

In The
Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC., ET AL.,

Petitioners,

v.

LAKE EUGENIE LAND & DEVELOPMENT, INC., ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**BRIEF OF KENNETH R. FEINBERG,
SPECIAL MASTER OF THE FEDERAL
SEPTEMBER 11TH VICTIM COMPENSATION
FUND OF 2001 AND ADMINISTRATOR OF THE
GULF COAST CLAIMS FACILITY, AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

In two related decisions, the Fifth Circuit held that a class may be certified consistent with Federal Rule of Civil Procedure 23 and Article III of the Constitution even when the class includes vast numbers of members who have not suffered any injury caused by the defendant. On that basis, the court of appeals upheld a class-action settlement entered into between BP and a class of plaintiffs purportedly injured by the *Deepwater Horizon* oil spill, notwithstanding the district court's determination that the agreement requires BP to compensate claimants who have not suffered any injury as a result of the spill. The Second, Seventh, Eighth, and D.C. Circuits have adopted a contrary rule, concluding that certification is inappropriate where many members of the class have not been injured by the defendant.

The question presented is whether the court of appeals erred in holding—in conflict with the Second, Seventh, Eighth, and D.C. Circuits—that district courts can, consistent with Rule 23 and Article III, certify classes that include numerous members who have not suffered any injury caused by the defendant.

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INTEREST OF *AMICUS CURIAE*

Amicus Kenneth R. Feinberg was selected by Executive Branch officials to help design, implement, and administer two successful alternatives to the conventional tort litigation system. Both programs demonstrate that principled, transparent, and effectively administered claims programs can fairly compensate victims, conserve judicial resources, and efficiently resolve claims without the uncertainty and cost associated with conventional litigation.¹

In November 2001, Mr. Feinberg was appointed to design an expeditious alternative to mass tort

¹ Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. At the specific request of counsel for respondents Lake Eugenie Land & Development, Inc., et al., and out of an abundance of caution, *amicus* informs the Court that the district court determined Mr. Feinberg acted as BP's "agent" in administering the Gulf Coast Claims Facility. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, MDL No. 2179, 2011 WL 323866, at *6 (E.D. La. Feb. 2, 2011) (finding that Mr. Feinberg was BP's agent—not counsel—solely for purposes of satisfying BP's role as the "responsible party" under the Oil Pollution Act but recognizing that he was "independent" in the sense that "BP d[id] not control Mr. Feinberg's evaluation of individual claims"). Pursuant to this Court's Rule 37.2, counsel of record for petitioners and respondents were timely notified of *amicus*' intent to file this brief. Counsel for Allpar Custom Homes, Inc., et al. and Earl Aaron, et al., have provided *amicus* with written consent. All other parties have filed blanket consents with this Court.

litigation arising out of the September 11 terrorist attacks. Pursuant to the Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (codified as amended at 49 U.S.C. § 40101 note), the Attorney General delegated to Mr. Feinberg all necessary authority to design and administer a compensation program encouraging 9/11 terrorist victims and their survivors to seek compensation from a fund established by the legislation as an alternative to protracted, uncertain tort litigation.

For nearly three years, Mr. Feinberg processed over 7500 individual claims submitted by victims of the 9/11 attacks, and authorized payments totaling over \$7 billion. Kenneth R. Feinberg, et al., *Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001*, U.S. Dep't of Justice, at 1 (2004) ("Special Master's Final Report").²

Similarly, within weeks of the April 2010 explosion on the drilling rig *Deepwater Horizon* in the Gulf of Mexico, Mr. Feinberg was chosen to design, implement, and administer the Gulf Coast Claims Facility. See *Statement by the President After Meeting with BP Executives*, The White House, at 1 (June 16, 2010, 2:25 P.M. EDT) ("President Obama's June 16, 2010 Statement").³

² Available at http://www.justice.gov/final_report.pdf.

³ Available at <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives>.

