, an acceptable level of procedural fairness seems to be promoted, without introducing the procedural inefficiencies that have come to characterize the due process model, in which procedural safeguards have become institutionalized."); *see also* Force & Mavronicolas, *supra* note 13, at 1510–11.

prevent arbitration from becoming a preliminary step to judicial resolution.[52]

It has been argued that "in big cases there ought to be a right of appeal to the courts on questions of law" and it has been suggested that the FAA be amended so that a court may modify or change the award when there is a certain amount in controversy and a "serious error of law."[53] However, in order to serve the goals of efficiency and speed, extreme deference to the Panel's decisions is required, even if it means some unfair decisions stand. The fact that the parties have negotiated and agreed to an arbitration clause and its terms in their contract must be given great weight. The fact that the parties have appointed the Panel and granted them the authority to resolve their dispute must be given great weight. The existence of rules that ensure procedural fairness and transparency in the procedure must be relied upon in order for the process to remain a successful *alternative* to litigation, rather than a preliminary step towards it.

1. Example of a SMA Award Challenged under FAA

In 2009, the SMA resolved a dispute arising under a charterparty[54] between Vertical, hereinafter the "Charterers," and Dundee, hereinafter the "Owners," for use of the ship Nora for the carrying of goods between Houston, Texas and Bilbao, Spain.[55] The Charterers initiated the arbitration proceeding according to their contract after experiencing substantial difficulty, delay and expense in navigating the Owners' vessel.[56] At issue in the arbitration and subsequent litigation was an amount held in escrow by the SMA. When the Nora was ready to discharge the Charterers'

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52 *See* Vertical UK LLP, No. 10 Civ. 1173(DAB); Willemijn Houdstermaatschaappij, BV v. Std. Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997).

53 Force & Mavronicolas, *supra* note 13, at 1509.

54 "A contract by which a ship, or a principal part of it, is leased by the owner, esp. to a merchant for the conveyance of goods on a predetermined voyage to one or more places or for a specified period of time; a special contract between the shipowner and charterer, esp. for the carriage of goods by sea." BLACK'S LAW DICTIONARY, CHARTERPARTY (9th ed. 2009).

55 *See* In re Arbitration Between Vertical UK LLP, as charters and Dundee Ltd., as owners of the Nora under an Asbatankvoy Form of Charterparty Dated August 19, 2008, SMA No. 4051, New York, November 16, 2009; s*ee* Vertical UK LLP v. Dundee Ltd., No. 10 Civ. 1173(DAB).

56 "The NORA arrived [in Amsterdam] approximately 72 days later than what the projected voyage should have taken. This substantial delay was attributable mainly to insufficient and inadequate bunker supplies, which in turn were linked to the Owners' precarious financial situation . . . . [F]urther substantial delays were experienced due to necessary class surveys and needed spare parts." In re Arbitration Between Vertical UK LLP, *supra* note 55.

cargo, despite difficulties in the voyage and operations, the Owners instructed their agent at the port not to release the Charterers' cargo until a $134,095.17 outstanding loadport demurrage charge was paid.[57] Although the Charterers disputed the amount, they deposited $134,095.17 with the SMA so the cargo would be released.[58] However, they failed to provide the SMA with a requested escrow agreement.[59] In the SMA's written decision, the panel explained that due to the Owners' "precarious financial situation," the demurrage claim actually belonged to the Owners' lenders and, therefore, the panel had no standing to release the amount to the Owners or offset the amount against the Charterers' award.[60]

The Charterers thereafter petitioned the United States Court for the Southern District of New York to vacate or amend the arbitration award under 9 U.S.C. §§10–11,[61] or, in the alternative, to order a second arbitration.[62] District Judge Deborah Batts denied the requested relief. By subjecting the award to limited review and granting great deference to the panel, Judge Batts' decision reflects the judicial desire to uphold arbitration's goals of efficiency and cost effectiveness. In her decision, she points out that the Charterers themselves asked the Panel to deny the Owners' demurrage and direct the return of the money held in escrow by the SMA. Therefore, the Charterers could not subsequently argue that the Panel exceeded its powers by rendering a decision on that matter.[63] In the interests of efficiency and avoiding long and expensive litigation, an arbitrator's decision must not be vacated as long as the arbitrator is even arguably acting within the scope of his authority.[64] Similarly, the petition for modification was denied: "This Court may not substitute its judgment for the judgment of the panel."[65] The petition for a second arbitration was rejected on the ground that such action is unwarranted where the award is unambiguous and the intent of the arbitrator is clear.[66]

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57 "Liquidated damages owed by a charterer to a ship-owner for the charter's failure to a load or unload cargo by the agreed time." BLACK'S LAW DICTIONARY, DEMURRAGE (9th ed. 2009).

58 In re Arbitration Between Vertical UK LLP, SMA No. 4051.

59 Vertical UK LLP, No. 10 Civ. 1173(DAB), at 1.

60 In re Arbitration Between Vertical UK LLP, SMA No. 4051.

61 *See supra* I.B.

62 Vertical UK LLP, No. 10 Civ. 1173(DAB), at 2.

63 *Id.* at 2–3.

64 *Id*. at 2.

65 *Id*. at 4.

66 *Id*.

Vertical UK LLP v. Dundee Ltd. demonstrates that, at times, an alternative dispute resolution model, such as maritime arbitration with the SMA, may sacrifice the fairness protected by a due process model of litigation for speed and cost efficiency. The SMA opinion even states that the arbitrators were "not unsympathetic to [Charterers'] predicament" and the District Court did not deny "the conduct of Owners as well as the performance by the vessel constitute[d] an egregious and flagrant breach of the charter-party."[67] However, the District Judge did not overturn the Panel's decision to allow the large sum of money deposited in escrow to go to the Owners' creditors. I include this in my argument to acknowledge that there is always a tradeoff. The OPA 90 amendments I propose may slow down or increase costs of claim resolution, but the changes may ultimately prove more effective in keeping those claims out of court by increasing the perception of fairness and justice in the public's eye.

III. Background on Claims Funds

The same goals of speed, efficiency and fairness that are behind maritime arbitration are also behind the creation and administration of public,[68] quasi-public,[69] and private funds[70] in the resolution of mass tort claims. A claims fund is money designated to pay injured persons, according to a set of rules as to who gets paid and how much.[71] "The claims fund may supplant other potential avenues of recovery, such as court lawsuits. The rules for claimant eligibility may be determined at the outset of the fund, or left to the claim administrator to craft."[72] Congress has set up funds in the wake of national disasters or tragedies. An example is the September 11th Victims Compensation Fund, administered by

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67 In re Arbitration Between Vertical UK LLP, SMA No. 4051.

