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## A Court's Continuing Obligation to Ensure Fairness of Class Action Settlements

Filip Grzelak

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# A Court's Continuing Obligation to Ensure Fairness of Class Action Settlements

FILIP GRZELAK\*

*In April 2010, Deepwater Horizon, a BP-operated drilling rig, exploded killing eleven workers and poisoning the waters of the Gulf of Mexico with 210 million gallons of oil. Some 90,000 cleanup workers become involved in the response; many became sick after exposure to crude oil and Corexit, a chemical used to disperse the oil. A class action against BP ensued. A settlement was reached in 2013 and provided for a two-phased compensation mechanism, which class action experts praised for effectiveness and fairness.*

*Soon, however, it became clear that the settlement was neither effective nor fair. Many cleanup workers were denied the compensation that they were promised under the administrative-based phase one of the settlement. Instead, they were forced into the ongoing litigation-based phase two, where their individual claims must be brought to federal courts. Plaintiffs have become stuck with an unfair settlement and federal courts could be bogged down with a multitude of personal injury trials—an unwanted result of any class action settlement. This Comment argues that after*

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*granting a judicial approval of a class action settlement under Federal Rule of Civil Procedure 23(e)(2), courts should have a continuing duty as a fiduciary to the class to ensure fairness and effectiveness of the settlement.*

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## INTRODUCTION

*“It is one of the fairest and most impressive settlements I have seen in more than 20 years of practicing, teaching and writing in the field of class actions.”*<sup>1</sup>

*“This settlement is an extraordinary achievement that realizes the great objectives behind court supervised class settlement.”*<sup>2</sup>

*“This Court . . . , class counsel, and counsel for BP deserve high praise for producing this historic settlement, one that provides meaningful and substantial benefits to the class.”*<sup>3</sup>

These were the statements that Dean Robert Klonoff and Professor Samuel Issacharoff, prominent practitioners and scholars in the area of class action lawsuits,<sup>4</sup> made about the *Deepwater Horizon* Medical Settlement Agreement (“MSA”).<sup>5</sup> Judge Carl J. Barbier of the Eastern District of Louisiana approved this settlement in *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*

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<sup>1</sup> Transcript of Final Fairness Hearing Proceedings at 183, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.* on April 20, 2010, 295 F.R.D. 112 (E.D. La. 2013) (MDL No. 2179), Doc. No. 7892 [hereinafter Fairness Hearing].

<sup>2</sup> Declaration of Samuel Issacharoff Relating to the Proposed Medical Benefits Class Settlement at 15, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.* on April 20, 2010, 295 F.R.D. 112 (E.D. La. 2013) (MDL No. 2179), Doc. No. 7116-2 [hereinafter Issacharoff Declaration].

<sup>3</sup> Expert Report of Robert H. Klonoff Relating to the Proposed Medical Benefits Class Settlement at 63, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.* on April 20, 2010, 295 F.R.D. 112 (E.D. La. 2013) (MDL No. 2179), Doc. No. 7116-2.

<sup>4</sup> *Id.* at 1–4; Issacharoff Declaration, *supra* note 2, at 2–3.

<sup>5</sup> *Deepwater Horizon* Medical Benefits Class Action Settlement Agreement as Amended May 1, 2012, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.* on April 20, 2010, 295 F.R.D. 112 (E.D. La. 2013) (MDL No. 2179), Doc. No. 6427-1 [hereinafter MSA].

on April 20, 2010.<sup>6</sup>

With the help of legal experts, the MSA was carefully drafted to compensate cleanup workers and coastal zone residents who suffered from crude oil and other chemical exposure during the cleanup efforts following the disastrous 2010 *Deepwater Horizon* oil spill in the Gulf of Mexico.<sup>7</sup> The oil spill not only devastated the fishing, shrimping, and tourist industry of the coastal areas of Texas, Louisiana, Mississippi, Alabama, and Florida (suffering businesses were later compensated under a separate settlement),<sup>8</sup> but it also devastated the lives of tens of thousands of cleanup workers and local residents,<sup>9</sup> who suffered either acute (short-term) or chronic (long-term) medical conditions—mostly related to the skin, eyes, throat, sinuses, and lungs—after the chemical exposure.<sup>10</sup>

Despite the enthusiastic statements that were made at the time the settlement was being approved, the implementation of the MSA did not work as intended. Despite British Petroleum's ("BP") public promises to take responsibility for both the oil spill and its consequences, as of November 2018, merely 22,836 out of 37,225 claimants were awarded \$67.2 million in compensation.<sup>11</sup> The paid

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<sup>6</sup> *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex. on April 20, 2010, 295 F.R.D. 112 (E.D. La. 2013) [hereinafter *Final Approval of the Deepwater Horizon MSA*].

<sup>7</sup> See MSA, *supra* note 5, § I; *Final Approval of the Deepwater Horizon MSA*, 295 F.R.D. at 117–18, 149–50.

<sup>8</sup> *Deepwater Horizon* Economic and Property Damages Settlement Agreement as Amended on May 2, 2012 at 1–5, *In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014) (No. 13-30095).

<sup>9</sup> On July 8, 2010, approximately 47,000 cleanup workers were deployed. Jeremy Repanich, *The Deepwater Horizon Spill by the Numbers*, POPULAR MECHANICS (Aug. 10, 2010), <http://www.popularmechanics.com/science/energy/a6032/bp-oil-spill-statistics/>. However, because of high rotation and replacement rates, the overall number of workers who were employed during the cleanup operations was significantly higher. *Cf.* *Final Approval of the Deepwater Horizon MSA*, 295 F.R.D. at 117 (stating that "[a]s many as 90,000 response workers engaged in near-shore and offshore Response Activities in the Gulf of Mexico . . .").

<sup>10</sup> See Specified Physical Conditions Matrix at 6–9, *Final Approval of the Deepwater Horizon MSA*, 295 F.R.D. 112 (E.D. La. 2013) (MDL No. 2179), Doc. No. 6427-10 [hereinafter Matrix].

<sup>11</sup> Status Report from the *Deepwater Horizon* Medical Benefits Settlement Claims Administrator at 4, 9, *Final Approval of the Deepwater Horizon MSA*, 295

amount is grossly inadequate to the scale of the 2010 Gulf Spill, especially considering that both economic and medical claims were to be paid out of a \$20 billion escrow account that BP set up during the spill.<sup>12</sup> Further, the paid amount is inadequate considering that the law firms representing the plaintiffs in the Plaintiff Steering Committee that negotiated the MSA received \$680 million in legal fees.<sup>13</sup> Looking at the MSA over six years after the court approved the settlement, it appears that this inadequate payment has left thousands of class members undercompensated or uncompensated, which threatens the federal courts with additional and unnecessary litigation due to the back-end litigation option in the MSA.”<sup>14</sup>

Thus, even the best designed class action settlement—or at least one highly praised by the legal community—may not guarantee equitable results. Unfortunately, even if a court that approved a class action settlement notices that the settlement does not work as intended, it has no power to reevaluate the agreement.<sup>15</sup> Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, “the court may approve [the proposed class action settlement] only after a hearing and on finding that [the settlement] is fair, reasonable, and adequate.”<sup>16</sup> Once the settlement is approved, the court has no continuing duty to

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F.D.R. 112 (E.D. La. 2013) (MDL No. 2179) [hereinafter November 2018 Status Report]; CNN Wire Staff, *BP Apology Campaign Begins Airing*, CNN (June 3, 2010, 10:05 AM), <http://www.cnn.com/2010/US/06/02/oil.spill.bp.apology/index.html>. It is estimated that around 200,000 people—cleanup workers and coastal residents—could belong to the class. Fairness Hearing, *supra* note 1, at 193.

<sup>12</sup> Steven Mufson, *BP, Plaintiffs Reach Gulf of Mexico Oil Spill Settlement*, WASH. POST (Mar. 3, 2012), [https://www.washingtonpost.com/business/economy/bp-plaintiffs-reach-gulf-of-mexico-oil-spill-settlement/2012/03/02/gIQA9OwnR\\_story.html?utm\\_term=.9645558d5b8e](https://www.washingtonpost.com/business/economy/bp-plaintiffs-reach-gulf-of-mexico-oil-spill-settlement/2012/03/02/gIQA9OwnR_story.html?utm_term=.9645558d5b8e).

<sup>13</sup> Katherine Sayre, *BP Oil Spill: Two Louisiana Law Firms to Receive \$87 Million Each in Attorney Fees*, NOLA.COM (Apr. 13, 2017), [http://www.nola.com/business/index.ssf/2017/04/bp\\_lawyer\\_fees.html](http://www.nola.com/business/index.ssf/2017/04/bp_lawyer_fees.html). In comparison to the MSA, the economic and property damages settlement, as of April 2019, has paid over \$11 billion. DEEPWATER HORIZON CLAIMS CTR., PUBLIC STATISTICS FOR THE DEEPWATER HORIZON ECONOMIC AND PROPERTY DAMAGES SETTLEMENT 3 (2019), <http://www.deepwaterhorizoneconomicsettlement.com/docs/statistics.pdf>.

<sup>14</sup> MSA, *supra* note 5, § VIII.

<sup>15</sup> FED. R. CIV. P. 23(e)(2).