For 16 months, Mr. Feinberg processed over one million claims and authorized payments totaling approximately \$6.2 billion to over 220,000 individual and business claimants (until the Gulf Coast Claims Facility was replaced by the Deepwater Horizon Court Supervised Settlement Program, which resulted from a Rule 23 class action settlement between BP and attorneys representing a putative class of injured Gulf Coast residents and businesses). BDO Consulting, BDO USA, *Independent Evaluation of the Gulf Coast Claims Facility: Report of Findings and Observations to the U.S. Department of Justice*, at 59 (2012) (“BDO’s Report”).⁴

In addition to administering the 9/11 and Deepwater Horizon claims programs, Mr. Feinberg served as Fund Administrator for the Hokie Spirit Memorial Fund after the tragic shootings at Virginia Tech. He also served as court-appointed Special Master in the Agent Orange Product Liability Litigation, asbestos personal injury litigation, and the DES (pregnancy medication) cases. Mr. Feinberg also designed, implemented, and administered an alternative dispute resolution settlement program involving Liberty Mutual Insurance Company, Zurich N.A. Insurance Company, and Hurricane Katrina and other Gulf hurricane claimants; served as Distribution Agent for AIG Fair Fund claimants; and served as the fund

⁴ Available at <http://www.justice.gov/opa/documents/gccf-rpt-find-obs.pdf>.

administrator for a variety of other claimant funds totaling more than \$1 billion.

Mr. Feinberg offers a unique perspective on effective alternatives to mass tort litigation—and has an interest in the continued viability of those alternatives. The September 11th Victim Compensation Fund and the Gulf Coast Claims Facility administered by Mr. Feinberg demonstrate that when designed and implemented appropriately, these alternatives to mass tort litigation can secure fair compensation for eligible victims, avoid delay, and alleviate crowded court dockets. Mr. Feinberg is concerned, however, that if permitted to stand, the Fifth Circuit decisions below threaten the continued viability of these much-needed alternatives to conventional litigation. Mr. Feinberg therefore files this brief in support of the petition for certiorari.



INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit held in two related decisions that district courts can certify classes that include numerous members who have not suffered any injury caused by the defendant. Those decisions, if permitted to stand, threaten to undermine the viability of alternatives, like the September 11th Victim Compensation Fund and the Gulf Coast Claims Facility administered by Mr. Feinberg, to conventional mass tort litigation.

Of particular relevance here, requiring claimants to establish causation—an essential element in claims processed by both the 9/11 Fund and the Deepwater Horizon Fund—is crucial to ensuring the integrity of the claims programs and to encouraging defendant companies to design and implement them. Given scarce judicial resources, these alternatives to conventional mass tort litigation—the shortcomings of which are well-documented—are essential because they provide expedited relief for injured parties and relieve overburdened courts clogged with mass tort filings.

The Court should therefore grant the petition to ensure that a key alternative to the conventional tort system remains viable for the fair, efficient, and expeditious compensation of injured victims.



ARGUMENT

In the wake of the 9/11 terrorist attacks, and later after the Deepwater Horizon explosion, Congress and the Executive Branch determined that traditional access to federal and state courts by thousands of victims would not be an effective way to provide compensation. It would take too long, be too contentious and uncertain, prove too costly, and likely result in disparate treatment among and between individual litigants. Instead, Congress and the Executive Branch decided to advance an alternative to conventional mass tort litigation. As Mr. Feinberg's vast experience demonstrates, that alternative has proven highly effective in a wide array of contexts, from the

aftermath of the 9/11 attacks to insurance recoveries in the wake of Hurricanes Katrina and Rita.

While these programs have been extraordinarily effective, by any measure, at efficiently and fairly compensating individual victims, the Fifth Circuit's decisions in this case affecting the causation standard, if permitted to stand, threaten to make these sorely needed alternatives to mass tort litigation unlikely to be replicated. Future funds would either adopt the Fifth Circuit's new standard, thereby threatening to overwhelm the claims process with spurious claims, or continue to require causation, thereby channeling claimants toward litigation where the burden of proof is lower. Either way, the future workability of these efficient mechanisms for compensating victims is needlessly put at risk. The petition should be granted.

