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The Other Oil Cleanup

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It was a little past 9 on a scorching July morning in South Texas, and Tony Buzbee was gunning down the Gulf Freeway outside Houston in his cherry red Ferrari 612 Scaglietti (license plate BUZB 8) on his way to a court hearing in Galveston. Buzbee's right hand was occupied with one of his ever-present La Gloria Cubana cigars, while his left stayed in intermittent contact with the wheel as he recounted how he destroyed an insurance company's expert witness in a recent deposition. So total was the demolition, in Buzbee's telling, that the witness retired on the spot from any future trial work. "I basically made him admit that his entire compensation model was" fouled up, Buzbee said with undisguised relish, as well as the blunt profanity that is a hallmark of his conversations.

I was having a little trouble focusing on the story as I stole glances at the speedometer and wondered if it would be bad form at this late juncture to reach for my neglected seat belt. But I noticed that Buzbee wasn't wearing his, either, and decided to place my faith in the driver and Italian engineering. After all, it didn't seem as if Buzbee was showing off. Just the opposite — it felt as if he were holding back for my sake. He wanted to go faster.

Buzbee, 42, is a former Marine who made his reputation as one of the most successful trial lawyers in Texas (and thus the country) while practicing in Galveston, but he doesn't get down to the island town much anymore. For years his office was in a restored warehouse near the docks, but in September 2008, Hurricane Ike made landfall on the east end of Galveston Island, pushing as much as 20 feet of water into downtown. Buzbee's offices were heavily damaged, and

he relocated most of his staff to sleek new quarters on the 73rd floor of Houston's JPMorgan Chase Tower, the tallest building in Texas.

It was Ike that was bringing Buzbee back to Galveston this morning. He was part of a team of lawyers that represented thousands of homeowners whose houses were damaged in the storm, and a few days earlier the group settled a block of the biggest claims with the Texas Windstorm Insurance Association for \$189 million. Buzbee wanted to show up in court to make sure the judge signed off on the deal and to meet with other lawyers to negotiate his cut of an \$11.5 million case-management fee. "The guys know I did most of the heavy lifting," Buzbee said as we drove. He planned to ask for \$7.5 million, "but I'll take 5," he added with a broad smile. (He ended up with 4.) In all, between his share of the fee and his percentage of his clients' recovery, Buzbee estimated he would make around \$20 million on Hurricane Ike litigation against an outlay of about \$750,000 in expenses. "People always say trial lawyers are such liberals," Buzbee said to me later, "but I'm a big believer in capitalism."

Make no mistake, Buzbee is an entrepreneur of a certain kind. As do most trial lawyers, he spends money to pry evidence of wrongdoing out of corporations that he can then leverage for a maximum return on investment. When I asked him what his product was, he thought for a moment before responding, "Fairness." However you react to his answer, lawyers like Buzbee need a big wrong to make their business model a success, which is why his current project revolves around the offshore explosion aboard BP's Deepwater Horizon, which killed 11 people aboard the floating rig and released an estimated 200 million gallons of crude into the Gulf of Mexico.

But the business environment has grown tougher for independent operators like Buzbee. Trial lawyers are held in low esteem by the public, and more to the point, the judicial and

political systems have increasingly pushed to rationalize the mass-torts circus, by consolidating litigation and, in the case of the BP spill, urging the creation of a company-financed compensation fund for victims. What this means is that trial lawyers can spend as much time jockeying for position among their rivals as they do attacking corporate wrongdoers.

When I met up with Buzbee in July, he was already girding for the fight on all fronts. As we drove around Galveston he pointed out some of the scenes of his previous legal battles, none more significant than the small community of Texas City, on Galveston Bay, where in 2005 an explosion at a refinery owned by BP killed 15 people, injured 170 and spawned thousands of damage claims. Buzbee sued BP on behalf of 179 clients, and in all, the company paid out \$2.1 billion on claims from that explosion. For Buzbee, a high point came when he became one of two lawyers allowed to take the deposition of John Manzoni, the senior BP executive overseeing the Texas City plant. The brutal dismantling culminated when Buzbee asked Manzoni, who was trying to defend BP's record, to read aloud from a safety survey of the plant that, as fate would have it, was completed on the very day of the explosion: "If this facility was an aircraft carrier, we would be at the bottom of the ocean." Buzbee's cases settled a few weeks later. He put his personal take from the litigation at close to \$100 million.

In the five years since the Texas City explosion, Buzbee has brought claims on behalf of thousands of clients against BP over a series of accidents and emissions from the Texas City plant. "It feels like I've been dealing with BP for so long, I know the supervisors, the rank and file," Buzbee told me. His battles with BP have left him with a considerable fortune and antipathy for the company. "I truly hate BP," Buzbee told me. "There is some deep problem inside that company."