<sup>16</sup> *Id.*

reassess the fairness of the settlement over time even if the settlement proves to be unfair, unreasonable, and inadequate.<sup>17</sup>

This Comment uses the MSA as an example of why the Judicial Conference of the United States should consider amending Rule 23(e)(2) to allow courts to reassess the settlement when justice so requires.<sup>18</sup> Part I of the Comment will provide a brief overview of how U.S. circuit courts interpret Rule 23(e)(2) and how the rule was modified in 2018. Also, it will discuss the court's duty as a fiduciary to the class. Part II will shed light on the *Deepwater Horizon* MSA, especially on the mechanism of compensation designed under the Matrix-based phase one and the litigation-based phase two. Part III will provide the analysis of how and where the MSA failed to provide fair, reasonable, and adequate solutions to the dispute between BP and the class members. The purpose of this Part is not simply to point out errors, which in hindsight may be an easy task, but to show that even a seemingly carefully crafted class action settlement might fail to accomplish its goals. Part III will also show that some changes to Rule 23(e)(2)—to allow courts to reassess the settlement after the judicial approval—could be a practical remedy to prevent similar mistakes in implementing future class action settlements. Part IV will conclude with final thoughts on why the courts should be able to reassess class action settlements after granting initial approval.

## I. COURTS' INTERPRETATION OF RULE 23(E)(2)

### A. Circuit Courts' Factors

Over the years, circuit courts have developed different tests interpreting the meaning of “fair, reasonable, and adequate” in regards to settlements of class actions lawsuits.<sup>19</sup> The Fifth Circuit, where the settlement in *Deepwater Horizon* was approved, uses the *Reed* factors.<sup>20</sup> These include

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<sup>17</sup> *See id.*

<sup>18</sup> The Judicial Conference of the United States is empowered to create and revise the Federal Rules of Civil Procedure pursuant to the Rules Enabling Act. 28 U.S.C. § 2072 (2012).

<sup>19</sup> FED. R. CIV. P. 23(e)(2).

<sup>20</sup> *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983).

(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.<sup>21</sup>

Other federal circuits use similar factors. For example, the Eleventh Circuit uses the *Bennet* factors, which include

(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.<sup>22</sup>

The 2018 amendment to Rule 23(e)(2) of the Federal Rules of Civil Procedure drafted by the Committee on Rules of Practice and Procedure added four baseline factors that courts must consider in assessing the fairness, reasonableness, and adequacy of a class action settlement.<sup>23</sup> These factors include “[1] the class representatives and class counsel have adequately represented the class; [2] the proposal was negotiated at arm's length; [3] the relief provided for the class is adequate (taking into account four subfactors); and ([4] the proposal treats class members equitably relative to each other.”<sup>24</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).

<sup>23</sup> FED. R. CIV. P. 23(e)(2); Memorandum from Hon. John D. Bates, Chair, Advisory Comm. on Civil Rules to Hon. David G. Campbell, Chair, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 18–19 (May 18, 2017), [https://www.uscourts.gov/sites/default/files/2017-06-standing-agenda\\_book\\_0.pdf](https://www.uscourts.gov/sites/default/files/2017-06-standing-agenda_book_0.pdf) (starting at page 415) [hereinafter Advisory Committee Memorandum].

<sup>24</sup> Advisory Committee Memorandum, *supra* note 23, at 18–19.



Even after considering these factors and concluding that the settlement is “fair, reasonable, and adequate,”<sup>25</sup> it is possible that the court may be making a mistake by approving the proposed settlement. For example, even though the court may approve a settlement agreement in good faith, the circumstances surrounding the implementation of the settlement may change or simply be different from what was expected.<sup>26</sup> Another possibility is that the court, experts, or the parties may make an honest error in miscalculating the monetary value and fairness of the settlement.<sup>27</sup> Also, it is possible that—despite the court’s best efforts to detect any wrongdoing—the settlement might be a result of fraudulent collusion between the plaintiffs’ attorneys and defendants.<sup>28</sup> Under the current language of Rule 23(e), the court has no practical instrument to rectify its mistake of approving an unfair, unreasonable, or inadequate settlement.<sup>29</sup>

### B. Court’s Duty as a Fiduciary

There are two theories on the role of courts in approving class action settlements. One theory recognizes “that a class action settlement is a private contract negotiated between the parties” and that “Rule 23(e) requires the court to intrude on that private consensual agreement merely to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned.”<sup>30</sup> Thus, this view argues that the role of the court is limited and—absent fraud or collusion—the court must approve the settlement as long as it finds it sufficiently fair, adequate, and reasonable.<sup>31</sup> Under this view, in contemplating the Rule 23(e)(2) requirements, courts are “[not to] focus on individual

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<sup>25</sup> FED. R. CIV. P. 23(e)(2).

<sup>26</sup> See *infra* Section III.C.

<sup>27</sup> See, e.g., *Courtney v. Andersen*, 264 F. App’x 426, 430 (5th Cir. 2008) (finding that class members “bore the risk of mistake” in a settlement and were bound by even reasonable mistakes).

<sup>28</sup> On the dangers of possible collusion, see 2 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 6:4 (15th ed.), Westlaw (database updated Oct. 2018).

<sup>29</sup> See FED. R. CIV. P. 23(e)(2).

<sup>30</sup> *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 934 (8th Cir. 2005).

<sup>31</sup> *Id.*

components of the settlements, but rather view them in their entirety” and consider the facts “in the light most favorable to the settlement.”<sup>32</sup>

The other theory treats the court as a fiduciary of the class. When examining and approving the settlement, the court becomes a fiduciary to the parties bound by the settlement because “fiduciary relationship[s] usually arise . . . when one person assumes control and responsibility over another.”<sup>33</sup> Judge Posner explains that “courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”<sup>34</sup> Therefore, being a fiduciary “requires district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.”<sup>35</sup> In other words, “[a] court must approve a class action settlement because the parties that are present and settling the case—class counsel, the class representatives, and the defendants—are proposing to compromise the rights of absent class members.”<sup>36</sup>

Thus, a judge’s role in a class action settlement is peculiar and differs from the judge’s typical role “as a neutral arbiter between two competing parties.”<sup>37</sup> In non-class-action settlements, because no fiduciary relationship exists, courts do not examine the fairness, reasonableness, and adequacy of the settlement and, unless there is

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<sup>32</sup> *Isby v. Bayh* 75 F.3d 1191, 1199 (7th Cir. 1996) (citing *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 315 (7th Cir. 1980)).

<sup>33</sup> *Fiduciary Relationship*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>34</sup> *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 280 (7th Cir. 2002).

<sup>35</sup> *Id.* at 279.

<sup>36</sup> 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTION § 13:40 (5th ed.), Westlaw (database updated Nov. 2018).

<sup>37</sup> *Id. Compare* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2363 (3d ed.), Westlaw (database updated Nov. 2018) (“A voluntary dismissal by stipulation [of all parties] under Rule 41(a)(1)(A)(ii) is effective immediately and does not require the court’s approval.”), *and* *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069, 1080 (8th Cir. 2017) (“Rule 41(a)(1) cases require no judicial approval or review as a prerequisite to dismissal; in fact, the dismissal is effective upon filing, with no court action required.”), *with* FED. R. CIV. P. 23(e) (“The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court’s approval.”).

a consent decree, courts have no power to interpret the settlement.<sup>38</sup> If, subsequently, a dispute arises as to the interpretation of the settlement, parties can file a new lawsuit alleging a breach of contract.<sup>39</sup> However, if in a class action settlement the court is a fiduciary of the absent class members, the court needs to ensure that class representatives and class counsel have not compromised plaintiffs' interests in settling the case.<sup>40</sup> Because the court is presented with a non-adversarial mode of introducing a settlement, the court is "required to make a decision using a mode of decision-making unfamiliar to courts."<sup>41</sup> To fulfill this obligation, "the judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."<sup>42</sup>

Assigning courts a continuing duty to ensure fairness of the settlement also arises from difficulty, or even impossibility, to collaterally attack a properly approved settlement.<sup>43</sup> This is because the Supreme Court ruled that "under elementary principles of prior adjudication . . . [a class action settlement] is binding on class members in any subsequent litigation" as it would be in "[a] judgment in favor of either side [which] is conclusive in a subsequent action be-

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<sup>38</sup> See FED. R. CIV. P. 41(a)(1); see, e.g., *Adams*, 863 F.3d at 1080 (stating that "[t]he reason for the [voluntary] dismissal is irrelevant under Rule 41(a)(1)" and holding "that the district court erred in concluding that counsel engaged in sanctionable conduct by stipulating to a dismissal under Rule 41(a)(1) for the purpose of forum shopping and avoiding an adverse result"). Cf. Fred O. Goldberg, *Enforcement of Settlements: A Jurisdictional Perspective*, FLA. B.J., July/Aug. 2011, at 31, 31–32 (discussing a similar proposition under the Florida Rules of Civil Procedure).

<sup>39</sup> 85 JAMES L. BUCHWALTER, *CAUSES OF ACTION* 2d § 4 (2d ed.), Westlaw (database updated Mar. 2019) ("As with contracts generally, the elements of a cause of action for breach of a settlement agreement are (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damages to the plaintiff. . . . When interpreting a settlement agreement, a court must honor the intentions of the parties as reflected in the settled usage of the terms they accepted in the agreement.").

<sup>40</sup> MCLAUGHLIN, *supra* note 28, § 6:4.

<sup>41</sup> RUBENSTEIN, *supra* note 36, § 13:40.

<sup>42</sup> *Id.* (quoting DAVID F. HERR, *MANUAL FOR COMPLEX LITIGATION* § 21.61 (4th ed. 2004)).

<sup>43</sup> See MCLAUGHLIN, *supra* note 28, § 6:30.

tween them on any issue actually litigated and determined, if its determination was essential to that judgment.”<sup>44</sup> In other words, class members who fail to opt out of a class are bound by the settlement.<sup>45</sup> The only other means of a class member challenging the binding nature of a class settlement is a direct appeal from the district court’s approval of the settlement.<sup>46</sup> Collateral attacks are thus frowned upon as they would undermine finality to judgments entered on class action settlements and “[c]ourts are wary of disturbing settlements, because they represent compromise and conservation of judicial resources, two concepts highly regarded in American jurisprudence.”<sup>47</sup> A collateral attack is available only in limited instances “to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a full and fair opportunity to litigate the claim or issue.”<sup>48</sup>

Despite the guidance of the *Bennet* and *Reed* factors and the newly added factors under Rule 23(e)(2) to help courts evaluate fairness, reasonableness, and adequacy of a class action settlement, settlements may still prove to be inequitable and ineffective—and the *Deepwater Horizon* Medical Settlement Agreement is a good example of how “one of the fairest and most impressive [class action] settlements” went all wrong.<sup>49</sup> If we agree with the stipulation that the district judge is a fiduciary to the class before the final judicial

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<sup>44</sup> *Id.* (quoting *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984)).