I. Mass Tort Litigation Poses Serious Challenges To The Judicial System

As is well known, the sheer volume of cases involved in mass tort litigation poses a serious challenge to the ability of state and federal courts to process individual tort claims in an efficient, fair, and effective manner. Efforts to deal with the mass tort phenomenon have thus focused primarily on the challenge of finding an appropriate way to aggregate hundreds or even thousands of individual tort claims in one forum to promote speedy resolution through trial or settlement. But the aggregation of mass tort claims has proven both difficult and controversial.

During the past 15 years, for example, this Court has questioned the use of the class action device under Rule 23 as the primary mechanism for aggregating mass tort claims. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (holding sprawling, mass tort settlement-class certification failed to satisfy Rule 23's requirements); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (rejecting limited fund class certifications in asbestos litigation). This Court has similarly questioned the effectiveness of aggregating claims in the context of arbitration proceedings. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752-53 (2011) (“[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once [in an arbitration], the risk of an error will often become unacceptable.”).

Courts have also attempted to meet the challenges posed by mass tort litigation through other alternative mechanisms, such as the “quasi-class action” arising out of use of multidistrict litigation (“MDL”). See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 270-71 (E.D.N.Y. 2006) (characterizing multidistrict litigation on behalf of over 8000 private individuals against a pharmaceutical manufacturer as a “quasi-class action”); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 611 (E.D. La. 2008) (treating multidistrict products liability litigation involving prescription drug Vioxx as a “quasi-class action”). Those creative alternatives, however, do not completely address the serious problems of crowded court dockets and scarce judicial resources.

II. Administrative Claims Programs Like The 9/11 And Deepwater Horizon Funds Provide Much-Needed Alternatives To Conventional Mass Tort Litigation

The challenges to courts posed by mass tort litigation have not gone unnoticed by Congress and the Executive Branch. Concerned about processing individual tort claims in a speedy, streamlined, and cost-effective manner, both branches of government have, in recent years, promoted alternative means of compensating victims outside the conventional tort system. Those efforts began with subject-specific statutes designed to make it easier for eligible claimants to resolve their individual claims without confronting traditional courtroom delays. See, e.g., Price-Anderson Nuclear Industries Indemnity Act of 1957, 42 U.S.C. § 2011 *et seq.*; Federal Coal Mine Health and Safety Act of 1969, 42 U.S.C. § 423 *et seq.*; National Childhood Vaccine Act of 1986, 42 U.S.C. §§ 300aa-1 to 300aa-34.

Those earlier efforts led, in turn, to the two most prominent examples of alternative compensation programs to date—the 9/11 Victim Compensation Fund and the Gulf Coast Claims Facility, both designed and administered by Mr. Feinberg. Both programs successfully compensated thousands of victims with billions of dollars in claims in a streamlined and efficient fashion. And both programs required claimants to establish causation—demonstrating there is nothing unworkable or problematic about such a requirement in the administrative claims context.

To the contrary, it is the *absence* of such a requirement that threatens the integrity of such programs—and raises serious questions about whether, if the Fifth Circuit’s decisions are permitted to stand, similar efforts will be viable. This Court’s review is needed to ensure the viability of these much-needed alternatives to conventional mass tort litigation.

A. The 9/11 Victim Compensation Fund

In response to the 9/11 terrorist attacks, Congress created the September 11th Victim Compensation Fund of 2001 under the Air Transportation Safety and System Stabilization Act. Concerned that conventional mass tort litigation would threaten the financial viability of the Nation’s airline industry, and determined to compensate victims of the attacks in a prompt and fair manner, Congress provided eligible claimants with the option of bypassing federal court in favor of an administrative, no-fault compensation system funded entirely by federal taxpayer dollars. Congress delegated authority to the Attorney General to select a Special Master to design and administer the compensation program. Pub. L. No. 107-42, § 404(a)(1)-(2). The Attorney General designated Mr. Feinberg to perform these functions. Mr. Feinberg reached out to all 9/11 victims who qualified to file a claim, evaluated applications, determined appropriate compensation, and disseminated awards to 9/11 victims and their families.