68 *See* National Pollution Funds Center, About NPFC, *available at* http://www.uscg.mil/npfc/About_NPFC/default.asp. *See generally* Mullenix, *supra* note 7 (providing a comparative discussion of September 11th Victim Compensation Fund).

69 *See* Byron G. Steir, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and the Independence in Claim Administrator Compensation*, 30 Miss. C. L. Rev. 255, 256 (2011). *See also* Conk, *supra* note 3, at 138 ("The purportedly independent method developed by BP and Feinberg could be labeled "the pseudo-fund model" of global settlement.").

70 *See* Steir, *supra* note 69, at 268 ("Unlike the public fund, which seeks to offer just compensation, the private fund might be seen as essentially a settlement offer that may discount full compensation, but provide claimants quick and certain recovery.").

71 *Id.* at 266.

72 *Id.*

Kenneth Feinberg and funded by the Treasury.[73] Prior to that, the Black Lung Program compensated miners diagnosed with black lung disease.[74] Private companies have also used the funds model of claims resolution to preempt mass tort litigation or class action; for example, Merck set up a fund after Vioxx was linked to heart disease.[75]

A. *Oil Pollution Act of 1990, Oil Spill Liability Fund, and National Pollution Funds Center*

After the Exxon Valdez oil spill off the coast of Alaska in 1989, Congress passed OPA 90 and expanded the Oil Spill Liability Trust Fund ("Trust Fund").[76] The NPFC was created at this time under the United States Coast Guard to administer the Trust Fund and implement OPA 90.[77] OPA 90 sets forth elements of liability for responsible parties for a vessel or facility from which oil is discharged, as well as an alternative claims procedure for both natural resource damage claims by the United States, state and local governments, Native American tribes, and foreign governments.[78] OPA 90 also allows for private damages claims, including damages to real or personal property, loss of subsistence from natural resources, loss of revenues, loss of profits and earnings, and increased or additional public service costs up to a legislative cap of $75 million (except where the spill occurred due to gross negligence or

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73 *Id.*

74 *Id.*

75 *Id.* at 267. *See* Conk, *supra* note 3, at 141, for a discussion of the history of mass tort claim resolution. Professor Conk argues that the Vioxx and September 11th Victim Compensation Funds "yield awards that are products of open and adversarial processes with transparent measures of damages." Conk, *supra* note 3, at 141. He goes on to argue that by contrast, "the GCCF is entirely private, its liability principles obscure, and its damages measures stated with such generality as to leave the Administrator with wide discretion." Conk, *supra* note 3, at 141.

76 John M. Woods, *Going on Twenty Years – The Oil Pollution Act of 1990 and Claims Against The Oil Spill Liability Trust Fund*, 83 TUL. L. REV. 1323, 1324 (2009). There were actually four major oil spills in a three-month period preceding the passing of OPA. In a 24-hour period in the summer of 1989, there were oil spills in the coastal waters of Rhode Island, the Delaware River, and the Houston Ship Channel, although none as damaging as the 11-million gallon disaster in the Prince William Sound. S. Rep. No. 101-94 (1989).

77 Woods, *supra* note 76, at 1324.

78 *See* 33 U.S.C. §2701; *see also* Stanley A. Millan, *Escaping the Black Hole in the Gulf*, 24 TUL. ENVTL. L.J. 41 (2010); Alfred R. Light, *The Deepwater Horizon Oil Spill Trust Fund and the Gulf Coast Claims Facility: The "Superfund" Myth and the Law of Unintended Consequences,* 5 GOLDEN GATE U. ENVTL. L.J. 87, 90 (2011).

willful misconduct, or by a violation of federal law).[79] OPA 90 is distinguishable from other environmental statutes in that it goes beyond natural resource restoration and allows for private damages claims, which would otherwise be a "private law game" under maritime law, which does not traditionally provide for pure economic loss damages absent physical damage.[80]

Although the legislative history of OPA 90 is long and dense, the aforementioned goals of speed, efficiency and fairness behind the legislation and expansion of the Trust Fund are clear in the reports of the enacting Congress (101st):

> One of the purposes of the Fund is to provide a source of money for immediate cleanup activities or damage compensation in the event a spiller does not act promptly. In such a case, the Fund would be used for removal costs and would be available for prompt damage compensation. . . . Another purpose of the Fund is to provide a source of compensation for claims which are not settled by the spiller by virtue of a limit or a defense. . . . The Fund assures that the costs associated with a spill are compensated, not just those within the spiller's limit of liability, through a mechanism which spreads these excess costs to all users of oil. . . . As reported, S. 686 would establish a simplified claims procedure for the disbursement of compensation available from the Fund. . . . [The] principle concept of this bill is to provide ready and complete compensation for any party suffering damages from discharges of oil . . . to assure prompt access to sufficient sums[.][81]

A report of the introductory Congress (94th) also lays out these goals.[82] In this report, the House discusses the "patchwork" of conflicting legislation that regulated liability for oil spills at the State and Federal level, which led to a Department of Justice study on methods and procedures that would support a uniform law of oil spill liability and compensation.[83] The report states that Congress intended the study to "address the means of insuring fair and expeditious compensation to victims of pollution, without imposing unreasonable financial burdens on the persons involved in the necessary activities associated with the production and movement of

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79 33 U.S.C. §2704; Millan, *supra* note 78, at 51.

80 Millan, *supra* note 78, at 47–48.

81 S. Rep. No. 101-94.

82 H.R. Rep. No. 94-1489.

83 *Id.*; *see also* S. Comm. on Commerce, 94th Cong., Methods and Procedures for Implementing a Uniform Law - Providing Liability for Cleanup Costs and Damages Caused by Oil Spills from Ocean Related Sources (Comm. Print 1975).

oil."[84] The Department of Justice submitted the study to Congress and it became the basis for the first version of OPA 90.[85]

B. *Procedure and Standard of Review for OPA 90 Claims*

OPA 90 preempts general maritime tort law, for which federal courts are granted original jurisdiction.[86] Claims must first be presented to the responsible party as a condition precedent to federal court action or presentation to the Trust Fund.[87] It is interesting to note that an issue the House Report of the 1976 introductory Congress cited as "less controversial" was the mechanism of victim compensation and this decision, in the name of efficiency, to require that a claim first be submitted to the spiller prior to being submitted to the Trust Fund or to a federal court.[88] Ironically, the report predicts that in most cases this would result in quick, uncomplicated settlements, and avoid the need to maintain government personnel to handle fund settlements.[89] The mechanism of victim compensation employed by the spiller was not seen as controversial, in 1976 nor in 1990, but later became the center of complicated and expensive multi-district litigation.