<sup>45</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985); *Matsushita Electric Industries Co. v. Epstein*, 516 U.S. 367, 385 (1996); MCLAUGHLIN, *supra* note 28, § 6:30.

<sup>46</sup> MCLAUGHLIN, *supra* note 28, § 6:30 (citing *Devlin v. Scardelletti*, 536 U.S. 1, 10–11 (2002)). Circuit courts recognize district courts’ judicial discretion in approving the settlement as district judges have deeper knowledge of the facts of the case. *Devlin*, 536 U.S. at 22 (Scalia, J., dissenting); *see, e.g., In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 299 (3d Cir. 1998).

<sup>47</sup> MCLAUGHLIN, *supra* note 28, § 6:30 n.8 (quoting *Anita Founds., Inc. v. ILGWU Nat’l Ret. Fund*, 902 F.2d 185, 190 (2d Cir. 1990)).

<sup>48</sup> *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 258 n.6 (2d Cir. 2001), *aff’d by an equally divided court in part, vacated in part*, 539 U.S. 111 (2003) (per curiam) (quoting *Epstein v. MCA, Inc.*, 179 F.3d 641, 648–49 (9th Cir. 1999)) (internal quotation omitted).

<sup>49</sup> Fairness Hearing, *supra* note 1, at 183.

approval, I argue that we should expand that fiduciary duty to cover the full time period to implement the settlement.

## II. *DEEPWATER HORIZON* MEDICAL SETTLEMENT AGREEMENT

In April 2010, the *Deepwater Horizon*, an oil drilling platform in the Gulf of Mexico, exploded and ultimately sunk.<sup>50</sup> The explosion and subsequent sinking of the *Deepwater Horizon* led to a devastating oil spill.<sup>51</sup> BP, one of the world's largest oil companies, was ultimately held liable for the spill.<sup>52</sup> During and after the spill, BP engaged tens of thousands of cleanup workers in a large-scale operation of containing and removing the oil.<sup>53</sup> Their work lasted from late April 2010—immediately after the spill—until mid-June 2013, although most work was done by early April 2012.<sup>54</sup> Cleanup workers and coastal residents who suffered exposure to crude oil and Corexit, a toxic chemical sprayed over the Gulf to disperse the oil, brought personal injury lawsuits against BP and other companies involved in this environmental disaster.<sup>55</sup> Ultimately, parties entered into the MSA, which the District Court approved on January 11,

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<sup>50</sup> *Deepwater Horizon – BP Gulf of Mexico Oil Spill*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill> (last visited Apr. 17, 2019).

<sup>51</sup> *Id.*

<sup>52</sup> *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 21 F. Supp. 3d 657, 757 (E.D. La. 2014) (finding BP sixty-seven percent (67%) liable for the oil spill).

<sup>53</sup> See Repanich, *supra* note 9. It is estimated that around 200,000 people, cleanup workers and coastal residents, could belong to the class. Fairness Hearing, *supra* note 1, at 193.

<sup>54</sup> Margaret M. Kitt, *Protecting Workers in Large-Scale Emergency Responses*, 53 J. OCCUPATIONAL & ENVTL. MED. 711, 711–12 (2011); *Deepwater Horizon Oil Spill Timeline, Updated from April 2010 Through 2014*, AL.COM (Apr. 20, 2014), [https://www.al.com/news/beaches/index.ssf/2014/04/deepwater\\_horizon\\_timeline\\_upd.html](https://www.al.com/news/beaches/index.ssf/2014/04/deepwater_horizon_timeline_upd.html); Telephone Interview with Craig T. Downs, Founding Partner, The Downs Law Grp. (Feb. 2, 2018) [hereinafter Downs Telephone Interview].

<sup>55</sup> In August 2010, seventy-seven cases, including those brought by state governments, individuals, and companies, were transferred to the United States District Court for the Eastern District of Louisiana under Multi-District Litigation docket MDL No. 2179. *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 731 F. Supp. 2d 132 (U.S. J.P.M.L. 2010).

2013.<sup>56</sup> This was the same agreement that many established law scholars considered “one of the fairest settlements they had seen.”<sup>57</sup>

The *Deepwater Horizon* MSA divided the claims into two phases.<sup>58</sup> Under the first phase, each class member with adequate affidavits or medical records was to be compensated for a Specified Physical Condition (“SPC”) according to the list of tables known as the “Matrix,” which specified medical conditions, times of physical manifestation of the condition, and proof required for compensation.<sup>59</sup> Under the second phase, known as the Back-End Litigation Option (“BELO”), a class member with a “later-manifested physical condition” (“LMPC”) diagnosed after the cut-off date of April 16, 2012, was to be allowed to litigate the claim in court.<sup>60</sup> The lucrative enterprise of claim processing and administration was assigned to the Garretson Resolution Group (“Garretson,” often referred to in Court documents as “GRG” or “Claims Administrator”).<sup>61</sup>

#### A. *Compensation Under the Matrix: Specified Physical Condition*

To be compensated under the SPC, a claimant had to go through several steps and meet multiple requirements.<sup>62</sup> First, a claimant had to submit a Proof of Claim form to Garretson.<sup>63</sup> The form was a twenty-eight-page document asking for personal and background information, basis for participation in the MSA, proof of status as cleanup worker or zone resident, benefits claimed, information on medical conditions, as well as information about bankruptcy, liens, and healthcare insurance coverage.<sup>64</sup> Claimants had to submit the form to Garretson no later than one year after the “effective date” of February 12, 2014 or they would lose their right to be compensated

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<sup>56</sup> *Final Approval of the Deepwater Horizon MSA*, 295 F.R.D. 112 (E.D. La. 2013).

<sup>57</sup> Fairness Hearing, *supra* note 1, at 183.

<sup>58</sup> *See* MSA, *supra* note 5, §§ VI, VIII.

<sup>59</sup> *Id.* § VI; Matrix, *supra* note 10.

<sup>60</sup> MSA, *supra* note 5, § VIII.

<sup>61</sup> *Id.* § XVIII.A.11.

<sup>62</sup> *Id.* § VI.

<sup>63</sup> *Id.* § VI.A.

<sup>64</sup> Medical Benefits Class Action Settlement: Proof of Claim Form, *Final Approval of the Deepwater Horizon MSA*, 295 F.R.D. 112 (E.D. La. 2013) (MDL No. 2179), Doc. No. 6427-7.

under the SPC.<sup>65</sup>

Depending on the type of medical condition suffered because of exposure and the level of proof presented, claimants could qualify for different levels of compensation.<sup>66</sup> To receive the lowest compensation under A1 level (\$1,300 for cleanup workers and \$900 for zone residents), a claimant had to declare the manifestation of a medical condition within a prescribed timeframe (within seventy-two hours of exposure).<sup>67</sup> Compensable conditions enumerated in the Matrix included *dermatitis* (rash), *conjunctivitis* (eye irritation or eye burn), *sinusitis* (nasal inflammation), *pharyngitis* (throat irritation), as well as acute conditions such as headache, dizziness, and fainting.<sup>68</sup>

Higher levels of compensation required more proof.<sup>69</sup> To qualify for higher compensation, A2, A3, and A4 (a lump sum between \$2,700 and \$12,350), a claimant had to present supporting medical records that Garretson evaluated “based on the totality of the evidence . . . whether that evidence more likely than not supports the assertions made in the declaration.”<sup>70</sup> To qualify for the highest level of compensation, B1 (\$60,700 for cleanup workers and \$36,950 for zone residents), a claimant had to present relevant medical records establishing ongoing care for a chronic condition as well as “indicate that exposure was considered by either the claimant or the medical professional to be related to the condition(s) or symptom(s).”<sup>71</sup> Garretson later interpreted this provision as requiring not only medical diagnosis, but also doctor’s statement that the medical condition resulted from exposure to crude oil or Corexit.<sup>72</sup>

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<sup>65</sup> See MSA, *supra* note 5, § V.A; Press Release, GRG Subject Matter Experts, Deepwater Horizon Medical Settlement Effective Date Announced; Claims Administrator Garretson Resolution Group to Begin Processing Claims (Feb. 14, 2014), <https://web.garretsongroup.com/press-releases/press-release/deepwater-horizon-medical-settlement-effective-date-announced-claims-administrator-garretson-resolution-group-begin-processing-claims> [hereinafter GRG Press Release].

<sup>66</sup> See MSA, *supra* note 5, § VI.

<sup>67</sup> Matrix, *supra* note 10, at 1, 13–14.

<sup>68</sup> *Id.* at 6–8, 12.

<sup>69</sup> *Id.* at 1–5.

<sup>70</sup> *Id.* at 1–3.

<sup>71</sup> *Id.* at 4–5.

<sup>72</sup> Downs Telephone Interview, *supra* note 54.