So when Buzbee received word of the April 20 blowout of BP's Macondo well in the

gulf, it didn't take him long to formulate his objective: "To nail their scalp to the wall, and for me to be the guy holding it there."

These days, Buzbee has a lot of competition for the honor of making BP suffer. Unlike their professional cousins in the defense bar, trial lawyers tend to be loners. They are often poor boys made good, smart scrappers who went to second- or third-tier law schools and thus possess a keen antenna for slights visited upon them by their white-shoe brethren in the corporate bar as well as a highly developed capacity for nursing a grudge. That's certainly true of Buzbee, who contemptuously refers to corporate-defense lawyers as the "bow-tie brigade" and doesn't have much better to say about many of his fellow trial lawyers. "I'm at war," he wrote me in August. "This is my mission. As a Marine I won't fail." For those who know Buzbee, this is a familiar stance. "When Tony tries a case, he opens a flamethrower right away," Richard Melancon, a former partner, says. "A flamethrower attached to a bulldozer." Of course, to be in a position to scorch the enemy, you first have to navigate past your own lines.

Buzbee was among the first to file a case relating to the disaster, but in the six months since the explosion, hundreds of lawsuits have been filed against BP, Transocean, Halliburton and other companies involved with the doomed well. There are suits brought by some of the 126 people who were onboard the Deepwater Horizon when it exploded, as well as by their families and dependents. There are personal-injury claims brought by cleanup workers, first responders and others who say they were hurt from exposure to the spilled crude or to Corexit, the chemical used by BP to disperse the oil. There are cases brought by people who suffered economic harm from the spill. This diverse group includes commercial fishermen, shrimpers and oystermen; hotel and resort owners along the coast where there were cancellations; restaurants and other businesses that saw customer traffic dry up; and property owners who have seen their holdings

devalued. Most of the plaintiffs live, naturally, along the Gulf Coast, but suits have been brought from places as far away as California, Kentucky and Illinois, and new ones are being filed all the time.

In June, BP sized up this onslaught of litigation as well as its sagging stock price and, under pressure from the Obama administration, struck an unprecedented deal to create a \$20 billion trust fund to compensate those damaged by the spill. The fund was intended to speed up the process of compensating victims, and BP, at the administration's urging, hired Kenneth Feinberg, the veteran mediation specialist, to oversee the claims process. Since taking over in late August, Feinberg, who also administered the compensation fund for the victims of the Sept. 11 terrorist attacks and oversaw the executive-compensation system for bailed-out banks, has paid out more than \$1.5 billion to parties injured by the spill. But those initial payments — mostly short-term emergency relief to fishermen, shrimpers and small-business owners — represent only a fraction of BP's total liability. The oil giant has spent billions more on environmental cleanup. It pledged \$100 million to compensate offshore workers idled by the deep-water drilling moratorium imposed by the Obama administration and \$500 million to monitor the spill's impact upon the Gulf Coast in coming years. BP has spent millions to finance ad campaigns for state tourism offices and the seafood industry — and, of course, many millions more on an ad blitz to mend the company's own tattered image.

By the end of October, BP estimated that it had spent more than \$12 billion in connection with the disaster. The company's total liabilities from the spill, including fines, cleanup costs and litigation, have been estimated to be somewhere between \$30 billion and \$60 billion. By comparison, the Valdez spill in Alaska cost Exxon a total of about \$4.3 billion. In short, BP is facing the most expensive corporate environmental catastrophe in history.

The BP disaster comes at a pivotal juncture for the American trial bar. In many respects its power and influence hit its zenith in the late 1990s, when a coalition suing the tobacco industry on behalf of 46 states reached a landmark \$206 billion settlement in a case that both fundamentally altered the public's perception of cigarette smoking and made billionaires out of several of the lawyers involved. That settlement led to predictions, both dire and hopeful, that the trial bar would use its newfound financial clout to go after a host of other industries, transforming the face of American capitalism.