OPA 90 does not guide the responsible party in satisfying its duties, but it does speak to the way the Trust Fund, under the NPFC, should handle claims.[90] The statute says that a claimant may commence the action in federal court or present the claim to the Trust Fund,[91] if the spiller denies all liability or does not settle the claim in a timely manner.[92] Claims submitted to the Trust Fund must be presented to the responsible party at least ninety days prior, but there are no statutory standards for the Trust Fund or NPFC to employ when reviewing claims denied by the responsible party.[93] The Trust Fund claims decisions, however, are reviewable under the Administrative Procedure Act ("APA").[94]

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84 H.R. Rep. No. 94-1489.

85 *Id.*

86 28 U.S.C. §1333 (2012).

87 *See* 33 U.S.C. §2713(a); *see also* Millan, *supra* note 78, at 49.

88 28 U.S.C. §1333; *see also* H.R. Rep. No. 94-1489.

89 H.R. Rep. No. 94-1489 at 20.

90 *See* 33 U.S.C. §2704; Mullenix, *supra* note 7.

91 *See* 33 C.F.R. §136.103(d) (2009).

92 Millan, *supra* note 78, at 51.

93 Light, *supra* note 78, at 90. *See infra* note 158 for a discussion of NPFC review of claims denied by responsible party.

94 Light, *supra* note 78, at 90; *see also* Woods, *supra* note 76, at 1324, 1331.

In the name of efficiency, much like the FAA's standard of review, the APA's standard of review is highly deferential, particularly when a court is asked to rule on an agency decision that evaluated scientific data within its technical expertise.[95] A court must set aside an NPFC decision if it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."[96] NPFC can satisfy this benchmark by showing it examined the relevant data and explained a rational basis in the facts for its decision.[97] The unsatisfied claimant bears the burden of proving the NPFC acted arbitrarily, and the court may not substitute its judgment or try to supply a rational basis if the NPFC has failed to do so in the administrative record before the court.[98] This deference is comparable to that laid out in the FAA, serving the similar goals of speed, efficiency and fairness.

1. Example of an NPFC Decision Challenged under APA

A recent example of a challenge to an NPFC decision came out of the District Court for the District of Columbia in 2010. At issue in *Bean Dredging v. US* was the definition of the term "seas" in 46 C.F.R. §44.340(a)(1).[99] NPFC denied Bean Dredging's claim partially because when the oil spill occurred, the vessel was operating in seas more than ten feet high, which violated Coast Guard restrictions applicable to the vessel.[100] OPA 90 would normally allow Bean Dredging to be compensated for damages to real property, loss of revenues, or loss of profits and earnings that resulted from an oil spill, but there is an exception where the spill occurred

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95 Bean Dredging v. US, 699 F. Supp. 2d 118, 126 (D.D.C. 2010).

96 *Id.* (citing 5 U.S.C. §706). To survive this standard of review, the NPFC is required to:

> examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts and the choice made" . . . . [I]f an agency's interpretation of a statute . . . is contrary to Congress's intent, as evidenced by the language and legislative history of the statute, the reviewing court must reject the agency's interpretation.

Woods, *supra* note 75, at 1334 (quoting Hornbeck Offshore Transp., LLC v. U.S. Coast Guard, 424 F. Supp. 2d 37, 45 (D.D.C. 2006)). Professor Woods suggests that deference and unfettered discretion previously exhibited by courts toward NPFC were contrary to the original purpose of OPA 90, that is, to create a strict liability regime but with a trade-off of limited liability. Woods, *supra* note 75, at 1337. *Compare* Int'l Marine Carriers v. Oil Spill Liability Trust Fund, 903 F. Supp. 1097 (S.D. Tex. 1994) (arbitrary, capricious and abuse of discretion standard applied to Trust Fund's determination, courts willing to afford great deference to NPFC) *with* Water Quality Ins. Syndicate v. US, 522 F. Supp. 2d 200, 2008 AMC 284 (D.D.C. 2007) (NPFC had misinterpreted O.P.A. in legal error, NPFC does not appeal and rather pays W.Q.I.S.'s claim).

97 *Bean Dredging*, 699 F. Supp. 2d at 126.

98 *Id.*

99 *Id.* at 128.

100 46 C.F.R. §44.340(a)(1); *Bean Dredging*, 699 F. Supp. 2d at 127.

during a violation of federal law.[101] Bean Dredging argued that "seas not more than ten feet" as written in the statute referred to "significant wave height" rather than general average wave height, and, therefore, the operation of its vessel at the time of the oil spill did not violate 46 C.F.R. §44.340(a)(1).[102] The NPFC failed to discuss its rejection of this argument explicitly in its decision; it only advanced the rationale in its briefing.[103] For example, the NPFC argued that the oceanography definition of seas should not apply to the interpretation of the regulation because the regulation is meant to apply to mariners and vessel owners (such as Bean Dredging), not oceanographers.[104] However, since this argument and others were not set out in the actual decision, but only after-the-fact, the court could not determine whether substantial deference was appropriate.[105] The court remanded for further explanation as to the NPFC interpretation of the statute.

Bean Dredging provides an example of fairness taking precedence over efficiency and speed, in contrast to the maritime arbitration example earlier of arguably the opposite occurring. It is clear that a balance is always necessary to ensure that too much is not being sacrificed to save money and time.[106]

C. *Gulf Coast Claims Facility*

The explosion of the Deepwater Horizon oil rig in April 2010 dumped nearly five million barrels of oil in to the Gulf of Mexico.[107] Given the catastrophic degree of destruction, it became obvious that damages would exceed the $75 million cap on liability provided in OPA 90.[108] It also became obvious that the standard claims procedure, mandating a ninety-day window for the responsible party to render a decision before allowing submission to the Trust Fund, would be an unrealistic remedy to those fishermen,

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101 *See* 33 U.S.C. §2701; *see also* Millan, *supra* note 78, at 49; Light, *supra* note 78, at 90.