Garretson then evaluated the form's "sufficiency and completeness" pursuant to § XXI.C–F of the MSA.<sup>73</sup> Among other tasks, Garretson verified whether a claimant could either be found in one of the cleanup worker training, employment, or medical encounter databases, or had enough documents to claim zone residency.<sup>74</sup> If either the form or the required documents were incomplete or insufficient, Garretson sent the claimant a Notice of Defect that contained a brief explanation of why the form was being rejected and whether, and how, claimant could cure the defect.<sup>75</sup> If Garretson denied a SPC claim for compensation, a claimant could request a one-time review conducted by Garretson.<sup>76</sup> After receiving the Notice of Denial, a claimant had fourteen days to request such review by submitting a Request for Review form and any necessary additional documents.<sup>77</sup>

Theoretically, the process of compensation under the SPC was simple and straightforward—the more proof of suffered medical condition a claimant presented, the higher the compensation he or she was to receive.<sup>78</sup> However, as Part III of this Comment will show, there were multiple problems with applying and interpreting the SPC provisions, and these problems precluded many class members from receiving compensation.<sup>79</sup>

### B. *Back-End Litigation Option*

To be compensated under the BELO, a plaintiff must first submit to Garretson a written Notice of Intent to Sue ("NOIS") and identify particular diagnosed medical conditions that the plaintiff will allege in the BELO claim.<sup>80</sup> After the NOIS is submitted, Garretson then reviews the submission for compliance and, if the diagnosed medical conditions meet the requirement, Garretson transmits the NOIS

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<sup>73</sup> MSA, *supra* note 5, §§ V.B, V.D, XXI.C–F.

<sup>74</sup> *Id.* § XXI.D–E.

<sup>75</sup> *Id.* § V.E.

<sup>76</sup> *Id.* § V.M.

<sup>77</sup> *Id.*; Medical Benefits Class Action Settlement: Request for Review Form, *Final Approval of the Deepwater Horizon MSA*, 295 F.R.D. 112 (E.D. La. 2013) (MDL No. 2179), Doc. No. 6427-9.

<sup>78</sup> See Matrix, *supra* note 10, at 1–5.

<sup>79</sup> See *infra* Part III.

<sup>80</sup> MSA, *supra* note 5, §§ II.VV, II.UUU, VIII.A.



to BP.<sup>81</sup> The MSA requires Garretson to review the NOIS and transmit it to BP within ten days.<sup>82</sup> Then, BP has thirty days to choose whether to mediate the claim.<sup>83</sup> If BP chooses not to mediate, the plaintiff acquires the right to file a BELO action, provided it is filed within six months of the date Garretson informs the plaintiff of BP's decision not to mediate.<sup>84</sup> Thereafter, the parties have ninety days for initial disclosures.<sup>85</sup> These include documents required under Federal Rule of Civil Procedure 26(a)(1)(A), as well as additional documents required by the Case Management Order ("CMO").<sup>86</sup> Before the end of the 120-day initial proceedings period, the parties must either stipulate to remain in the Eastern District of Louisiana or to be transferred to another United States District Court for further proceedings.<sup>87</sup> In case of disagreement, parties may submit motions regarding the proper venue.<sup>88</sup>

Neither the CMO nor the MSA specify how, and whether, a BELO complaint can be amended.<sup>89</sup> For example, there is no clear process for how a plaintiff is to amend the BELO complaint in cases where the plaintiff becomes diagnosed with additional medical conditions that are claimed to result from the exposure during cleanup.<sup>90</sup> Such cases are not unusual, especially when it takes Garretson as long as eight months—instead of ten days as mandated by the MSA—to process the NOIS.<sup>91</sup> While BP argues that plaintiffs may

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<sup>81</sup> *Id.* § XXI.I.

<sup>82</sup> *Id.* § VIII.C.1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* § VIII.C.2.

<sup>85</sup> BELO Cases Initial Proceedings Case Management Order ¶ II, *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* MDL No. 2179 (E.D. La. Apr. 27, 2016), Doc. No. 14099 [hereinafter CMO].

<sup>86</sup> *Id.*; FED. R. CIV. P. 26(a)(1)(A).

<sup>87</sup> CMO, *supra* note 85, ¶ III(1).

<sup>88</sup> *Id.* ¶ III(2).

<sup>89</sup> *See id.*; MSA, *supra* note 5, § VIII.

<sup>90</sup> *See MSA, supra* note 5, § VIII.

<sup>91</sup> Plaintiff's Unopposed Motion to Stay Proceedings and Memorandum in Support ¶ 8, *Odom v. BP Am. Prod. Co.*, No. 17-CV-0202-DAE (W.D. Tex. Oct. 25, 2017) [hereinafter *Odom Unopposed Motion to Stay Proceedings*].

not “add additional claims for newly alleged [medical conditions],”<sup>92</sup> some plaintiffs reason that they may essentially add new medical conditions by staying the pending complaint, submitting another NOIS with new medical conditions to Garretson, and then, after waiting for Garretson to process the NOIS, consolidating both BELO claims.<sup>93</sup> Such procedure, which practically makes amending BELO complaints impossible, seems unnecessarily difficult and burdensome for plaintiff.<sup>94</sup>

Only limited issues may be litigated in a BELO action.<sup>95</sup> These include the fact of correct medical diagnosis, the amount and location of crude oil and Corexit, the level and duration of claimant’s exposure, the fact of legal causation, alternative causes of injury, and the amount of compensatory damages.<sup>96</sup> However, punitive damages are disallowed.<sup>97</sup> Arguing over the amount and location of crude oil and Corexit may be problematic because there are no precise maps of where and when crude oil appeared and where Corexit was sprayed.<sup>98</sup> Thus, to prove the fact of exposure and the level of contamination plaintiffs will have to rely on cleanup workers’ and residents’ testimony, as well as on local media reports.

### III. HOW THE *DEEPWATER HORIZON* MSA PROVED TO BE UNFAIR, UNREASONABLE, AND INADEQUATE

Over time, despite the initial enthusiasm from the academic

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<sup>92</sup> The BP Parties’ Response to Plaintiff’s Motion to Stay Proceedings at 2, *Odom v. BP Am. Prod. Co.*, No. 17-CV-0202-DAE, No. 17-CV-0202-DAE (W.D. Tex. Oct. 30, 2017).

<sup>93</sup> *Odom* Unopposed Motion to Stay Proceedings, *supra* note 91, ¶ 8; *see also* MSA, *supra* note 5, §§ II.UUU, VIII.A, VIII.C.1, XXII.

<sup>94</sup> Telephone Interview with Charles F. Herd, Jr., The Lanier Law Firm (Jan. 31, 2018) [hereinafter Herd Telephone Interview].

<sup>95</sup> MSA, *supra* note 5, § VIII.G.3.a.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *See Environmental Response Management Application: Gulf of Mexico*, NOAA, <https://erma.noaa.gov/gulfofmexico/erma.html#/layers=3+446+5328+16023+482&x=-89.87561&y=28.90952&z=6&panel=layer> (last visited on Apr. 4, 2019) (select “Deepwater Horizon MC 252 Incident” layer); *Tracking the Oil Spill in the Gulf*, N.Y. TIMES, <http://www.nytimes.com/interactive/2010/05/01/us/20100501-oil-spill-tracker.html> (last visited on Apr. 17, 2019).

community,<sup>99</sup> the MSA has proven to be unfair to many class members as well as inefficient, as it threatens to burden the federal court system with unnecessary litigation. From the outset, the settlement's healthcare provisions have not provided much-needed medical help and condition diagnoses to often uninsured class members.<sup>100</sup> This resulted in many claimants' inability to be diagnosed or to gather sufficient medical documentation before the required deadline.<sup>101</sup> At the same time, claimants had to fight Garretson, who disregarded some of the MSA provisions, showed incompetence, and often, instead of staying impartial and objective, sided with BP.<sup>102</sup> Further, because of failing some procedural requirements of the MSA, many claimants were undercompensated or not compensated at all for their injuries, and their claims were moved to the second litigation-based phase of the settlement.<sup>103</sup> These BELO claims, because of the high number of potential claimants, threaten to congest many federal district courts with highly technical cases in which plaintiffs must prove a causal connection between their injuries and exposure to crude oil and Corexit.<sup>104</sup> The story of the MSA thus shows that without a court's continuing obligation to ensure fairness of class action settlement under Rule 23(e)(2), end results of even a meticulously designed settlement may be unjust and ineffective in reaching its goals in compensating large groups of harmed individuals.

#### A. *Inadequacy of the MSA's Medical Provisions*

To provide the former cleanup workers and zone residents with proper medical care, BP and the Plaintiff Steering Committee agreed to include in the MSA the Periodic Medical Consultation Program ("PMCP") and the Gulf Region Health Outreach Program ("GRHOP").<sup>105</sup> These initiatives, however, were not designed to

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<sup>99</sup> See *supra* notes 1–3 and accompanying text.

<sup>100</sup> See *infra* Section III.A.

<sup>101</sup> See *infra* Section III.B.

<sup>102</sup> See *infra* Sections III.B, III.F.

<sup>103</sup> See *infra* Sections III.B, III.C.

<sup>104</sup> See *infra* Section III.D.

<sup>105</sup> MSA, *supra* note 5, §§ VII, IX.

help identify medical conditions caused by the oil spill and subsequent cleanup efforts.<sup>106</sup> As a result, medical conditions of many indigent class members without health insurance were not properly diagnosed before the cut-off date, barring those class members from making valid claims under the first phase of the settlement, the SPC.<sup>107</sup> Plaintiffs argue that this medical program was nothing more than a façade on behalf of BP to create the illusion that BP was acting on plaintiffs' behalves, only to hide BP's objective of minimizing payments to class members.<sup>108</sup>

Richard Godfrey, the defendants' attorney, and Robin Greenwald, an attorney of the Plaintiff Steering Committee, presented the purpose of and the procedures for implementing the PMCP and the GRHOP during the Fairness Hearing.<sup>109</sup> The principal goals of these two programs, respectively, were to provide "a significant and tangible benefit, especially to those class members who might not otherwise have access to or be able to afford primary medical services"<sup>110</sup> and "to increase . . . the capacity of healthcare systems throughout the areas that were most impacted by the oil spill."<sup>111</sup> As defendants explained with respect to the PMCP, "we have a medical care issue in this country, and many [claimants], or at least some of these people, may not have had access [to healthcare] . . . they now have access and will be given access [to healthcare]. That's an important benefit [of the MSA]."<sup>112</sup>

Thus, it was a stated goal of the PMCP to help class members in receiving medical care.<sup>113</sup> To implement the program, first, Garretson would "enter into a written contract with each medical services provider selected to provide medical consultation visits" near class members' places of residence.<sup>114</sup> Then, Garretson was supposed to

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<sup>106</sup> *Id.* The following paragraphs expand on the notion that the PMCP and the GRHOP were not designed to help diagnose medical conditions for SPC claims.