There were other victories, but a change in how the average person viewed trial lawyers never came to pass. Instead, the past decade has seen a steady diminishment in the trial bar's influence in American life. In the courts, a series of rulings has limited the size of punitive-damage awards, the trial bar's most potent weapon when going after corporations. In Congress and state legislatures, the tort-reform movement, spearheaded by the U.S. Chamber of Commerce, has scored a string of legislative victories, capping damage awards and limiting the scope of class-action litigation. But nowhere has the trial bar's defeat been more decisive than in the court of public opinion, perhaps best personified by the story of Stella Liebeck, the 79-year-old New Mexico grandmother who successfully sued McDonald's for \$2.9 million in 1994 after she was badly burned by a cup of their coffee (the award was later reduced to \$640,000). The McDonald's Coffee Lady entered the public's consciousness as a potent symbol of the tort system run amok and marked a turning point in efforts by industry to thwart its chief adversaries. In the last decade, groups like the American Tort Reform Association have waged an effective campaign against the evils of "jackpot justice," "runaway juries" and "judicial hellholes." So successful were these efforts in shaping public opinion that the Association of Trial Lawyers of America determined in 2006 that the term "trial lawyer" had become so toxic

that it had to be jettisoned and voted to change its name to the American Association for Justice.

Given that history, the BP spill offers the trial bar a chance to burnish its image with the public and recapture the narrative from its corporate enemies, all while making a fortune in fees. The contest pits sympathetic gulf fishermen, oiled critters and hard-working rig workers against BP, one of the largest oil companies in the world, with a demonstrably lousy safety record and a lingering patina from its British colonial past. When BP's nebbishy former chief executive Tony Hayward acted as the corporate frontman in the months following the spill, traversing the Gulf Coast and committing one plummy-accented gaffe after another, the trial bar could hardly believe its luck.

Enter into this scene Kenneth Feinberg. Normally the appearance of \$20 billion in settlement money within months of a disaster would cause the trial bar to rejoice. But soon after his appointment was announced, Feinberg began making a provocative suggestion: maybe trial lawyers weren't going to be necessary at all. "That shrimper should come right into this fund, doesn't need a lawyer, doesn't have to pay a lawyer 40 percent of what he receives," Feinberg said on NBC's "Meet the Press," one of several similar statements he made early in his tenure. (Lawyers whose clients get compensation from the fund typically take a smaller cut than they would on a full-fledged court case.) Though Feinberg later tempered his views, the damage to his relations with the trial bar was done. In Feinberg, many trial lawyers saw a man who was doing BP's bidding, someone who was not only trying to shortchange their clients but also to take money from their pockets and rob them of their moment of glory. While that may seem of no concern to either Feinberg or BP, in truth both need at least some cooperation from the trial bar to encourage those harmed by the spill to seek compensation from the fund rather than swamping the courts with lawsuits, which, after all, is what the fund was created to avoid.

As the term implies, a key to influence in a mass tort is achieving mass. From the moment a cataclysm like BP's Deepwater Horizon blowout occurs, a trial lawyer is on the clock. How much power he can wield in the expanding litigation is often determined, or at least influenced, by how many clients he has and how quickly he gets to court.

While lawyers can be sanctioned for directly soliciting clients for representation on a specific case, they have, naturally, devised various ways to work around that prohibition — television ads are one. But with some notable exceptions, high-end trial lawyers like Buzbee shy away from late-night, basic-cable inducements. A more-nuanced approach is to mount their own investigations into the cause of a given accident. This is perfectly legitimate, as long as the lawyer doesn't directly solicit the people he interviews. Of course, if the person interviewed gets it into his head to hire that smart lawyer who knew so much about the incident, well, so much the better. In the weeks following the BP disaster, Buzbee's investigator was able to interview and take statements from about 60 people who were aboard the Deepwater Horizon when it exploded. The investigation gave Buzbee an early look at key witnesses months or even years before they might testify in depositions or at trial, though he did make several of his clients available to government investigators. He also allowed rig workers to use a private jet, one of three that he owns, to attend the funerals of their co-workers.

Another tactic to attract potential clients is the informational seminar. Within weeks after the BP spill began, trial lawyers were crisscrossing the gulf states, meeting with seafood and tourism associations and appearing at town hall-style get-togethers, concerts and other gatherings, where they could make presentations to victims of the spill. At one memorable four-hour event for Vietnamese fishermen in Louisiana, Robin Greenwald, a lawyer from the Manhattan firm of Weitz & Luxenberg, flew in to give a talk on the spill (translated onstage into

Vietnamese), and her assistant serenaded the crowd with a version of Woody Guthrie's "This Land Is Your Land" that incorporated lyrics about the struggles of gulf fishermen.

As it became apparent over the summer that the oil from the ongoing spill was drifting toward the white-sand beaches of the Florida Panhandle, Buzbee and other lawyers shifted their attention to the multibillion-dollar hotel-resort market centered along the state's Gulf Coast. Buzbee made multiple trips to meet with resort and restaurant owners and establish contact with local lawyers who could serve as referral counsel. He also brought potential clients to Houston on his private plane. Moving into a different market "is kind of like being a Marine," Buzbee told me. "You establish a beachhead. Then get your communications and logistics working properly."