102 *Bean Dredging*, 699 F. Supp. 2d at 123 ("Significant wave height" is an oceanography term of art describing the average height of the highest one-third of wave encountered over a specified period of time.).

103 *Id.* at 127.

104 *Id.*

105 *Id.*

106 *See* Woods, *supra* note 76, at 1337 (suggesting that deference and unfettered discretion previously exhibited by courts toward NPFC were contrary to the original purpose of OPA, that is, to create a strict liability regime but with a trade-off of limited liability).

107 Steir, *supra* note 69, at 259.

108 Light, *supra* note 78, at 90.

shrimpers, and Gulf-dependent businesses that lost their livelihood due to the spill.[109] In response to these circumstances, BP, after the Coast Guard designated them as the "responsible party," waived the $75 million liability cap and set up claims offices throughout the Gulf Coast states that paid out for losses on a walk-in basis for two months.[110] OPA 90 does not require the creation of a claims facility or a fund for victim compensation; it is "entirely vague concerning how a responsible party must satisfy its duties," so these actions were not in violation of the statute and were a way to appease public outcry.[111] Although this initial program dispensed hundreds of millions of dollars, many frustrated applicants, who were denied compensation due to documentation problems or who were becoming impatient with "administrative slowness," criticized it as chaotic and unregulated.[112]

In response to these criticisms, and to ensure fair, timely and transparent claims procedures, President Obama and BP executives negotiated the creation of a $20 billion fund.[113] The GCCF, under Kenneth Feinberg, administered the fund.[114] The precise legal authority for these executive actions is unclear.[115] After this initial agreement, there was little to no government oversight of the creation and implementation of standards and regulations governing claimant eligibility and compensation.[116] "[A]lthough Feinberg made well-publicized tours of Gulf Coast towns in the weeks after the oil spill and held several 'town hall' meetings, he nonetheless did not provide for a formal public notice and comment on proposed standards" such as is provided in the federal rulemaking

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109 *Id.*

110 *See* Mullenix, *supra* note 7, at 833; *see also* Steir, *supra* note 69, at 260–61.

111 Mullenix, *supra* note 7, at 833.

112 *Id.;* Steir, *supra* note 69, at 261.

113 Steir, *supra* note 69, at 261; *see also* Mullenix, *supra* note 7, at 834–45 ("BP did not actually place this entire amount in escrow. Instead, only $3 billion was transferred into an account . . . BP's remaining obligations pursuant to this $20 billion commitment are to be funded, in the future, by BP's ongoing oil drilling revenues, largely derived from its offshore drilling efforts in the Gulf.").

114 Steir, *supra* note 69, at 261.

115 Mullenix, *supra* note 7, at 835 ("[N]o Executive Order. . .Congress held no hearings to lay the groundwork for creation of the fund, nor was congress involved at all in the creation of GCCF. . . or appointing a special master. . .Feinberg explained to a congressional subcommittee that he was operating pursuant to a 'compact.'. . .In subsequent colloquies, Feinberg abandoned his 'compact' conceit and instead vaguely suggested that he was operating under the authority of OPA.").

116 *Id.* at 842–43. *See also* Conk, *supra* note 3, at 141 (describing the "regulatory gap" apparent in OPA 90).

process.[117] The lack of oversight and governance at this and subsequent stages made a large, complicated and expensive mess out of claim resolution.[118] One scholar deemed GCCF as representative of an "unnoticed incremental trend toward the lawless, private resolution of mass claims. This resolution . . . was created by a culpable defendant, unbounded by legal norms, and administered by a heroic 'special master' with limitless, unreviewable discretion, who [was] also the employ of the malefactor."[119] A competing view is that GCCF may one day serve as a model for handling future industrial accidents, and was "a remarkably effective alternative to the cumbersome way damages are usually meted out after a corporate accident: through the tort system."[120] One scholar wrote that GCCF, as a "quasi-public claims fund," should be welcomed into the mass tort toolbox as an effective way to respond to rapidly developing crises.[121] Despite this support, GCCF was dissolved in a settlement between BP and the Plaintiffs Steering Committee (attorneys representing individuals and businesses denied claims by the GCCF or who otherwise opted into the class action multi-district litigation against it) in May of 2012.[122] Even those that sup-

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117 Mullenix, *supra* note 7, at 842–43.

118 *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources,* 101ST CONG. (Oct. 27, 2011), http://naturalresources.house.gov/Calendar/EventSingle.aspx?EventID=265099 (Chairman Hastings repeatedly commented that the lack of "any semblance of oversight" by administration was problematic, and "maybe this is an experience, something in progress, and we'll have to see how it works.").

119 Mullenix, *supra* note 7, at 823 ("Since the Claims Facility was set up, there have been constant complaints from claimants of lost paperwork, slow processing time and low-ball payments."); *see also* Eric Heisig, *New Lawsuit Filed in Gulf Oil Spill*, THE DAILY COMET (Dec. 8, 2011, 10:55 AM), http://www.dailycomet.com/article/20111208/ARTICLES/111209613.

120 Joe Nocera, *BP Makes Amends*, N.Y. TIMES (Jan. 9, 2012), http://www.nytimes.com/2012/01/10/opinion/nocera-bp-makes-amends.html?_r=1.

121 Steir, *supra* note 69, at 275. *See also* Joe Nocera, *The Phony Settlement*, N.Y. TIMES (Mar. 9, 2012), http://www.nytimes.com/2012/03/10/opinion/nocera-the-phony-settlement.html.

> [The GCCF] could – and should – serve as a model for how to compensate victims after a big industrial disaster. It was vastly more efficient than using lawsuits to extract money from companies. It was fairer, too; in lawsuits, some victims get rich while others are left empty-handed, even though their cases are virtually the same . . . What the BP claims process couldn't do, it turns out, is overcome lawyers greed.

Id. Nocera suggests lawyers seeking larger fees than would be attainable by assisting victims with the claims process over exaggerated the flaws of the GCCF to convince people to join the class action suit and to garner public support for the settlement. *See infra* note 122.

