



ONE YEAR AFTER THE GULF OIL SPILL:

Is Justice Being Served?



A report by

Alliance for Justice

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About Alliance for Justice

Alliance for Justice is a national association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans. It is the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process.

AFJ's short film, *Crude Justice*, explores the damage done by the *Deepwater Horizon* disaster to the lives and livelihoods of the people who depend on the waters of the Gulf of Mexico for their income, their food, and the continuation of their culture. Learn more about the film at crudejustice.org.

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Executive Summary

Overview

One year ago, on April, 20, 2010, the *Deepwater Horizon* drilling rig leased and operated by BP exploded, killing 11 people, injuring 17 others, and precipitating the largest environmental disaster in our nation's history. For the next three months, the ruptured well spewed millions of barrels of oil into the Gulf of Mexico – the worst accidental oil spill ever recorded.¹ Oil did not stop flowing until July 15, 2010 when a temporary cap was affixed,² and the BP well was not “killed” until September 19, 2010.³ Meanwhile, the public watched in horror as the enormous magnitude of the tragedy slowly unfolded.⁴ Government scientists estimate that over 200 million gallons of oil were released⁵ – almost 20 times the amount of oil spilled by the *Exxon Valdez* tanker.⁶ Approximately 1.84 million gallons of dispersants were also dumped into the Gulf to help break up the oil, with their effects on human health and marine life largely unknown.

Though the full environmental ramifications of the spill will not be known for years, the oil and the dispersants used to combat the spill clearly wrecked sensitive ecosystems and killed wildlife. Oiled and dead wildlife frequently washed ashore, and many marshes and beachfronts have been polluted.⁷ The oil has damaged a wide variety of essential habitats which, in turn, has harmed large numbers of interdependent species in the Gulf's complex food web.⁸

Government scientists are assessing the damages to natural resources, and will be doing so for some time.

While the environmental effects have been devastating, the human toll has been just as catastrophic. The primary economic engines of the Gulf – seafood, tourism, and energy production – have all been directly affected, disrupting lives, careers, and families.⁹ The commercial fishing industry has been devastated by government closure of fisheries, decreased marine populations, and public concern over the safety of seafood. Fear of oiled beaches has led to a decrease in tourism. And the temporary moratorium on deepwater drilling cost oil and gas industry workers until it was lifted.

The disaster is hurting more than peoples' pocketbooks. Surveys of residents show that depression is up 25%, and domestic violence has increased.¹⁰ Many of those

Over 200 million gallons of oil were released – almost 20 times the amount of oil spilled by the *Exxon Valdez*.



exposed to the oil have reported physical ailments, with the longer-term health effects still unknown.¹¹ As Alabama Attorney General Luther Strange recently observed,

There is a tangible impact on families based on what's happened in this oil spill. It is not just business, anonymous people. It is human beings who are hurting because of this oil spill.¹²

Alliance for Justice is a national association of over 100 organizations dedicated to advancing justice and democracy. We advocate for a more equitable society and increased access to justice for all Americans. To advance these goals, we have sought to ensure that victims of the BP oil spill receive meaningful compensation for their losses. We have explored the damage done by this calamity and its effects on the lives and livelihoods of residents of the Gulf by interviewing scores of people, producing reports, hosting panel discussions, and producing the short film *Crude Justice*. Now, one year later, Alliance for Justice is publishing this report to assess whether the legal

system is working to provide adequate compensation for victims. In short, at the one-year anniversary of the BP spill: Is justice being served?¹³



After the *Exxon Valdez* oil spill disaster in Prince William Sound, Alaska in 1989, our legal system did not come close to realizing the goal of making injured victims whole. The litigation to compensate victims dragged on for nearly 20 years, and one out of five plaintiffs died before they could be compensated.

Congress passed the Oil Pollution Act of 1990 (OPA) to address many of the deficiencies in the legal system revealed by *Exxon Valdez*. One change the law made was to require the party responsible for a spill to set up a process to pay victims immediate compensation. BP fulfilled this obligation by creating the Gulf Coast Claims Facility (GCCF). Another change OPA made was to establish a government fund – the Oil Spill Liability Trust Fund – to compensate victims if the responsible party could not pay. OPA also altered the litigation landscape for injured parties.