At one point Buzbee thought he had stolen a march on his Florida rivals by locking up representation of the powerful Florida Restaurant and Lodging Association, whose 10,000 members make up the largest block of hotel and resort owners in the state. Buzbee is close to Keith Overton, the group's chairman, but in an unexpected twist (at least to Buzbee), the board voted to hire a consortium of firms led by Perry Weitz, a prominent Manhattan trial lawyer (with whom Robin Greenwald works), and Levin Papantonio, a Florida firm. "I thought the fix was in, but it turned out they had it in better," a chagrined Buzbee says.

Despite the setback, Buzbee remained determined to capture a piece of the lucrative Florida market. I caught up with him in mid-July at a La Quinta Inn just outside Panama City to watch him make a presentation to a gathering of potential clients, most of them Indian-Americans who owned chain hotels in the state's Panhandle region. A strong smell of curry wafted into the conference room from a lavish buffet in the lobby, while Buzbee sat fiddling with his PowerPoint presentation and sniping at one of his associates over small typos and mistakes. Buzbee, it turns out, is a stickler for grammar.

Buzbee was introduced to the group by J. L. Evans, who is what is known as a public insurance adjuster, a job description with which I was not familiar. Buzbee hadn't been either until adjusters began contacting him after Hurricane Ike. Sometimes called storm chasers, public adjusters are licensed by states and operate as consultants, helping property owners file claims with their insurance carriers and usually getting a percentage of the proceeds. Unlike lawyers, they are not prohibited from directly soliciting clients. The adjuster can recommend a lawyer to his clients, if they need one, and a lawyer can likewise recommend an adjuster to his clients who want help filing their insurance claims.

Evans's practice took off after Hurricane Opal in 1995, and his home range is the Florida Panhandle, but he goes where the storms go. After Ike hit Galveston, Evans traveled to Texas and eventually began working with Buzbee. Recounting stories of Buzbee's prowess in handling an insurance-company witness, Evans repeatedly dug his finger into my chest and exclaimed in a loud voice, "He got Buzzed!" Buzbee also teamed with a Florida lawyer who was a past president of the local chamber of commerce, a common practice in which a local lawyer receives a split of the fee for recommending the out-of-town tort lawyer to his clients.

Before the lights went down, Buzbee reminded everyone to fill in the sign-up sheets being circulated around the room, so they could get in touch with him later with any questions. On a table at the front of the room was a stack of retainer agreements for those who decided to hire Buzbee on the spot. The purpose of the meeting, Buzbee told the group, was to discuss why they needed a lawyer to help them fight BP and why, if they chose to get a lawyer, they should consider him for the job. As the PowerPoint slides clicked through, Buzbee paused to make his key arguments. To make their claims, the hotel owners would have to calculate what revenue they lost as a result of the spill. Buzbee advised them not to base this calculation on revenue

earned during the recession years of 2008 and 2009 but rather to project what they would have made in light of an economic recovery. “Only you know your business,” Buzbee told the crowd. “No one knows your business as well as you.”

Buzbee assured the hotel owners that, if hired, his economic experts would sit with them to work out what their projected revenue would have been but for the spill, not just in the next few quarters but also over the next few years. “We all are fighting a perception problem, whether or not oil has ever touched the beach,” he said, cautioning that dealing with BP’s agents was just like dealing with an insurance company after a car accident. “What do you think the adjustment firm’s goal is?” Buzbee asked. “You think their goal is to pay you as much as possible?” Heads shook around the room. “They would not be BP’s third-party administrator if they were paying the claims the way they should be paid. End of story. That’s the facts.”

Buzbee made sure to note that his firm had won the largest single verdict against BP in the history of the company. (He did not, however, mention that a federal judge reduced that \$100 million jury award to less than \$500,000 earlier this year, finding that the punitive damages were not warranted.) For good measure, Buzbee got in a dig at Feinberg, who would soon take over the BP claims process. BP’s \$20 billion fund might be unprecedented, Buzbee told the worried businessmen, but in his view Feinberg was nothing more than a glorified mediator. His job was to get a settlement done, not to make sure claimants were made whole. “He wants a deal, and the more people he can peel out of the litigation process and resolve in the claims process, the better it is for Ken Feinberg,” Buzbee said. BP and Feinberg, Buzbee told the crowd, “will talk about every weakness you have with your claim. You need somebody there who can talk about every strength of your claim. At the end of the day, that’s why you need a lawyer.” And, of course, Tony Buzbee stood ready to do that job. “There’s no law firm in the country who’s done the

work we've already done on this case," Buzbee said. "There's just not." He paused and added, "I've been dealing with these guys for many, many years."