122 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. May 2, 2012); *see also* Andrew Longstreth & Jonathan Stempel, *BP Spill Claims Process Set Up, Feinberg Relieved*, REUTERS, (Mar. 8, 2012) http://uk.reuters.com/assets/print?aid=UKBRE82716920120308 ("Lawyers on the Plaintiffs' Steering Committee . . . have said the new program will be fair and transparent, although some lawyers outside that

ported the GCCF must admit it failed as an alternative dispute resolution procedure.[123] To avoid this outcome in the future, and achieve the goals of speed, cost-efficiency and fairness, OPA 90 should require some transparency and guide the spiller's means of determining eligibility and claim value.[124]

Transparency was a problem from the outset of GCCF. Early in the process, Feinberg refused to disclose how much BP was compensating his law firm for administrating the Fund.[125] There was also no information made public as to how claims administrators were trained.[126] This caused distrust in the public, after having been promised by President Obama that the Fund would be independent and not controlled by BP.[127] This also raised an obvious conflict of interest, despite Feinberg's repeated assertions that he functioned as an impartial administrator.[128] Even a New York Uni-

process have questioned whether it will be an improvement."). Patrick Juneau, the Louisiana lawyer appointed by Judge Barbier to replace Feinberg as claims administrator, has stated that he believes the court supervised process would be smoother than the GCCF's due to claimant eligibility terms set out in the settlement agreement. *See* Brendan Kirby, *BP Lawsuit Settlement Administrator Promises 'Claimant-Friendly' Assistance Program*, PRESS REGISTER (June 5, 2012), http://blog.al.com/live/2012/06/bp_lawsuit_settlement_administ.html.

123 It is easier to argue about who is to blame for this failure than it is to argue about whether expensive litigation was avoided or not. Joe Nocera of *The New York Times* argues greedy plaintiffs' lawyers are to blame; more commonly the finger was pointed at "pay czar" Ken Feinberg. Either way, the litigation is daunting and continuous. One plaintiffs' lawyers website boasted,

> The BP CLAIMS Lawsuit is going to be one of the biggest legal battles in [U.S.] history . . . More than 120,000 claimants have stepped forward to join in the federal lawsuit against BP and other energy companies, claiming personal and financial losses after last year's disastrous BP oil spill in the Gulf Coast. It's not too late for you to do the same and say to hell with the GCCF, I want to get my compensation. The legal proceedings are expected to reach all the way to the Supreme Court . . . Many legal experts are comparing the BP claims lawsuit to the lawsuit filed against Exxon-Valdez after the oil spill off the coast of Alaska in 1989. That legal battle lasted almost a decade.

BP CLAIMS – KNOW THIS BEFORE FILING YOUR BP CLAIMS WITH GCCF, http://bp-claim.com/bp-claims-lawsuit-less-than-2-months-away/ (last visited June 25, 2012).

124 Mullenix, *supra* note 7, at 914 ("The theory underlying fund resolution of claims is that by avoiding the litigation system, claimants receive quick, easy payment of claims and eliminate the risks, transaction costs, and delays inherent in litigation.").

125 *See* Moira Herbst, *Pressure on Kenneth Feinberg to Disclose BP Pay Deal*, REUTERS LEGAL (Nov. 23, 2010), http://in.reuters.com/article/2010/11/22/idINIndia-53083520101122; *see also* Steir, *supra* note 69, at 257.

126 Mullenix, *supra* note 7, at 833.

127 President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010) (transcript *available at* http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill) ("[T]his fund will not be controlled by BP. In order to ensure that all legitimate claims are paid out in a fair and timely manner, the account must and will be administered by an independent third party.").

128 Mullenix, *supra* note 7, at 873.

versity Professor who opined that Feinberg was not in violation of professional responsibility standards was paid by BP (at a rate of $950.00 per hour).[129] To deal with this problem, Judge Barbier, presiding over the consolidated multidistrict litigation in the Eastern District of Louisiana, enjoined Feinberg and his firm in February of 2011 from referring to themselves as neutral or independent.[130] In late 2011, the Justice Department named an independent auditor to review the GCCF process of evaluating and paying claims.[131] Senator Roger Wicker (R-MS.) commented: "[f]rom the beginning, we asked for transparency and fairness from the GCCF as it worked to help people impacted by the oil spill. Many questions about the claims process have arisen without sufficient answers, so this audit should bring needed explanations."[132] In June 2012, results of the audit showed approximately $64 million in erroneously underpaid claims.[133] The litigation and auditing due to a lack of transparency undermined the goal of the Fund as an alternative means to resolve claims quickly and cheaply.

A second problem that arose with the GCCF's processing of claims was the rule making, claims eligibility and claims valuation procedure it employed. As compared to the rulemaking and claims eligibility determination process employed in creating the September 11th Victims Compensation Fund, "the creation of criteria gov-

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129 *Id.* at 874.

130 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) (order in response to Plaintiffs' Motion to Supervise Ex Parte Communications with Putative Class (Rec.Doc. 912)).

> While BP may have delegated to Mr. Feinberg and the GCCF independence in the evaluation and payment of individual claims, many other facts support a finding that the GCCF and Mr. Feinberg are not completely 'neutral' or independent from BP. For example, Mr. Feinberg was appointed by BP, without input from opposing claimants or the Plaintiffs' Steering Committee, and without an order from the Court. Mr. Feinberg is not a true third-party neutral such as a mediator, arbitrator, or court-appointed special master . . . The clear record in this case demonstrates that any claim of the GCCF's neutrality and independence is misleading to putative class members and is a direct threat to this ongoing litigation.

Id.

131 Rena Havner Philips, *Outside Firm Will Do Audit*, HUNTSVILLE TIMES, Dec. 22, 2011.

132 *Wicker-Backed Amendment to Audit Gulf Coast Claims Facility Advances*, Y'ALL POLITICS (Nov. 2, 2011, 8:23 AM), http://yallpolitics.com/index.php/yp/post/30581. Even after this audit was ordered, Mississippi Attorney General Jim Hood vowed to continue his own investigation of and litigation with GCCF and Feinberg. *See also* Kaija Wilkinson, *AG Hood Vows to Continue Pursuit of Transparency*, HUNTSVILLE TIMES, Dec. 23, 2011 ("Hood praised the department's selection of [the auditors] . . . But Hood suggested the audit might be too little, too late.").