<sup>107</sup> Downs Telephone Interview *supra* note 54.

<sup>108</sup> *Id.*

<sup>109</sup> See Fairness Hearing, *supra* note 1, at 49–76, 180–96.

<sup>110</sup> *Id.* at 218.

<sup>111</sup> *Id.* at 190.

<sup>112</sup> *Id.* at 218.

<sup>113</sup> *Id.*

<sup>114</sup> MSA, *supra* note 5, § VII.C.4.

contact every class member, find out where they lived, find the closest facility to do medical tests and consultations, and schedule an appointment for each person.<sup>115</sup> Appointments were to be scheduled every three years for the next twenty-one years following the effective date of February 12, 2014.<sup>116</sup> Medical visits were to consist of a medical examination, a vision screening, and additional blood, urine, cardiac, and respiratory tests performed at the discretion of the physician.<sup>117</sup> Overall, defendants maintained that “[t]he program w[ould] have a rapid positive impact on the physical, mental and behavioral health of Gulf Coast community members, and these benefits will be realized not just for the five years but long thereafter.”<sup>118</sup>

The MSA, however, created a paradoxical situation that made the PMCP purposeless. Generally, to claim the program’s benefits and be tested for a claimed medical condition, a claimant would have to have first filed an SPC claim, in which he or she had to both ask to be qualified for the program, as well as claim their medical condition under the SPC.<sup>119</sup> This meant that the only way to claim compensation above the basic A1 level (\$1,300 for cleanup workers and \$900 for residents) at A2, A3, A4, and B1 levels (which required medical documentation), was for a claimant to have a medical diagnosis of his or her condition made not under the PMCP, but paid from his or her own pocket.<sup>120</sup> This was disastrous for many indigent class members who did not have health insurance and could not pay for costly medical tests required to get diagnosis.<sup>121</sup> Therefore, these class members never had the means to get their conditions diagnosed for the purpose of an SPC claim.<sup>122</sup> As Greenwald admitted during the Fairness Hearing, there was “no fund set up for people . . . to go to a doctor and get their diagnoses” and there was “no place that they

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<sup>115</sup> Fairness Hearing, *supra* note 1, at 252–53.

<sup>116</sup> *Id.* at 189; MSA, *supra* note 5, § VII.B.3.

<sup>117</sup> Components of the Periodic Medical Consultation Program, *Final Approval of the Deepwater Horizon MSA*, 295 F.R.D. 112 (E.D. La. 2013) (MDL No. 2179), Doc. No. 6427-14.

<sup>118</sup> Fairness Hearing, *supra* note 1, at 218.

<sup>119</sup> MSA, *supra* note 5, §§ VI.D., VII.A.

<sup>120</sup> *See* Matrix, *supra* note 10, at 1–5.

<sup>121</sup> Downs Telephone Interview, *supra* note 54.

<sup>122</sup> *Id.*; Fairness Hearing, *supra* note 1, at 257–58.

[could] go before they file[d] their claim form to find out what they ha[d].”<sup>123</sup> If a claimant could not be diagnosed for the purpose of receiving compensation, what then was the purpose of the PMCP?

Practically speaking, if a claimant could not afford medical diagnosis—a process that often included not just a visit to a primary care physician, but also multiple visits to and costly medical tests from a specialist—such a claimant was arguably precluded from receiving compensation higher than the A1 level. Jason Melancon, one of the objectors to the MSA, stated as much during the Fairness Hearing: “[G]uess how much money has been allocated to give [class members] an initial diagnosis? None. There isn’t a single penny allocated to where my clients can see someone right now and figure out whether or not they have a chronic problem that is associated from their exposure.”<sup>124</sup> Melancon proposed that the MSA should include the right to go to a doctor for initial evaluation.<sup>125</sup> But, instead of allocating funds for the purpose of helping class members receive medical diagnosis, BP and the Plaintiff Steering Committee agreed in the MSA to spend \$105 million on enigmatic community outreach programs.<sup>126</sup> These programs were “a set of integrated projects designed to improve healthcare capacity and health literacy for Class Members and others in Gulf Coast communities.”<sup>127</sup> As Melancon concluded,

I love the fact that it is an open-ended, uncapped settlement, theoretically. . . . [But] if [you] can't go to the doctor, and you can't afford to see a doctor, or

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<sup>123</sup> Fairness Hearing, *supra* note 1, at 257–58.

<sup>124</sup> *Id.* at 244.

<sup>125</sup> *Id.* at 247.

<sup>126</sup> MSA, *supra* note 5, § IX (outlining the “Gulf Region Health Outreach Program,” which had the stated purpose of “expand[ing] capacity for and access to high quality, sustainable, community-based healthcare services”).

<sup>127</sup> *Final Approval of the Deepwater Horizon MSA*, 295 F.R.D. 112, 123 (E.D. La. 2013); *see also* MSA, *supra* note 5, § IX. To Melancon’s suggestion that the MSA does not specify what “community outreach programs for mental and behavioral health services” are, Judge Barbier responded to “Google it and find out.” Fairness Hearing, *supra* note 1, at 247. Unfortunately, even the most laborious search engine inquiries do not bring any cogent explanation of the meaning of “community outreach programs for mental and behavioral health services.” *Id.*

you can't afford to see a toxicologist, then you're necessarily going to be shuffled into the \$1300 classification.<sup>128</sup>

Melancon's prediction came true as the MSA essentially put "a practical cap [on recovery under the SPC], despite the fact that there [was] no theoretical cap."<sup>129</sup>

B. *Some SPC Claims Were Unnecessarily Moved into BELO*

As Melancon predicted during the Fairness Hearing,<sup>130</sup> many class members whose claims were denied—either because they lacked proper medical documentation or due to defendant-friendly interpretations of the settlement agreement by the claims administrator—are being forced into the litigation phase of the settlement.<sup>131</sup> A class member who did not receive appropriate medical help in diagnosing his or her recurring health symptoms (e.g. skin irritation, cough, wheeze, tightness in the chest, and burning in the eyes, nose, throat, or lungs being symptoms of acute or chronic dermatitis, sinusitis, or conjunctivitis) could only claim \$1,300 in damages, as opposed to \$12,350 or \$60,700.<sup>132</sup> Many of these claimants, some with multiple conditions, will now have to participate in the litigation phase that was originally intended for class members with medical conditions manifesting years after the exposure, including leukemia and other cancers.<sup>133</sup>

Seemingly straightforward, the MSA is vague in describing under what circumstances a claimant could qualify for the SPC,<sup>134</sup> and also when his or her claim is being pushed into BELO.<sup>135</sup> Although Garretson (and BP) managed to eventually persuade the court that the MSA was unambiguous in this matter, such interpretation is

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<sup>128</sup> Fairness Hearing, *supra* note 1, at 244.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 249.

<sup>131</sup> Downs Telephone Interview, *supra* note 54.

<sup>132</sup> *See* Matrix, *supra* note 10, at 1–5.

<sup>133</sup> *See* Fairness Hearing, *supra* note 1, at 255–56.

<sup>134</sup> *See* MSA, *supra* note 5, § VI.

<sup>135</sup> *See id.* § VIII.G.

problematic.<sup>136</sup> Paradoxically, although Garretson admitted that it “ha[d] no authority to interpret [the MSA’s] terms,” in the very same memorandum, it interpreted the terms of the MSA regarding classification of diagnosis made after April 16, 2012.<sup>137</sup> Garretson argued that when the MSA’s definition of “later-manifested physical condition” under section II was read together with section VIII.B.1, its meaning was clear.<sup>138</sup> Later-manifested physical condition was to “mean a physical condition that is first diagnosed in a [claimant] after April 16, 2012.”<sup>139</sup> Additionally, per MSA section VIII.B.1, a claimant “who is diagnosed with a [LMPC] may either (i) seek compensation for that [LMPC] pursuant to workers’ compensation law . . . or (ii) seek compensation from BP for that [LMPC] pursuant to the [BELO]. Such [claimant] may not seek compensation . . . in any other manner.”<sup>140</sup>

Garretson concluded that because of this language, a claimant who meets LMPC requirements “is foreclosed from seeking compensation for a [SPC].”<sup>141</sup> However, the language of the MSA does not unequivocally exclude claimants who qualify for LMPC from having an SPC claim under the Matrix.<sup>142</sup> In other words, the MSA does not state that the LMPC and the SPC are mutually exclusive.<sup>143</sup> Further, it does not explain that if a claimant is eligible for the LMPC, he or she is automatically forced out of the first settlement phase into the second, litigation-based phase.<sup>144</sup> Judge Barbier, however, agreed with Garretson’s and BP’s interpretation of the

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<sup>136</sup> Downs Telephone Interview, *supra* note 54; *see* Memorandum from Garretson Resolution Group, Claims Administrator, to Hon. Sally Shushan (May 13, 2014), Classification of Chronic Physical Conditions First Diagnosed After April 16, 2012 at 2, *In re* Oil Spill by the Oil Rig “Deepwater Horizon, MDL No. 2179 (E.D. La. July 14, 2014) [hereinafter Garretson SPC Memorandum].

