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Colloquium
2/17/10

The "Option" to Settle With the GCCF

In analyzing the appropriateness of an administrative compensation regime in the context of responses to mass tort claims, it is necessary to examine not only the functionality and legality of such regimes, but also concerns of equity and fairness to the victims of such mass torts. As such, the delineation between those victims who accept administrative settlements and those who pursue tort litigation through the courts becomes quite significant. While the author of the paper admittedly concedes the existence of a noticeable group of claimants expected to refuse settlements, this paper seeks to determine if there exist specific classes of victims more likely to settle in the administrative context, and what fairness issues are associated with such classes.

One of the more prominent incentives identified by the paper in agreeing to an administrative settlement, and consequently waiving one's right to sue, is the avoidance of the long, drawn out, and delayed process of litigation. Indeed, Ken Feinberg is quoted as proffering that claimants will do no better in court than they will do with the settlement he offers. Consequently, it is urged that victims accept immediate payments for their damages without going to court. This idea raises serious concerns about the exploitation of a certain class of claimant. While BP did indeed pay out emergency funds to cover immediate losses of claimants in the months following the disaster, many felt these payments were inadequate and are now dependent upon payments of final settlement to become whole again, or for many, to merely continue their way of life. Hence, the claimant most likely to accept the immediate final settlement and spurn years of litigation is most often the claimant suffering the most, those for whom the bills are piling up even as their local industries limp to recovery. In short, those likely to accept settlements and waive the right to sue are probably those who need the money the most.

Conversely, those claimants that opt to sue in court are most likely those with enough money saved or alternate means of support that they can afford to wait several years for an equitable settlement. The true cost of litigation lies not in legal fees, but rather the time spent waiting for a settlement. Significantly then, become the concerns that the poorest claimants, of which there are many, could be receiving undervalued settlements because the GCCF knows they have no other choice but to accept immediate payment. By circumventing the courts and offering settlements administratively, there is a definite threat of the GCCF depriving claimants of equitable justice. Tort litigation in the court system offers even destitute clients protection under the laws. The GCCF, operating without statute or clearly defined parameters, does little to guard against settlement exploitation of low-income claimants.

A particular element that is troubling in this context concerns the settlement condition that a claimant waive their right to sue any defendant. This is alarming for two different reasons: first, the extent of the damage of the oil spill is not yet entirely known, creating uncertainty about the true value of settlements. Second, for the aforementioned reasons, claimants may agree to settlements hastily without understanding the potential for further, future damages they could be entitled to if they did not waive their right to sue. A potential solution to alleviate this concern would be for GCCF to merely deduct the amount of settlement from future settlements received through the court system. Hence, a claimant would be precluded from "over-recovering" from litigation because BP, or any other related defendant, would pay only the net settlement amount. This solution would allow for claimants who need settlements now to recover for the damages now calculable, but also to recover from future damages that may or may not arise from the oil spill. Theoretically, this would merely transform the Phase II final settlements into more comprehensive Phase I emergency settlements. As mentioned above, many claimants do not

have the financial capacity to wait it out in litigation, and must, as a matter of need, accept settlements now. In order to protect them against accepting undervalued claims, the removal of waiver to sue as a condition for settlement acceptance is needed. In the alternative, the GCCF could extend emergency funds for a longer period until further scientific study reveals the true extent of damages to be incurred by the oil spill. By requiring needy claimants to waive their right to sue as a condition of accepting settlements before the true extent of damages are known, the GCCF comes dangerously close to strong-arming the most desperate class of claimants.

Implicit in the discussion of a claimant's economic incentive to accept final settlement is the assertion, by Feinberg himself, that the claimants will do no better in court. However, ~~I take significant issue with this statement.~~ The GCCF was admittedly set up, in part, to avoid massive tort litigation in local courts with local juries, whom BP officials, and perhaps Washington as well, feared would find for plaintiffs in devastatingly high figures. This fear is perhaps well grounded, especially when considering a range of figures a Louisiana jury would award for punitive damages. If the GCCF was intended to avoid such litigation, than why is the potential severity ~~of same~~ so easily discounted by Feinberg himself? This raises another, broader concern as to the establishment of the GCCF in the first place. As well documented by the author, the same rationales present at the establishment of the 9/11 fund were not present here. Consequently, one may ask the ~~simple question of~~ whether the GCCF was established to help the victims resolve their claims in an efficient and expedited manner, or ~~rather~~ instead, to stem the coming tide of crippling tort litigation? Additionally, such a move could have been motivated by a desire to settle the majority of claims before the full severity of the disaster is known. These considerations cast significant doubt on the legitimacy of settlement amounts, and therefore, the fairness of the claims process itself.

Weaker, less clearly articulated than prior pages

The aforementioned concerns cast serious doubt on the appropriateness of administrative settlement regimes when certain criteria are met. While the author highlights what criteria are necessary for such regimes to be legitimate, I believe there is a converse perspective from which to view such legitimacy. Namely, that when certain criteria are present in the wake of a mass tort claim, an administrative settlement regime requiring waiver of claimants' right to sue is not appropriate. These criteria are repeated here. First, an administrative settlement requiring claimants to waive their right to sue is inappropriate when the pool of claimants lack adequate resources to have an effective option to pursue litigation. Second, such a regime is inappropriate when the extent of the damage resulting from the tort is still under debate or unknown to a degree of certainty. Additionally, the requirement of waiver to sue is unnecessary under a legal system that already precludes litigants from settling the same claim twice. Finally, administrative settlement regimes may not be appropriate in situations where punitive damages may exceed actual damages. Far from being only a plaintiff issue, there is strong sentiment that not only should the defendants be responsible for paying actual damages, but should also be punished for their actions. In conclusion, when analyzing the appropriateness of administrative settlement regimes it is necessary to look at the tortfeasor, the tort itself, and perhaps most importantly, the tort victims themselves.

Some weaker here

Very solid work. It begins very strong, then loses steam 2/3 of way through. However. Why? Perhaps as your focus drifted, + you tried to cover more ground than you needed to?

That said, the incisive comments + org. analogies up in the beginning 2/3s are great.

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