Buzbee and his fellow trial lawyers weren't the only ones who spent the summer in the gulf region holding meetings with spill victims. In small communities like Houma, La., Biloxi, Miss., and Bayou La Batre, Ala., Kenneth Feinberg appeared at packed town-hall meetings to introduce himself — the \$20 billion man! — to Gulf Coast residents who were eager to take his measure. The reception was not always warm. The hostility was not entirely Feinberg's fault. Anyone perceived to be stepping into BP's shoes was bound to absorb the anger directed at the company and, to put it delicately, in Southern pickup-truck country, a lawyer from Washington with a heavy Boston accent (oystah hah-vah-stahs) was burdened with the same outsider status that plagued Tony Hayward during his stint as BP's front man.

But, as Feinberg acknowledges, many of his wounds were self-inflicted. Onstage, his professorial persona sometimes came across as didactic and even hectoring. He would often stake out a position in a meeting only to reverse it a few days or weeks later. Before taking over the claims process, Feinberg loudly criticized BP for its foot-dragging and repeatedly promised restive crowds that on his watch it would take just 48 hours to pay emergency claims by individuals and just seven days for business claims. Instead, for many the process dragged out for weeks or longer while their cash ran out. "His whole operation was about as badly rolled out as the Edsel," says Scott Bickford, a New Orleans trial lawyer. As Feinberg repeatedly said, he "overpromised and underdelivered." In mid-September, the Justice Department gave Feinberg a public kick in the shins, and he responded by rapidly speeding up payments to spill victims.

Yet despite the volleys of criticism directed at Feinberg by trial lawyers, public officials and disgruntled claimants, the fact remains that by the end of October he had doled out more than

\$1.5 billion in emergency payments to distressed workers and businesses in the gulf region. That stands in stark contrast to the experience of the victims of the last major oil spill to foul U.S. waters. In 1989, after the Exxon Valdez ran aground in Prince William Sound, thousands of Alaska residents discovered to their dismay that, under the antiquated provisions of maritime law, they had no right to recover any damages at all against Exxon even though their livelihoods were decimated by the spill. Many of those who did have standing to sue wound up in a protracted legal battle that would not reach its conclusion until 2008, when the Supreme Court finally ended it. “By that time, a third of my clients were dead,” says Elizabeth Cabraser, a San Francisco trial lawyer, who worked on the Valdez case and is also a leader in the trial bar’s effort against BP.

After the Valdez disaster, Congress passed the Oil Pollution Act, which greatly expanded eligibility for damage claims from offshore spills like the Valdez or the Deepwater Horizon. It also required that the party deemed responsible by the government compensate victims. Given the fact that the law has been on the books for 20 years, you might assume that setting up a compensation fund for victims of the BP spill would be a straightforward matter. It has not been. In fact, a good deal of the delay in getting Feinberg installed to run the fund was caused by intense bickering among trial lawyers, BP and the government over how exactly the fund should operate — disagreements that persist to this day. And while those disagreements are varied, the main source is clear: Feinberg’s principal objective is to keep people out of the courts, to bypass the tort system that the trial bar has labored so hard to construct over the past four decades. Feinberg likes to boast that under his stewardship 97 percent of claimants to the 9/11 compensation fund never filed suit. Though he acknowledges that the circumstances of the oil spill are quite different, he says that he would like to achieve a similar result with the BP fund.

“Don’t underestimate the existential nature of finality,” he told me. “Here is a check; let’s close the chapter on this so we can move on. It’s almost cruel when the uncertainty of the present continues on into the future.”

It is precisely that “existential finality” that has the trial bar worried. The Feinberg fund represents an alternative model for the resolution of big disasters, one that moves trial lawyers from center stage to a spot in the chorus. Over the last few decades the trial bar has built what amounts to a private-enterprise regulatory machine, compiling an impressive string of victories over — or at least a series of large settlements from — the most powerful corporations in the world. Some call them parasites and label their style of litigation the “American disease.” Others see them as the last truly effective check on corporate power left in the U.S. system. With the Feinberg model comes the prospect of their further diminishment, a blueprint for a future without big-time trial lawyers. And they are not willing to accept that future without a fight.