<sup>137</sup> Garretson SPC Memorandum, *supra* note 136.

<sup>138</sup> *Id.*

<sup>139</sup> MSA, *supra* note 5, § II.VV.

<sup>140</sup> *Id.* § VIII.B.1.

<sup>141</sup> Garretson SPC Memorandum, *supra* note 136, at 2.

<sup>142</sup> MSA, *supra* note 5, § VIII.B.

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*



MSA that a class member who was diagnosed with a chronic condition after April 16, 2012, was excluded from asserting an SPC claim, and could only assert a LMPC claim under the BELO.<sup>145</sup>

Earlier understanding by both the plaintiffs and the defendants during the Fairness Hearing contradicts this new interpretation of the MSA.<sup>146</sup> Robin Greenwald, a liaison counsel for the plaintiffs, made an un-contradicted statement that “[BELO] is designed for people who get sick 5, 10, 15, 20 years from now.”<sup>147</sup> She also stated that “all class members can sue BP on what’s call[ed] a B[E]LO, a back-end litigation option, if they were to unfortunately experience a later manifested physical condition.”<sup>148</sup> Similarly, Richard Godfrey, one of defendants’ attorneys, stated that “if you discover . . . that you have what you consider to be a later-manifesting condition, then you have the B[E]LO that you have to decide and exercise your rights under.”<sup>149</sup> Godfrey provided this interpretation of the BELO during a discussion of the benefits of the PMCP, which, as he stated, gave class members “the opportunity to learn whether or not there is going to be some [medical] condition that they are not aware of.”<sup>150</sup> Godfrey’s statement may be understood to mean that the BELO was designed to provide a litigation backdoor to those class members whose conditions manifested during a medical screening under the PMCP, which was to be available on the “effective date” of February 12, 2014.<sup>151</sup> Thus, the widely accepted understanding—of both the plaintiffs and the defendants—was that the BELO would apply *only* to later-manifested conditions and not to conditions that had appeared during the twenty-four to seventy-two hour timeframe

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<sup>145</sup> Order Regarding Medical Benefits Settlement – Policy Statement on Classification of Chronic Physical Conditions First Diagnosed After April 16, 2012, *In re* Oil Spill by the Oil Rig “Deepwater Horizon,” MDL No. 2179 (E.D. La. July 23, 2014), Rec. Doc. 13,179 [hereinafter Order Regarding Medical Benefits Settlement].

<sup>146</sup> See Fairness Hearing, *supra* note 1, at 190, 216–17, 255.

<sup>147</sup> *Id.* at 255.

<sup>148</sup> *Id.* at 190.

<sup>149</sup> *Id.* at 217.

<sup>150</sup> *Id.* at 216.

<sup>151</sup> MSA, *supra* note 5, § VII.B.3 (“The PERIODIC MEDICAL CONSULTATION PROGRAM shall begin on the EFFECTIVE DATE, and last for 21 years from the EFFECTIVE DATE.”); GRG Press Release, *supra* note 65.

provided in the Matrix but were diagnosed by a medical professional after April 16, 2012.

Another problem is that, although the MSA includes definitions for over a hundred different terms, it fails to define the terms “diagnosed” or “diagnosis.”<sup>152</sup> If Garretson, as it claimed, “is bound to follow the plain language in the MSA,”<sup>153</sup> it should also admit that the plain meaning of the term “diagnosed condition” is not necessarily equivalent with a medically diagnosed condition or with a condition diagnosed by a medical professional, but could just as well mean “self-diagnosed condition.”<sup>154</sup> Merriam Webster defines the verb “diagnose” as “to recognize (something, such as a disease) by signs and symptoms” or as “to analyze the cause or nature of.”<sup>155</sup> Therefore, the plain meaning of the word does not necessarily equate to medical diagnosis made by a medical professional. The question that the Court did not consider is whether a class member who recognized his or her own medical condition without having it diagnosed by a medical professional should nonetheless be automatically excluded from making a claim under the SPC.

Continuing with the semantic vagueness of the MSA, the settlement’s definition of the LMPC does not explain the meaning of “later manifested.”<sup>156</sup> If “later manifested” refers to a condition that manifested itself after the timeframe provided in the Matrix, (i.e. either twenty-four or seventy-two hours after exposure, depending on the resulting medical condition) and the time of medical diagnosis is after April 16, 2012, then, under the current interpretation, the MSA created a gap between the SPC claim and BELO claims.<sup>157</sup> For example, if a claimant’s medical condition manifested itself after the time between exposure and manifestation, as provided in the Matrix, and was also diagnosed by a medical professional before the cut-off deadline of April 16, 2012, the claimant has no avenue for

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<sup>152</sup> MSA, *supra* note 5, § II.

<sup>153</sup> Garretson SPC Memorandum, *supra* note 136, at 2.

<sup>154</sup> *Definition of Diagnose*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/diagnose> (last visited Apr. 9, 2019).

<sup>155</sup> *Id.*

<sup>156</sup> MSA, *supra* note 5, §§ II.VV.

<sup>157</sup> Matrix, *supra* note 10, at 6–14.

legal redress.<sup>158</sup> Such a claimant would neither qualify for a remedy under the SPC (because his or her condition manifested itself too late, after the timeframe provided for in the Matrix) nor under the BELO (because the condition was diagnosed by a medical professional too early, before the cutoff date of April 16, 2012).<sup>159</sup>

Under a scenario such as this, a claimant must either (1) lie about the time when his or her condition manifested itself and sign a “declaration under penalty of perjury . . . asserting that such condition(s) (or the symptom(s) thereof) occurred within the applicable timeframe,” or (2) conceal any medical diagnosis made before April 16, 2012, and get a new diagnosis after that date to qualify for the BELO.<sup>160</sup> Either solution forces the claimant to behave unethically or fraudulently if he or she wants to be compensated.

Finally, the decision to interpret the meaning of the MSA was made retroactively, meaning that it bound claimants without allowing them an opportunity to adapt their strategy for receiving compensation to the changing interpretation of the settlement.<sup>161</sup> From November 2012, when the MSA was still being approved by the court, until April 2014, when BP and Garretson proposed their interpretation of the LMPC, plaintiffs’ attorneys were not able to predict that the MSA would be interpreted to preclude recovery by claimants whose conditions were not diagnosed by a medical professional before April 16, 2012 from making a claim under the SPC.<sup>162</sup> As one cleanup worker explained, he does not understand how he and his fellow workers were supposed to know they needed to get a medical diagnosis before April 2012, since at that time the MSA had not even been approved yet, and the class members therefore still did not know the final conditions of the settlement.<sup>163</sup>

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<sup>158</sup> *Id.*; MSA, *supra* note 5, § II.VV; *see* Fairness Hearing, *supra* note 1, at 233–34.

<sup>159</sup> *See* MSA, *supra* note 5, §§ VI, VIII.

<sup>160</sup> Matrix, *supra* note 10, at 1–2, 4.

<sup>161</sup> Downs Telephone Interview, *supra* note 54.

<sup>162</sup> *Id.*; Fairness Hearing, *supra* note 1, at 190.

<sup>163</sup> David Hammer, *BP Medical Interpretation Could Cut out Thousands*, USA TODAY (Aug. 15, 2014, 1:17 AM), <https://www.usatoday.com/story/news/nation/2014/08/15/bp-spill-cleanup-medical-claims/14094089/>.

*C. Many SPC Claims Were Uncompensated  
or Undercompensated*

Another problem under the MSA is that the settlement gave Garretson an almost absolute and virtually unreviewable power to determine whether claims are valid or not and what level of compensation is due to each claimant. As of November 2018, when Garretson filed its latest periodic status report, 22,836 claimants had been awarded \$67.2 million in compensation.<sup>164</sup> Thus, the average compensation per person has been around \$2,944.<sup>165</sup> Not all awards were paid to the claimants: 490 claimants had unresolved liens, such as healthcare- and bankruptcy-related liens, which precluded payment.<sup>166</sup> At the same time, thirty-six percent (36%) of the total 37,225 claimants (or 13,403 claimants) were denied *any* compensation under SPC.<sup>167</sup>

The small number of awarded claims and amounts of compensation contrast starkly with the expected implementation of the MSA that plaintiffs' and defendants' attorneys presented to the court at the Fairness Hearing.<sup>168</sup> For example, during the Fairness Hearing, Robin Greenwald, representing plaintiffs, suspected that around 200,000 people, cleanup workers and residents, could belong to the class.<sup>169</sup> In April 2010, approximately 105,000 coastal residents that could qualify for compensation lived in the MSA-designated zones, and approximately 13,000 cleanup workers made approximately 20,000 visits to the BP medic stations in connection with work-related conditions.<sup>170</sup>

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<sup>164</sup> November 2018 Status Report, *supra* note 11, at 3.

<sup>165</sup> Of course, this is an average, which means that the wide majority of approved claims, almost eighty, were determined to be compensated under A1 level (that is, the lowest, \$1,300, compensation under the SPC). *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 4–5.

<sup>168</sup> See Fairness Hearing, *supra* note 1.

<sup>169</sup> *Id.* at 193.

<sup>170</sup> *Final Approval of the Deepwater Horizon MSA*, 295 F.R.D. 112, 131 (E.D. La. 2013).