The requirement that claimants establish causation was an essential feature of the Fund. Eligibility was limited to those who died on the four airplanes “or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001.” Pub. L. No. 107-42, § 405(c)(2)(A)(i). Fund regulations also required that any valid claims of physical injury be accompanied by contemporary medical records that confirmed emergency treatment within 72 hours of the September 11 attacks (96 hours for first responders, who were too busy to seek earlier medical help). 28 C.F.R. § 104.2(b)(c)(1).

The Fund regulations further required that the physical injuries occur at “the site” of the terrorist attacks, defined to include “the buildings or portions of buildings that were destroyed as a result of the terrorist-related airplane crashes” and “any area contiguous to the crash sites that the Special Master determines was sufficiently close to the site that there was a demonstrable risk of physical harm resulting from the impact of the aircraft or any subsequent fire, explosions, or building collapses (generally, the immediate area in which the impact occurred, fire occurred, portions of buildings fell, or debris fell upon an injured persons).” 28 C.F.R. § 104.2(e).

During the statutorily prescribed 33 months of the program, Mr. Feinberg, as Special Master, evaluated approximately 7500 individual claims, determined that approximately 5500 were eligible for compensation under the statute, and distributed over

\$7 billion to the eligible claimants. See Feinberg, Special Master's Final Report, at 1 (2004). Although the compensation program was entirely voluntary, 97 percent of all eligible claimants submitting a death claim opted into the program to accept compensation from the Fund rather than litigate claims in court. *Ibid.*

B. The Gulf Coast Claims Facility

Shortly after the April 2010 Deepwater Horizon Oil Rig explosion and oil spill in the Gulf of Mexico, the U.S. Department of Justice and BP agreed to establish an independent claims process, as required under the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2762. About two months after the explosion, President Obama announced an agreement by which BP would (a) set aside \$20 billion over three years to establish a claims fund that would satisfy legitimate claims for losses and damages, and (b) create a new claims process—the Gulf Coast Claims Facility—that Mr. Feinberg would administer. See President Obama's June 16, 2010 Statement, at 1.

The Gulf Coast Claims Facility evaluated all claims submitted “to determine whether a loss was caused by the Oil Spill.” See *Gulf Coast Claims Facility Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology*, at 2 (Feb. 18, 2011), available at <http://www.eng2viet.files.wordpress.com/2011/02/gccf-final-rules.pdf> (“The ability of the claimant to link

the alleged damage to the Oil Spill—as opposed to other factors such as a general downturn in the Gulf region economy or other financial uncertainty unrelated to the Oil Spill—is required.”). For each claim, evidence of “an identifiable link between an actual loss and the Oil Spill” was required. *Ibid.*

During the next 16 months—well before the first trial involving the explosion began—Mr. Feinberg, acting as Administrator of the Gulf Coast Claims Facility, received and processed over one million individual claims and distributed some \$6.2 billion to over 220,000 individuals and businesses. See BDO Consulting, BDO’s Report, at 59 (2012).

C. The 9/11 Fund And The Gulf Coast Claims Facility Were Highly Successful Alternatives To Mass Tort Litigation

The numbers confirm the success of both the 9/11 Fund and the Gulf Coast Claims Facility. An overwhelming percentage of eligible claimants chose to file a claim and receive compensation from the funds rather than litigate in court. *Ibid.*; Feinberg, Special Master’s Final Report, at 1. And both programs worked precisely as intended. If a claimant could demonstrate causation—i.e., that the death, physical injury, or business loss was caused, respectively, by the terrorist attacks or the oil rig explosion—payment was authorized without having to resort to litigation. Instead of waiting years for an uncertain litigation outcome, hundreds of thousands of claimants received

prompt, certain, and fair compensation with relatively minimal delay and cost. But the burden of proof remained with claimants in each instance to demonstrate causation.