Does the settlement fund represent a superior alternative to trial-lawyer-financed litigation? For some claimants, undoubtedly it does. Since increasing his efforts in September, Feinberg has proved generous to workers and other small claimants seeking compensation for lost wages. But for others, principally business owners, the fund has so far been a bust. John Nelson, president of Bon Secour Fisheries, a seafood processor and supplier on the Alabama coast, neatly sums up the difference. He says that while his workers have been compensated by the fund for lost wages, his company has received only about 10 percent of its claimed losses. “I think everybody is prepared to pursue litigation, but we’d much rather not have to,” says Nelson, who has retained a lawyer (not Buzbee). Jo Bonner, a Republican congressman whose Alabama district encompasses the state’s Gulf Coast, says Nelson’s experience is a common one among his constituents. “I know a lot of money has been paid out, but many, many, many haven’t been

paid, have been denied or gotten only partial payment and no explanation why,” Bonner says.

Feinberg says he is working hard to get people compensation. “I want to discourage claimants from litigating, and it’s the claimant I’m thinking about here,” Feinberg says, arguing that his standards for documenting losses are far more liberal than those that people are likely to encounter in court. “I want to see these people made whole, and quickly, and not after years of litigation,” Feinberg says. But while Feinberg casts himself as a neutral arbiter seeking to get victims just compensation, the fact that he is paid by BP has inevitably led to a perception among many spill victims that he is BP’s guy. Trial lawyers frequently note that Feinberg, despite repeated promises to do so, has been slow to reveal details surrounding his compensation and that the initial criteria he set up for paying claims was in many ways more onerous than required under the Oil Pollution Act. (In October, Bloomberg reported that Feinberg’s firm was being paid \$850,000 a month by BP.) “This fund is being publicized as some kind of magnanimous gesture, when in fact BP is only doing what is obligated to do by law,” says Anthony Tarricone, a Boston-based trial lawyer and recent past president of the American Association for Justice. Trial lawyers also argue that there is a social cost to using an administrative fund like Feinberg’s in lieu of litigation. “BP does not want to see a trial, they want to quietly sweep this thing under the rug,” Stuart Smith, a lawyer in Louisiana, says. “But I’m going to do everything in my power to make sure a jury finds out what happened.”

So far most of the skirmishing between Feinberg and the trial bar has been behind the scenes, but that may change. On Nov. 23, the initial emergency phase of the compensation-fund payout comes to an end. During this phase, claimants have been able to get up to six months’ compensation with comparatively little documentation and without having to give up their rights to sue BP. That will not be the case in the next phase, during which claimants will have to sign

releases agreeing not to sue BP, and possibly all other potential defendants, to get their final payment. Trial lawyers have pushed back against the idea of these releases, arguing that no such requirement appears in the law. “If Ken only offers them partial compensation — which, trust me, he will — then trying to get them to sign away all their rights for a reduced number is outrageous,” says Perry Weitz, who has served as a lead negotiator with Feinberg on some of the trial bar’s issues.

In the last month Feinberg moved to address some of the trial bar’s concerns. He loosened the so-called proximity requirement, which made it difficult for hotel and restaurant owners not in the immediate zone of the spill to claim damages, and agreed to reverse his stance against making payments to claimants while they negotiate a final settlement. Feinberg also suggests that some in the trial bar might be surprised by the size of the final offers he will be making. “If you want people to waive their right to sue, you better be pretty generous so that they will assume the risk of being better off with a lump-sum payment now.” Of course, Feinberg notes, participation in his fund remains purely voluntary: “If you think you can get a better deal in court, then by all means, go litigate.” That certainly remains an option for some, like Keith Overton, who is also the chief operating officer of TradeWinds Island Resorts, which Buzbee represents. “Unless Feinberg changes his position on losses occurring further out than two years from now, I don’t think he’s going to offer a fair long-term settlement,” says Overton, who also says he is unwilling to sign away the rights of his business to sue and leave money on the table.

Determining just where Overton and other potential litigants would have to go to bring their cases against BP if they chose not to settle with Feinberg was the question that drew an elite contingent of the American trial bar into courtroom No. 3 on the sixth floor of the James A. McClure federal building in Boise, Idaho, at a little after 9 a.m. on Thursday, July 29. Crowded

into that remote outpost of the federal judiciary was a veritable *loya jirga* of the nation's top trial lawyers. From California came Elizabeth Cabraser, the pixieish San Franciscan who is helping to lead the legal assault against Toyota for sudden-acceleration problems with its vehicles. Seated nearby was Perry Weitz, Manhattan's king of asbestos litigation. At a table up front, Russ Herman and Daniel Becnel, two old bulls from Louisiana who helped fight the tobacco wars in the 1990s. Behind them, W. Mark Lanier the boyish-looking Texas tort lawyer and Baptist Sunday-school teacher whose pride of place was from scoring the first big verdict against Merck in the Vioxx litigation. Lounging against a far wall in a tailor-made light blue pinstripe suit, brown shoes and no socks was Buzbee, and seated next to him was his friend Mikal Watts, whose bald pate and bulldog countenance belie the Texas lawyer's genial disposition. Watts, by his count, accumulated 40,000 clients interested in suing BP in the months after the blowout.