D. *Uncompensated or Undercompensated SPC  
Claims Could Clog Federal Courts*

Because of the decision to preclude the class members who qualify for a LMPC claim from asserting an SPC claim, many claimants were forced out of compensation under the Matrix and into the BELO, which is a costlier second phase of the settlement agreement requiring litigation.<sup>171</sup> The denied SPC claims (possibly several thousands of them), instead of being compensated according to the Matrix, will soon be flooding federal courts, causing potential disruptions and clogging dockets.<sup>172</sup> Only a few of these cases have already been filed, and there is a risk that not all claimants will have their day in court as some of the claims will be below-cost cases that attorneys will not want to work on, especially because they are labor-intensive and prospective damages are too low.<sup>173</sup>

Plaintiffs' attorneys expect that in the next few years, claimants are likely to file thousands of BELO claims.<sup>174</sup> As of November 2018, class members had filed a total of 6,699 Notice of Intention to Sue claims ("NOIS"), 4,080 of them were approved by Garretson, and, of those, 2,673 claims have been eligible to be filed in the Eastern District of Louisiana.<sup>175</sup> In fact, many more, "possibly thousands," of BELO claims are expected to flood the Eastern District of Louisiana, as well as other federal courts that will be handling these cases.<sup>176</sup>

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<sup>171</sup> Order Regarding Medical Benefits Settlement, *supra* note 145, at 6.

<sup>172</sup> However, some plaintiff attorneys argue that medical claims under the Matrix—even those B1 claims that Garretson rejected because they were diagnosed after the cut-off date of April 16, 2012—cannot be litigated under the BELO and that only non-Matrix conditions, such as cancers, can be litigated under the BELO. Telephone Interview with Andre F. Toce, Principal Attorney, The Toce Firm (Jan. 30, 2018) [hereinafter Toce Telephone Interview]. Nonetheless, other plaintiff attorneys agree that previously uncompensated SPC claims can be litigated under the BELO. *See* Back-End Litigation Option Complaint ¶ 22, *McGill v. BP Expl. & Prod., Inc.*, No. 2:18-cv-00130-CJB-JCW (E.D. La. Jan. 4, 2018) (listing chronic sinusitis as one of the claimed conditions caused by the exposure).

<sup>173</sup> Downs Telephone Interview, *supra* note 54.

<sup>174</sup> Herd Telephone Interview, *supra* note 94.

<sup>175</sup> November 2018 Status Report, *supra* note 11, at 11–13.

<sup>176</sup> Herd Telephone Interview, *supra* note 94.

E. *Many BELO Claims Will Be Transferred to  
Other District Courts Around the United States*

The massive number of expected BELO claims will not only pose a problem for the Eastern District of Louisiana, but also for other district courts across the United States. This is because BELO claims are likely to be adjudicated not where the injury occurred (which would include the four federal districts along the Gulf), but where plaintiffs currently reside and where their medical conditions were treated.<sup>177</sup> In transferring venue, courts follow 28 U.S.C. § 1404(a) which states that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”<sup>178</sup>

To determine when a § 1404(a) venue transfer is appropriate, courts follow the *Gilbert* test that applies four private interest factors and four public interest factors.<sup>179</sup> The private interest factors include “(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.”<sup>180</sup> Additionally, the public interest factors include

(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.<sup>181</sup>

The Eastern District of Louisiana has already applied the *Gilbert* factors in some of the BELO cases to determine the most suitable

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<sup>177</sup> 28 U.S.C. § 1404(a) (2012).

<sup>178</sup> *Id.*

<sup>179</sup> *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc) (quoting *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004)).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

venue.<sup>182</sup> For example, in one case where the plaintiff worked and was injured in Jefferson Parish, in the Eastern District of Louisiana, but currently resides and is treated for his health conditions in Baton Rouge in the Middle District of Louisiana, the court transferred the case to the Middle District of Louisiana.<sup>183</sup> In another case where plaintiff resided and worked in Pensacola, in the Northern District of Florida, but later moved and has been treated for his medical conditions in San Antonio, Texas, the court transferred the case to the Western District of Texas.<sup>184</sup>

In many cases, scattering BELO claims around different district courts—even after applying the *Gilbert* factors—may lead to unjust and unreasonable results. For example, if a claimant was a cleanup worker in Alabama or northern Florida but currently resides and is treated in Miami, Florida, his or her case will likely be heard in the Southern District of Florida.<sup>185</sup> As one plaintiff explains, “trial of this case in [a district court outside the Gulf region] is expected to take longer, since more time will be needed to educate the judge and/or jury on these issues.”<sup>186</sup> This is because it takes time for each presiding judge to become familiar with even just the most important documents of the over 25,000-item docket,<sup>187</sup> including the

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<sup>182</sup> See Order and Reasons on Motion at 2, *Odom v. BP Am. Prod. Co.*, No. 16-CV-15974 (E.D. La. Mar. 15, 2017) [hereinafter *Odom Order and Reasons on Motion*]; Order and Reasons on Motions at 2–3, *Worley v. BP Expl. & Prod., Inc.*, No. 16-3620 (E.D. La. Sept. 7, 2016) [hereinafter *Worley Order and Reasons on Motions*].

<sup>183</sup> *Worley Order and Reasons on Motions*, *supra* note 182.

<sup>184</sup> *Odom Order and Reasons on Motion*, *supra* note 182.

<sup>185</sup> See Annie Correal, *The Life of Hispanic Immigrant Cleanup Workers in the Gulf*, FEET 2 WORLDS (June 24, 2010), <http://www.fi2w.org/2010/06/24/the-life-of-hispanic-immigrant-cleanup-workers-in-the-gulf/> (describing specifically the experience for Hispanic immigrant workers). Many Hispanic workers from South Florida were employed as cleanup workers to clean up the shorelines. See Fairness Hearing, *supra* note 1, at 241.

<sup>186</sup> Memorandum of Law in Support of Plaintiff’s Motion to Retain at 2, *Odom v. BP Am. Prod. Co.*, No. 16-CV-15974 (E.D. La. Mar. 1, 2017) [hereinafter *Odom Memorandum of Law in Support of Plaintiff’s Motion to Retain*].

<sup>187</sup> As of April 25, 2019, the docket contained 25,600 entries. *In Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (2:10-md-02179)*, CT. LISTENER <https://www.courtlistener.com/docket/4510515/>

facts of the *Deepwater Horizon* disaster, the subsequent spill, the cleanup efforts, and the terms of the MSA.<sup>188</sup> As one plaintiff pointed out in his filing, “[i]t is extremely unlikely that any other court in America is as knowledgeable or experienced [as the Eastern District of Louisiana] in handling the multitude of facts and legal issues which have been generated as a result of the BP Oil Spill.”<sup>189</sup>

Also, a jury in other states may not fully appreciate the scale of the *Deepwater Horizon* oil spill and of the ensuing cleanup operations, at least not as well as local jurors who either experienced the spill or have a better understanding of how the spill affected their communities. The fact that the MSA mandates qualifying BELO cases to be transferred away from the Gulf region under 28 U.S.C. § 1404(a), favors defendants. If BP was consistently tried in federal or state courts of the Gulf region, it is likely that the verdicts would be reflective of the local juries’ sense of fairness—results that any defendant in BP’s shoes would want to avoid.

Transferring the venue to outside the Gulf region may also create other problems for plaintiffs and their attorneys. Many, if not most, attorneys litigating BELO actions are located in the Gulf states.<sup>190</sup> Because these law firms are usually small and consist of a few attorneys who likely limit their practice to one or two states, these attorneys would need to become registered with each of the federal district courts in the states where the venue has been transferred.<sup>191</sup> Small plaintiff law firms—unlike the big law firms that BP retained to defend the BELO cases—have limited resources, both human and financial, to invest in litigating their clients’ cases in multiple jurisdictions.<sup>192</sup>

The process of “just, speedy, and inexpensive” adjudication may

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[in-re-oil-spill-by-the-oil-rig-deepwater-horizon-in-the-gulf-of-mexico/?filed\\_after=&filed\\_before=&entry\\_gte=&entry\\_lte=&order\\_by=desc](https://www.courts.msa.gov/courts/ea/record-repository/in-re-oil-spill-by-the-oil-rig-deepwater-horizon-in-the-gulf-of-mexico/?filed_after=&filed_before=&entry_gte=&entry_lte=&order_by=desc) (last updated Apr. 25, 2019).

<sup>188</sup> Herd Telephone Interview, *supra* note 94.

<sup>189</sup> Odom Memorandum of Law in Support of Plaintiff’s Motion to Retain, *supra* note 186, at 1.

<sup>190</sup> A web search of lawyers and law firms representing individuals in BELO actions against BP indicates that most attorneys litigating BELO actions are located in Louisiana, Florida, Texas, and Mississippi.

<sup>191</sup> Herd Telephone Interview, *supra* note 94.

<sup>192</sup> *Id.*



suffer when venue is transferred outside the Gulf region.<sup>193</sup> Fortunately, in cases where a claimant currently resides in a distant state but multiple other factors show his or her close contacts with the federal districts of Eastern Louisiana, Southern Mississippi, Southern Alabama, or Northern Florida, either the court or BP may be persuaded that the venue should not be transferred away from the Gulf region.<sup>194</sup> For example, in an ongoing BELO case, plaintiff resides in the Eastern District of Tennessee, but his injury and medical treatment took place in the Eastern District of Louisiana, and his expert witnesses also reside within the jurisdiction of the latter district court.<sup>195</sup> In this case, BP stipulated that the appropriate venue for the trial was the Eastern District of Louisiana.<sup>196</sup>

Not scattering the claims around different federal districts is also important because it gives plaintiffs' attorneys an opportunity to consolidate claims consistent with where and when injuries occurred.<sup>197</sup> Consolidating cases would significantly lower litigation costs, for example, by requiring only one expert witness testimony instead of multiple testimonies by the same or multiple experts and by reducing the number of motions and pleadings, thus cutting down the workload for the attorneys.<sup>198</sup>

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<sup>193</sup> FED. R. CIV. P. 1.