One reason the claims processes were so successful is that they were based on clear rules governing causation. The integrity of these two programs—and public acceptance of their credibility and fairness—required clear evidence of causation as a precondition for both eligibility and the calculation of damages. If a claimant could demonstrate causation, then the processing of a claim occurred without years of courtroom litigation. And the number and amount of claims paid out of both funds remove any question that requiring causation is somehow unworkable.

To the contrary, both the 9/11 Fund and Deepwater Horizon Fund have been widely praised as successful alternatives to litigation. See, e.g., Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 224-25 (2005); Mike Steenson & Joseph Michael Sayler, *The Legacy of the 9/11 Fund and the Minnesota I-35 Bridge Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524, 559 (2009).⁵

⁵ This is not to say, of course, that courts have no role to play where alternative mechanisms for compensation are concerned. To the contrary, appropriate judicial oversight has proven
(Continued on following page)

But the success of such programs going forward depends, among other things, on their own clarity, consistency, and integrity. Absent these characteristics, they cannot serve as viable alternatives to conventional litigation. Of particular relevance here, without a causation requirement, such programs would lack integrity—and defendant companies would surely be reluctant to design and implement them.

III. If Permitted To Stand, The Fifth Circuit's Decisions Threaten The Viability Of Innovative, Efficient, And Fair Alternatives To Mass Tort Litigation

The success of the 9/11 Fund and the Gulf Coast Claims Facility demonstrate that fair compensation can be efficiently delivered to thousands of eligible victims without the necessity of litigating for years in federal and state courts throughout the Nation. If permitted to stand, however, the Fifth Circuit's decisions pose a serious threat to the continued viability of such programs.

invaluable in maintaining the integrity (and thus the effectiveness) of such alternatives. See, e.g., *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 301 (S.D.N.Y. 2003) (adjudicating challenge to the “methodologies and policies of the Special Master” of the 9/11 Fund and holding they were “reasonable and proper”); *In re “Deepwater Horizon,”* 2011 WL 323866, at *8 (granting plaintiffs’ motion to supervise the Administrator’s *ex parte* communications with putative class members).

First, there would be little, if any, incentive for a party to choose an alternative if it ends up being more onerous than traditional litigation. Under the Fifth Circuit's decisions, potential claimants have a lower burden of proof in federal court than they would resolving their claims through a fund such as the Gulf Coast Claims Facility. So long as the funds maintain the causation standards they have up to now, it is unclear why claimants would forego litigation in favor of the alternative claims process. The result undoubtedly would be more litigation, with its attendant costs and delays.

Second, funds will be susceptible to claims by vast numbers of uninjured persons, exacerbating the problems of delay, cost, and unfairness these alternative programs are intended to avoid. As a result, they will lack any reasonable limitation that is essential both to public acceptance and defendant companies' willingness to fund them.

The challenges posed by mass tort litigation show no sign of abating any time soon. It is imperative, then, that alternatives to litigation that have been proven successful remain viable for compensating victims fairly, resolving claims expeditiously, and conserving the resources of courts and parties alike.

Unfortunately, however, that is not likely to happen if, as the Fifth Circuit has held, claimants need not establish causation. The funds will either become obsolete or else adopt the new rule and be overwhelmed by questionable claims—thereby hampering

truly eligible claimants from receiving prompt compensation, and recreating precisely those problems with conventional litigation that alternative mechanisms such as administrative claim programs are intended to avoid. That is assuming, of course, that defendant companies would even agree to design and implement such programs under such unstable conditions.

This Court's review is needed to ensure that the Fifth Circuit's rulings in this case do not compromise the ability of future programs like the 9/11 Fund and the Deepwater Horizon Fund to serve as viable, much-needed alternatives to conventional mass tort litigation.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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