The federal judiciary agreed in May to consider consolidating the flood of cases around the country related to the oil spill before a single judge in one court, a proceeding known as multidistrict litigation, or MDL, which was created in the late 1960s and took off in the 1970s and 1980s when mass litigation related to things like asbestos and breast implants threatened to overwhelm the federal courts. Over the last two decades it has become an arena of law unto itself, with a cadre of lawyers who specialize in handling big MDL cases and get rich doing so. Though designed to increase efficiency by consolidating pretrial discovery from multiple cases into a single proceeding, some trial lawyers feel that the MDL process has become just another layer of sclerotic bureaucracy in the judiciary, one that uproots and centralizes litigation before the first case is even tried.

The panel of judges that decides where and how to consolidate cases operates as a kind of a roving litigation carnival that opens in a different town every other month. In theory the panel

is supposed to assign the MDL by following such criteria as the capacity of a judge to handle the caseload and the locations of evidence, witnesses, plaintiffs and defendants. In practice, the MDL panel has discretion to select a venue and often confounds the expectations of the parties.

In the case of the BP spill, 23 lawyers were allowed to make presentations to the panel, suggesting judicial districts in various states where they believed the BP cases should be sent. In a proceeding that resembled a kind of legal speed dating, each lawyer had two or three minutes to speak. They would hustle to make their pitches before a red light signaled it was time for the next lawyer to rush up for a turn at the lectern. For reasons that remained opaque, some lawyers were parceled out more time than others, and their presentations varied accordingly. Russ Herman, arguing for his home district in New Orleans, was given a comparatively magisterial three minutes, and his argument incorporated the Mississippi River flood of 1927, the Roman jurist Cicero and a quote from Shakespeare's "Measure for Measure."

Lanier carried the ball for a group of Texas trial lawyers and made a rather elaborate six-minute presentation that lauded Houston's "deep bench" of federal judges. Several lawyers, including Cabraser, made compromise suggestions, like having the cases heard in New Orleans but importing a judge from an outside jurisdiction to avoid perceived conflicts of interest among the Louisiana judges.

For trial lawyers the choice of venue is, as you might expect, a pocketbook issue. The judge overseeing the MDL customarily exercises a lot of sway and forms a steering committee of trial lawyers to help the court coordinate the workload. There is no sure path to serving on such a committee, but having a lot of cases helps, as does having a good reputation with the judge and a solid track record handling mass torts. Money is a factor, too, as committee members are expected to put up cash to finance costs like the hiring of experts, the collection of evidence,

document management and other expensive items involved in mounting complex litigation. Committee members might have to spend up to a million dollars each or more.

But of course, a spot on the steering committee can be extremely lucrative. Members of the committee are in a position to receive a percentage of the fees earned by all the lawyers involved in the litigation as compensation for their work organizing the documents, depositions and other trial materials developed for the “common benefit” of all the cases. In litigation the size of the BP disaster, that could mean millions of dollars in additional fees for every lawyer on the committee, which is why so much high-priced legal talent was willing to trek out to Boise for the sake of two-minute sales pitch. It is also why, despite all the bro-hugs and back slaps around the courtroom before the hearing, competition among and within the various factions was intense.

Buzbee has played a central role in some MDL litigation, notably on behalf of hurricane victims housed in substandard FEMA trailers, but he is not really a mass-tort lawyer and, unlike many of the trial lawyers in Boise, not a political animal. Profane, flamboyant and flagrantly aggressive, he’s something of a throwback to an earlier generation of trial lawyers, whose favorite place in the world was on their feet in court wearing out of some corporate malefactor. MDL cases, by contrast, with their endless confabs, committee work and procedural wrangling, are not well suited for a man with Buzbee’s pugnacious temperament. In fact, corralling dangerous legal agents like Tony Buzbee, who might otherwise wrest control of some tidy corner of the legal system and bend it to their will, is one thing that MDL proceedings are designed to accomplish.