<sup>194</sup> See, e.g., Plaintiff's BELO Complaint ¶ 6, *Banegas v. BP Expl. & Prod., Inc.*, No. 17-7429 (E.D. La. Aug. 2, 2017) [hereinafter *Banegas BELO Complaint*]; Order on Venue at 1, *Banegas v. BP Expl. & Prod., Inc.*, No. 17-7429 (E.D. La. Dec. 5, 2017) [hereinafter *Banegas Order on Venue*].

<sup>195</sup> *Banegas BELO Complaint*, *supra* note 194, ¶ 6.

<sup>196</sup> *Banegas Order on Venue*, *supra* note 194, at 1.

<sup>197</sup> The MSA allows "consolidation or joinder of matters at issue or actions consistent with the Federal Rules of Civil Procedure," though it prohibits actions under "Rule 23 of the Federal Rules of Civil Procedure or any other class, mass, or aggregate action procedures." MSA, *supra* note 5, § VIII.G.1.d.

<sup>198</sup> See Motion to Consolidate "B1 BELO" Actions ¶ 27, *In re Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179* (E.D. La. Dec. 19, 2017) ("Requiring plaintiffs' counsel to participate in pretrial discovery and proceedings in multiple courts across the Gulf South, hire experts, and litigate every aspect of all actions individually would result in 'litigation fatigue' to the defendants' sole benefit. Conversely, allowing consolidation would allow all counsel to participate more efficiently.").

F. *Claims Administrator's Shortcomings  
Cannot Be Rectified Under the MSA*

Claimants' rights to compensation have been curbed by Garretson's conduct in making it more difficult to file claims. Most importantly, Garretson has regularly disregarded the deadlines that it is mandated to follow by the MSA.<sup>199</sup> For example, under § V.E., Garretson is obligated to send the Notice of Defect within thirty days from the date of receipt of the Proof of Claim form,<sup>200</sup> but Garretson does not follow this deadline.<sup>201</sup> To take another example, under § V.J., Garretson has thirty days after receiving the last cured defect to issue final determination of what, if any, compensation is due;<sup>202</sup> however, Garretson also does not follow this deadline.<sup>203</sup> Further, under § V.M., Garretson has fourteen days after receiving the review request to review the appeal,<sup>204</sup> but, again, Garretson does not follow the deadline.<sup>205</sup> Finally, although the MSA requires Garretson to review the NOIS and transmit it to BP within ten days,<sup>206</sup> Garretson has taken as long as seven months to process the NOIS.<sup>207</sup> In one—not unusual—instance, Garretson took from September 3, 2015 to May 2, 2016, to process plaintiff's NOIS.<sup>208</sup>

Garretson's disregard for deadlines has caused multiple problems for claimants and their attorneys. First, Garretson has unnecessarily prolonged the process of compensating claimants under SPC, and these claimants' payments are not adjusted for the post-judgment interest rate as are the damages that are awarded in a civil trial.<sup>209</sup> Second, there are instances of claimants giving up their claims to higher compensation (for example deciding to take \$1,300 under A1 instead of pursuing \$7,750 under A2) because they no

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<sup>199</sup> Downs Telephone Interview, *supra* note 54.

<sup>200</sup> MSA, *supra* note 5, § V.E.

<sup>201</sup> Downs Telephone Interview, *supra* note 54.

<sup>202</sup> MSA, *supra* note 5, § V.J.

<sup>203</sup> Downs Telephone Interview, *supra* note 54.

<sup>204</sup> MSA, *supra* note 5, § V.M.

<sup>205</sup> Downs Telephone Interview, *supra* note 54.

<sup>206</sup> MSA, *supra* note 5, § VIII.C.1.

<sup>207</sup> Odom Unopposed Motion to Stay Proceedings, *supra* note 91, ¶ 8.

<sup>208</sup> *Id.*

<sup>209</sup> Downs Telephone Interview, *supra* note 54.

longer want—or can—wait for the money to cover their medical expenses.<sup>210</sup> Third, by not following the deadlines, Garretson makes it more difficult for plaintiffs’ attorneys to plan and organize their work because they never know when they should expect a response from Garretson.<sup>211</sup>

Garretson is also heavy-handed in examining claims, and, as some plaintiff attorneys say, it acts less as an impartial claims administrator and more as an insurer or adjuster of BP’s interests.<sup>212</sup> For example, Garretson requires most claimants to remedy their SPC claims through an amendment or by sending additional documents.<sup>213</sup> In one of its periodic status reports to the court, Garretson stated that the claims have been and continue to be “impacted by high defect rates”: seventy-eight percent (78%) of SPC claims submitted to Garretson have received either a “Request for Additional Information” or a “Notice of Defect.”<sup>214</sup> Another fifty-three percent (53%) of SPC claims are voluntarily updated by the claimants.<sup>215</sup> If Garretson, an experienced claims administrator that has handled over twenty class action settlements, claims that the defect rate of SPC claims is “high,” there is little reason to doubt its judgment.<sup>216</sup>

Also, Garretson is unforthcoming when it comes to the medical programs mandated by the MSA.<sup>217</sup> Garretson releases limited information regarding the PMCP.<sup>218</sup> This is because, as all evidence points to this conclusion, the program—despite being a part of the

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*; Herd Telephone Interview, *supra* note 94.

<sup>212</sup> Toce Telephone Interview, *supra* note 172; Downs Telephone Interview, *supra* note 54.

<sup>213</sup> November 2018 Status Report, *supra* note 11, at 10–11.

<sup>214</sup> *Id.* at 2–3.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*; *Comprehensive Project List*, GARRETSON RESOL. GROUP, [https://www.garretsongroup.com/about-us/comprehensive-project-list?\\_hstc=30026080.7687b01d84a93fbe78c0a8cf88917f88.1495039981970.1513101809395.1513106206698.7&\\_hssc=30026080.3.1513106206698&\\_hsfp=2714116927](https://www.garretsongroup.com/about-us/comprehensive-project-list?_hstc=30026080.7687b01d84a93fbe78c0a8cf88917f88.1495039981970.1513101809395.1513106206698.7&_hssc=30026080.3.1513106206698&_hsfp=2714116927) (last visited Apr. 9, 2019).

<sup>217</sup> MSA, *supra* note 5, §§ VII, IX.

<sup>218</sup> November 2018 Status Report, *supra* note 11, at 14–15.

MSA—is being implemented only partially.<sup>219</sup> Garretson does not maintain a publically available list of medical providers with whom Garretson has “enter[ed] into a written contract . . . to provide medical consultation visits.”<sup>220</sup> Garretson only provides information on the implementation of the GRHOP, as the MSA mandates Garretson to provide to the parties reports on the program’s implementation.<sup>221</sup>

Despite systematic disregard for the deadlines, which has harmed plaintiffs’ right to be compensated, in practice, Garretson is immune from suffering any consequences of its conduct. Although the MSA states that the Eastern District of Louisiana “shall have ongoing and exclusive jurisdiction over the Claims Administrator,” it is unclear whether the Court may sanction Garretson as it is not a party to the case.<sup>222</sup> Further, Garretson may only be removed by BP’s and plaintiffs’ joint motion.<sup>223</sup> Because Garretson’s continued misconduct benefits BP (e.g. some claimants are giving up as the process of compensation is dragging on, memories of the spill are fading, and documents, such as medical proof, are getting lost), it is highly unlikely that the defendant would agree to remove Garretson as a claims administrator.<sup>224</sup>

#### CONCLUSION

Under current Rule 23(e)(2), the class action settlement can only bind class members if the court approves the settlement after a fairness hearing during which the judge assumes the position of the class fiduciary.<sup>225</sup> In this Comment, I argued that the fiduciary duty of the court should continue even after the settlement’s approval. As I discussed in Part I, the relationship between the court and the parties in class settlements governed by Rule 23(e)(2) is different than the relationship in non-class-action settlements. Further, in Parts II

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<sup>219</sup> MSA, *supra* note 5, §VII. Garretson did not respond to any requests to comment or provide any information on the Periodic Medical Consultation Program for the purpose of this article. From February 2014 until December 2018, Garretson scheduled 3,720 physician visits for class members. November 2018 Status Report, *supra* note 11, at 14.

<sup>220</sup> MSA, *supra* note 5, § VII.C.4.

<sup>221</sup> *Id.* §§ IX.D.6, IX.F.3.

<sup>222</sup> *See id.* § XXI.A.5.

<sup>223</sup> *Id.* § XXI.A.3.

<sup>224</sup> Downs Telephone Interview, *supra* note 54.

<sup>225</sup> *See supra* Part I.

and III, I showed how a seemingly uncomplicated and straightforward class action settlement that was praised by the legal community and that promised just and swift compensation to class members turned into a prolonged nightmarish struggle for anybody wanting to receive more than the basic award of \$1,300. Also, I showed a failing mechanism that is forcing a large group of claimants into second-phase Back-End Litigation Option and that is expected to clog many federal district courts in the Gulf Coast region with unnecessary litigation.

The *Deepwater Horizon* MSA—which failed in its purpose of providing fair and swift compensation to class members—is an example of why courts should have a continuing power to reassess the class action settlement when justice so requires. The MSA did not live up to its promises and, ironically, it fulfilled the catastrophic visions of the proponents of the MSA that *not* approving the settlement would possibly lead to prolonged litigation as in the case of the 1989 *Exxon Valdez* oil spill.<sup>226</sup> As Judge Barbier noted during the Fairness Hearing in 2012 “there is still litigation [of the *Exxon Valdez* case] going on . . . up in Alaska” and “that case was again before the United States Supreme Court on a legal issue of punitive damages . . . I do not plan to be here in 20 or 23 years handling *this* case.”<sup>227</sup> Unfortunately, without the judicial power to reassess class action settlements, Judge Barbier may still be hearing *Deepwater Horizon* litigation years after the disaster.

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<sup>226</sup> Fairness Hearing, *supra* note 1, at 183, 269–70.

<sup>227</sup> *Id.* at 269–70.