133 *See* INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY, *available at* http://www.justice.gov/opa/documents/gccf-rpt-find-obs.pdf.

erning the GCCF claim process was subject neither to formal nor informal rulemaking. Simply, the GCCF is a largely privatized enterprise not subject to public legitimacy constraints."[134] Furthermore, once rules had been implemented, Feinberg resorted to an ad hoc decision making model that responded not only to objections and requests from the public and claimants, but also from BP.[135] Representative Jo Bonner (R-Ala.) remarked that the claims process was marked with great inconsistency,[136] and Feinberg was accused of "increasing claimant appeasement by further extending eligibility, including increasingly remote proximity claims."[137]

Let us first examine the issue of claim valuation. In the hearing that preceded the audit order, Feinberg addressed the outcry over inadequate compensation to the regions' shrimpers, telling Congress the GCCF would "find a way to be more generous."[138] The following month, shrimpers' and crabbers' compensation doubled[139] to four times each claimant's 2010 documented losses.[140] Although this was seen as a victory and a fair result for those claimants, the pressure to please the public and the lack of restraints on the process led to inconsistency[141] and payment of fraudulent claims.[142] One Louisiana attorney commented,

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134 Mullenix, *supra* note 7, at 841–42.

135 *Id.* at 843–44.

136 Jim Snyder, *BP's Spill Fund Paid $5.5 Billion in Claims, Feinberg Says*, BLOOMBERG BUSINESSWEEK (Oct. 27, 2011, 12:20 PM), http://www.businessweek.com/news/2011-10-27/bp-s-spill-fund-paid-5-5-billion-in-claims-feinberg-says.html.

137 Mullenix, *supra* note 7, at 850.

138 *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra* note 118. S*ee also* Deborah Barfield Berry, *Feinberg Promises More Aid For Shrimpers Affected by Gulf Oil Spill*, THE MONTGOMERY ADVERTISER, Oct. 28, 2011.

139 David Hammer, *Ken Feinberg Expands Oil Spill Claims Payments for Shrimpers, Crabbers*, THE TIMES-PICAYUNE (Nov. 30, 2011, 9:20 AM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/11/ken_feinberg_expands_oil_spill.html.

140 *See* GULF COAST CLAIMS FACILITY – SECOND MODIFICATION TO FINAL RULES GOVERNING PAYMENT OPTIONS, ELIGIBILITY AND SUBSTANTIATION CRITERIA, AND FINAL PAYMENT METHODOLOGY (Nov. 30, 2011), *available at* http://gulfcoastdisaster.com/etc/deepwater/files/docs/METHODOLOGY_8162011.pdf.

141 David Ferrara, *In Gulf Shores: 2 Claims, 2 Stories,* HUNTSVILLE TIMES, Aug. 23, 2011 (landscaping business owner satisfied with GCCF settlement, commercial landlord resorts to suing BP after GCCF rejects his claim application).

142 Berry, *supra* note 138; *see also* Brendan Kirby, *Mobile Man Convicted of False Oil Spill Claim*, MOBILE REGISTER, Nov. 4, 2011; Brendan Kirby, *Long Record Results in Prison,* HUNTSVILLE TIMES, Oct. 31, 2011; *Delray Couple Charged in BP Oil Spill Scheme*, WPBF NEWS, (Oct. 7, 2011), http://www.wpbf.com/Delray-Beach-Couple-Charged-In-BP-Oil-Spill-Scam/-/8789538/

> I've heard outrageous stories of waiters or waitresses, or even exotic dancers getting $10,000, $20,000 or $30,000 in the first month. . . . It really upset a lot of victims of the oil spill that had earned a living in and on the water of the Gulf of Mexico and they weren't seeing the same compensation as a waiter, waitress or someone in a related field.[143]

A Florida attorney said he had heard of waitresses receiving $80,000, yet others with legitimate and documented losses getting rejected.[144] These may be exaggerations, but the public's perception of a claims resolution process is a determining factor in its success as an alternative to litigation.

This leads to the issue of claims eligibility and the question of how the GCCF should have responded to claims as far removed as Sweden and Minnesota.[145] Although for a period, GCCF used eligibility charts and maps, they succumbed to public outcry and eventually abandoned them.[146] In response to a question from Rob Wittman (R-VA) about the reasonableness of a claim from oyster processors in Virginia, Feinberg testified:

> If there is a direct link, in your hypothetical, between a Virginia oyster processing company, that depends for its livelihood on Gulf Coast shrimp, by all means, and I can go back and see, but I'm sure we've paid some of those claims. I know we have in Maryland. In Maryland we paid, I think there are a couple of oyster restaurants that we've paid that were dependent on Gulf Coast shrimp for their livelihood.[147]

Again, this was seen as a victory and a fair outcome for seafood industry claimants "once-removed," but there were examples

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5057672/-/7yufwz/-/index.html; Associated Press, *Florida Man Charged With Claims Fraud*, HUNTSVILLE TIMES, Aug. 31, 2011.

143 Laura Layden, *Naples Developer Sues BP Over Marked-Down Price for Pelican Bay Condo*, NAPLES NEWS (Dec. 9, 2011), http://www.naplesnews.com/news/2011/dec/09/bp-sue-pelican-bay-real-estate-price-drop-condo.

144 *Id.*; *see also* Matt Barrentine, *Feinberg Breaks Promises to Seville Quarter*, FOX 10 TV (Jan. 18, 2012, 12:47 PM), http://www.fox10tv.com/dpp/news/gulf_oil_spill/feinberg-promise-broken-to-seville-quarter (discussing restaurant owner whose claim got denied, but restaurant employees, using same lost business figures, received thousands of dollars).

145 *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra* note 118, statement of Kenneth Feinberg; *see also* Nicole Sanseverino, *Feinberg Sorts Through Oil Spill Victim's* [sic] *Claims*, THE DAILY TEXAN (October 3, 2011, 11:20 PM), http://www.dailytexanonline.com/news/2011/10/04/feinberg-sorts-through-oil-spill-victim%E2%80%99s-claims (Rope-maker in Sweden makes claim to GCCF for lost profits when Gulf Coast fishermen no longer need ropes for nets).