Buzbee also had some practical concerns. Though it is not all that unusual for a besieged defendant like BP to set up a big compensation fund for victims, it usually comes only in the form of a settlement following years of intense litigation. With the gulf oil spill, BP flipped the

script. The \$20 billion fund is sufficiently large to exert a gravitational force, giving lawyers some pause in considering just how valuable the MDL litigation may end up being. As Buzbee put it, with characteristic bluntness: “Now you’ve got a \$20 billion fund. So a guy that goes and collects 20,000 clients can take them through the fund, make a mint and tell the committee: ‘You aren’t getting a penny of my money. I don’t care how many depositions you took, I never filed suit.’ ”

On Aug. 10, the Boise MDL panel decided to send most of the BP cases to Judge Carl Barbier in New Orleans. Buzbee had been rooting for Houston, but despite this, and despite his inborn aversion to working nicely with people, he immediately began strategizing to gain a seat on the steering committee. In all, more than 100 lawyers applied for 15 spots. Buzbee was at a disadvantage, not having any experience before Judge Barbier or a long track record in MDL cases.

Buzbee’s near-term focus was the possibility of getting his personal-injury cases out of federal court and to state court back in Texas. So he decided to approach Steve Herman and James Roy, the two Louisiana trial lawyers tapped by Judge Barbier to serve as liaison counsel for the plaintiffs, with the idea that they support a motion to allow him to take one of his cases back to Texas and try it as a “bellwether.” Buzbee was sure that he could move quickly to uncover loads of damaging information and, with the right judge and jury, stun BP, Transocean, Halliburton and the other defendants with a whopping verdict. This, he argued, would benefit the rest of the cases back in the MDL by speeding up the whole process, Buzbee style.

This gambit was vintage Buzbee. I was reminded of something he said to me weeks earlier. We were sitting in the basement of his sprawling home outside Houston, in a kind of man cave with a bar and a liquor cabinet that played the theme music of “Monday Night Football”

when its doors were opened. Buzbee told me that what he really wanted was to be the lawyer to depose senior BP corporate officers, reprising his performance in the Texas City litigation. Buzbee's main fear about the MDL, he told me, was not so much losing out on the committee money (though he was interested in that as well), but being kept on the sidelines during the biggest litigation in the country's history. "What's that line in the movie 'Patton,' " Buzbee said. "You don't want to have to tell your grandkids that you spent the war shoveling crap in Louisiana."

In late August, Buzbee flew to New Orleans with a pair of Texas lawyers to meet with Herman and Roy in a private dining room at the elegant Windsor Court Hotel. He said he had high hopes going in but was circumspect coming out. The Louisiana lawyers seemed hostile to his strategy and had some concerns about his fellow Texas lawyers trying to lure clients away from Louisiana lawyers (a common complaint by the Louisiana trial bar). Despite his resources and history litigating against BP, Buzbee became increasingly doubtful about his chances of making the steering committee. Herman pointed out, not unreasonably, that it was tough for Buzbee to argue for a spot on the steering committee when his objective was to get out of the MDL process and back in state court as soon as he could.

At the initial organizational hearing for the MDL in September before Judge Barbier, Buzbee kept a low profile as a group of lawyers with personal-injury cases argued that it would be unfair to make the families of the dead and the injured wait on the slow-moving MDL process before going to trial. Barbier was notably cool to the idea of trying the death and injury cases before liability for the oil spill had been determined and denied the group's motion. (Sensing the defeat, Buzbee, who represents 18 of the injured rig workers, had asked the group not to include his name with their motion.)

Barbier has set the first big trial in the case for February 2012, which is when he is expected to apportion liability among the defendants involved with the blowout. In October, Barbier made his selections for the 15-person plaintiffs' steering committee. Buzbee was not among them, though his friend Mikal Watts made it. None of the lawyers chosen to serve have much history suing BP.

Though his prospects for playing a leading role in the BP litigation were diminished by his failure to make it on to the steering committee, Buzbee remained enthusiastic about his cases and was busy gearing up for pending settlement negotiations on injury claims for those clients who were aboard the Deepwater Horizon. BP and the other defendants will very likely be eager to settle with these sympathetic plaintiffs and get them out of the MDL litigation. When I talked to Buzbee in mid-October, he sounded almost giddy at the prospect of once again extracting a sizeable settlement from the oil giant. Then, in late October, he got the news that he had been named to one of the MDL's many subcommittees — one that would give him a role managing discovery, raising Buzbee's hopes that he might yet get a crack at deposing top corporate executives in the case. He still travels to Florida regularly to meet with potential hotel and resort clients and recently flew a group of Vietnamese restaurant owners from Louisiana to Washington to meet with Senator Mary Landrieu and complain about Kenneth Feinberg. He says he now has 55 people who do nothing but work on spill cases. "I'm going to have to be dealt with at some point," he told me. "Whatever happens, I promise you at some point they are going to have to deal with me."