146 Mullenix, *supra* note 7, at 849.

147 *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra* note 118.

of less popular eligibility determinations and mid-game rule changes. One occurred in August 2011, when Feinberg announced that in order for businesses and workers to continue to be eligible for interim damage payments from GCCF, they had to show a 5% increase in income.[148] Where eligibility is broad and vague, there is again the issue of fraud.[149] There is also the issue of fairness and efficiency. Some have challenged the validity of claims by real estate developers, for example, who lost money in deals after the spill, questioning, "whether the selling price was more affected by the economy than the spill."[150] It is arguably unfair to make BP pay for money lost in real estate deals not along the coastline. It is also arguably an inefficient use of the fund money to compensate real estate developer "victims" when long-term damage to fisheries, for example, is yet to be determined.[151]

Lastly, the GCCF was criticized as slow and plagued with delays.[152] In one particularly heart wrenching story, a charter fishing boat captain died of cancer the night before his final claim paperwork came, after a year of trying to get payment.[153] A family friend who tried to help him through the process said, "Once it goes to the Feinberg level in Ohio, it goes into a magic black hole and nobody has any influence whatsoever, when it sits at that level."[154] At the October Congressional hearing, Feinberg denied Rep. Landry's claims that the GCCF conveniently "lost" paperwork in order to delay payments;[155] the PSC successfully claimed that this was a strategy to pressure cash-strapped business owners and individuals into accepting a Quick Payment Final Claim.[156]

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148 Dan Murtaugh, *Businesses Must Shoe Growth to Continue Claims,* HUNTSVILLE TIMES, Aug. 24, 2011.

149 Kirby, *supra* note 141; Kirby, *supra* note 141; Staff Report, *supra* note 141; Associated Press, *supra* note 142.

150 *See* Layden, *supra* note 143.

151 *Id.*

152 *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra* note 118; *see also* Heisig, *supra* note 119.

153 Guy Busby, *Bon Secour Boat Owner Dies Night Before Receiving Oil Claim Papers*, AL.COM (Nov. 17, 2011, 7:42 AM), http://blog.al.com/live/2011/11/bon_secour_boat_owner_dies_nig.html.

154 *Id.*

155 *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra* note 118, statements of Jeff Landry (R-LA).

156 *See, e.g.,* Laurel Brubaker Calkins, Jef Feely & Edward Petterson, *BP Reaches Estimated $7.8 Billion Deal with Gulf Spill Victims*, BLOOMBERG (Mar. 3, 2012), http://www.bloomberg.com/news/print/2012-03-03/bp-reaches-settlement-agreement (attorneys argued that the GCCF used coercive tactics to force claimants to accept inadequate payments for their claims and give

Although claims had been paid to the tune of over $6.1 billion by the time the GCCF was dissolved,[157] a better and quicker result than the victims of the Exxon Valdez oil spill experienced,[158] this can hardly be described as an efficient process. It is important to note that this cannot be described as an easy process either. Feinberg had no real model and, although there was a lot of criticism of him as the "master of disaster" and the "pay czar" of the fund, it is clear that statutorily mandated oversight from the federal government could have helped ensure efficient, timely and fair claims resolution.[159] It is yet to be seen how efficient the procedure will become under Judge Barbier's supervision.[160]

IV. PROPOSALS TO AMEND OPA 90

Given the catastrophic degree of damage done by the Deepwater Horizon Oil Spill, and the continuing aftermath of attempted alternative dispute resolution and litigation, there have been a number of OPA 90 amendments proposed. Some of these proposals include amendments that would increase presidential oversight

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up their right to sue); Ferrara, *supra* note 141 ("What they're trying to do is wear you down, so you give up"); *see also* GULF COAST CLAIMS FACILITY - SUMMARY OF OPTIONS FOR SUBMISSION OF FINAL AND INTERIM PAYMENT CLAIMS, *available at* http://www.gulfcoastclaimsfacility.com/summary_options.pdf (This option requires no loss documentation, compensates individuals at $5,000 and businesses at $25,000, and requires claimants to sign a full release of liability, thereafter foreclosing their appeal and litigation options.).

157 Brubaker Calkins, et al., *supra* note 156.

158 *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra* note 118, statements of Ed Markey (D-MA) (Rep. Markey commented at the start of the hearing the tragedy that some victims of the 1989 oil spill in the Prince William Sound did not receive any compensation until 2008, nearly two decades later. Some of those victims had already passed.).

159 It was noted in the October 2011 Congressional Hearing that the GCCF was not completely without oversight, although Feinberg commented that he was willing to take full blame or full credit for the failure or success of the project due to how minimal oversight had been. It seems oversight was limited to periodic review and suggestions from the Department of Justice in the form of letters, and appeal to the NPFC under OPA 90. As of the date of the hearing, all 1,359 GCCF claim determinations reviewed by NPFC had been upheld. *Id.*; *see also* Jim Snyder, *BP's Spill Fund Paid $5.5 Billion in Claims, Feinberg Says*, BLOOMBERG BUSINESS WEEK (Oct. 27, 2011, 12:20 PM), http://www.businessweek.com/news/2011-10-27/bp-s-spill-fund-paid-5-5-billion-in-claims-feinberg-says.html.

160 *See* Longstreth, *supra* note 122, discussing Feinberg's replacements. *See also* Richard Blackden, *BP in the Dock: the Case Explained*, THE TELEGRAPH (Feb. 26, 2011, 2:00 PM) http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/9104915, discussing Judge Barbier's thirty year experience as a maritime lawyer in New Orleans before being appointed to the bench.

of claims processing, remove the liability cap, limit the removal of OPA 90 claims from state to federal court, and expand causes of action for oil spill victims.[161] To serve the goals of fairness, efficiency, and speed, OPA 90 amendments should be modeled after the rules governing maritime arbitration, and should guide the creation and administration of claims facilities by responsible parties in the future.

To address GCCF's aforementioned transparency problem and satisfy a need for fundamental fairness, OPA 90 should borrow from the SMA Rules governing the appointing of arbitrators and subsequent disclosure requirements. If you recall, Part IV of the SMA Rules would disqualify any person who had a personal or financial interest in the outcome of the arbitration, or who has acquired detailed prior knowledge on the matter from an interested source from serving on the panel.[162] Clearly, if the responsible party is to administer an alternative dispute resolution procedure, administrators (like Feinberg) may have both personal and financial interests in the outcomes of claims, as well as detailed prior knowledge from their employer, the responsible party. However, OPA 90 could require specific disclosure procedures resembling those found in the SMA Rules that would prevent public outcry and distrust of the nature of the relationship between the responsible party and the claims administrator. For example, if OPA 90 had required Feinberg to disclose the amount BP was paying his firm and the details of BP's involvement with claim review, if any, there would have been no need to request this information and public distrust and criticism would not have developed while he withheld it.[163] In addition, there would have been no need for Judge Barbier to order Feinberg and GCCF representatives to stop

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161 *See, e.g.,* Implementing the Recommendations of the BP Oil Spill Commission Act of 2011, H.R. 501, 112th Cong. (as introduced January 26, 2011); Oil Spill Victims Redress Act, S.594, 112th Cong. (as introduced March 16, 2011); Oil Spill Victims Redress Act, H.R. 2386, 112th Cong. (as introduced June 24, 2011); Big Oil Bailout Prevention Trust Fund Act of 2011, S. 215, 112th Cong. (as introduced January 27, 2011); Deepwater Horizon Survivors' Fairness Act, S. 183, 112th Cong. (as introduced January 25, 2011).

162 MARITIME ARBITRATION RULES, *supra* note 25, at IV§ 8.

163 Steir, *supra* note 69 (discussing the need for transparency in claims-administrator pay and a structure that preserves independence and neutrality in administration). Up until the October 2011 Congressional hearing, members of the house were still unclear as to how much say BP had in claims decisions and valuations. *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra* note 118 (Feinberg clarified at this hearing the BP has the right to appeal claims settled for over $500,000, but added that they have not exercised that right often.).

portraying that they were neutral and independent from BP.[164] If the statute mandated disclosure, much government time and money could have been saved.

Another issue surrounding GCCF, as previously discussed, was the lack of government oversight. OPA 90 should require the Coast Guard and NPFC to be involved with the resolution of claims with the responsible party, taking a page from the SMA Rules. For example, the SMA keeps a roster of persons with qualifications to act as maritime arbitrators.[165] The NPFC and the spiller could also create such rosters, summarizing and organizing claims administrators' professional history and qualifications by location. A three-person panel could decide claims; the claimant appointing one administrator, the NPFC appointed a second, and the responsible party appointing a third. It must be kept in mind that adding these procedural protections would slow down the process significantly, but perhaps delays could be mitigated by mandating something similar to the GCCF's Emergency Advance Payments program,[166] or only allowing the panel to be assembled for business claims, or either business or individual claims over a certain amount. Regardless of delay, it seems in this instance statutorily mandated disclosure, transparency, and federal oversight would improve the alternative dispute resolution process employed by a party responsible for an oil spill in the future.

In keeping with the idea of increasing government oversight by utilizing Coast Guard and NPFC personnel, OPA 90 should outline ways for the government to work with the responsible party in the initial phase of claims administration to determine a "sphere of damage" within which eligible claimants would lie. If unforeseen damages are discovered later in the process, OPA 90 should govern the amending of eligibility rules and compensation charts. Lastly, standards of review, similar to those laid out by the FAA, the SMA, and the APA, should govern any appeal procedure.

This Note does not mean to suggest that government involvement would increase the speed of claims resolution; I only argue

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164 *See* 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).

165 MARITIME ARBITRATION RULES, *supra* note 25, at II §4.

166 From August 23, 2010, through November 23, 2010, claimants could submit claims to receive emergency relief for damages caused by the Spill. *See* GULF COAST CLAIMS FACILITY, FREQUENTLY ASKED QUESTIONS, http://www.gulfcoastclaimsfacility.com/faq#Q3 (last visited Jan. 22, 2012). The GCCF paid out over $2.5 billion in Emergency Advance Payment claims. GULF COAST CLAIMS FACILITY, OVERALL STATUS REPORT, http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf (last visited Jan. 22, 2012).

that this oversight would create a feeling of justice and fairness in the public eye. The public's perception of an alternative dispute resolution process' level of fairness is important in determining whether it will be effective in keeping claims out of court.

Although some of these suggestions may slow down the claims administration process, it has been noted that the GCCF received criticism for operating with delays. OPA 90 can outline, much like the SMA Rules for Shortened Arbitration Procedure,[167] strict turnaround times for document submission and response. If either party violated these deadlines, there could be penalties to encourage speed. For example, if a claimant missed a deadline, s/he would not be required to forfeit his claim, but perhaps suffer a penalty in the form of a fee when the claim is ultimately paid. If the responsible party missed its deadline, it could be required to pay an interim amount to the claimant while the issue is resolved.

The last issue OPA 90 should attempt to address in the claims administration process by the responsible party is fraud. The SMA Rules allow for "Arbitration on Documents Alone" where the parties agree in writing to forego the hearing process and submit documents and briefs to the panel for decision.[168] The default is an oral hearing, conducted in an orderly manner appropriate to judicial proceedings, but traditional rules of evidence are not applied. OPA 90 should call for a default for decision on documents alone, perhaps borrowing from the GCCF documentation requirements,[169] but allow either party to request an oral hearing. To try to stay as efficient as possible, the statute could limit the claimant's right to request a hearing until they have exhausted document submission options. On the other hand, OPA 90 could allow the responsible party to request a hearing at any time, which would discourage fraudulent claimants from pursuing compensation.

V. Conclusion

Whether the new court supervised claims process will fare better than the GCCF, and whether Feinberg will one day be hailed as a hero and pioneer of mass tort claim resolution, remains to be

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167 Rules for Shortened Arbitration Procedure of the Society of Maritime Arbitrators, *supra* note 39.

168 Maritime Arbitration Rules, *supra* note 25, at VI §27.

169 Gulf Coast Claims Facility, Document Requirements, http://www.gulfcoastclaimsfacility.com/requirements.pdf (last visited Jan. 22, 2012).

seen. What is already clear is that the huge responsibility of restoring individuals, businesses, and the environment of an entire region of the country should not be left in the hands of one "pay czar" to "see how it plays out."[170] OPA 90 should not be "entirely vague" as to how a responsible party must satisfy its duties.[171] SMA and the tradition of marine arbitration is a historically efficient and successful alternative dispute resolution model. The federal government should borrow a page from these rules to provide guidance and oversight to the future spiller. This would create a fairer, more efficient restitution process for victims and prevent the alternative claims resolution procedure from becoming a mere pathway to complex litigation.

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[170] *Gulf Coast Recovery: President Obama's BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra* note 118, statements of Chairman Hastings.

[171] Mullenix, *supra* note 7, at 834.