The BP oil spill is by far the largest oil spill disaster since OPA was enacted. As a result, there has been a high level of scrutiny as to whether the law is fulfilling its objectives.

This report focuses largely on the Gulf Coast Claims Facility (GCCF), the venue through which most victims of this disaster have thus far received compensation. Because the litigation is ongoing, very limited assessment can be made as to whether that process will succeed in making victims whole. On the other hand, GCCF has set most of the policies and “rules of the game” that will affect victims’ ability to recover, and has already paid hundreds of thousands of claims, making a one-year analysis of that system more feasible.

The National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling recommended “a close review of the Gulf Coast Claims Facility process to determine its effectiveness in adjudicating compensation claims and its value as a model for future spills of National Significance.”¹⁴

From our one-year review, we have identified a host of issues in need of resolution that raise questions as to whether this model has worked.

Gulf Coast Claims Facility

Soon after the explosion, BP admitted responsibility and vowed to pay “all legitimate claims.” At President Obama’s urging, and to meet the requirements of OPA, BP placed \$20 billion into a trust fund to compensate victims, and established the GCCF to administer it. President Obama and BP agreed that Kenneth Feinberg would head the fund, which was unprecedented in size and scope. In the less than nine months between taking over from BP in August 2010 and the one year anniversary of the spill, GCCF paid nearly \$4 billion in claims to over 178,000 individuals and businesses.

GCCF initially provided short-term emergency payments, and now offers interim payments for past damages, as well as final payments intended to cover all future damages. Claimants must sign a waiver of liability in order to receive a final payment, promising not to sue BP and a host of other parties. For most of the emergency advance payment phase, Mr. Feinberg told claimants they did not need attorneys, but as of early 2011, GCCF provided funding for free legal assistance for claimants, an important step toward ensuring meaningful access to justice.

There has been widespread criticism of GCCF’s administration of the claims process, primarily focusing on the ways in which the GCCF has failed to provide fair and timely compensation for claimants, and the limitations it has imposed on claims.



For example, the following criticisms have been leveled against GCCF:

- The structure and amount of compensation Feinberg receives from BP have raised questions as to whether he may be putting BP's interests ahead of claimants' interests.
- Claimants are not clearly apprised of the standards that will be used to adjudicate claims, and GCCF has not allowed enough public and governmental involvement in the development of GCCF policies and procedures.
- Claimants do not receive sufficient explanation when claims are denied or underpaid, and do not have enough access to information about their claim while it is pending.
- GCCF is not paying claims that might be recognized under OPA, such as claims that are not proximately located to injured natural resources, claims for economic damages suffered by certain industries not directly connected to the seafood industry, or claims based on mistaken perceptions about oiled beaches or contaminated seafood.
- GCCF is not paying many subsistence use claims that would be recognized under OPA.
- To receive a final payment, GCCF requires individuals to give up rights for future losses that cannot be foreseen at the time claims must be filed.
- The Tunnell report was not peer reviewed and acknowledges that losses may not accurately be known for years.
- The waiver that claimants must sign to receive a final payment requires them to give up rights the GCCF payments are not intended to cover, and against parties not involved in the GCCF claims process.
- GCCF uses a "one-size-fits-all" approach by not taking into account how the spill has affected individuals and businesses differently, and applying a standard "Future Recovery Factor" to all claims.
- GCCF only processes short-term interim claims for past damages once per quarter, leading some claimants to opt for a final settlement out of financial desperation.



Some of these criticisms have been ameliorated by modifications GCCF has undertaken in response to the feedback it has received. But GCCF has refused to make concessions when it comes to some of the most fundamental criticisms, such as whether claimants must sign a waiver releasing claims for all future damages. While GCCF has provided an important alternative to litigation that has allowed some victims to receive speedy recovery, there are many changes that must be made to the process if it is to truly make victims whole.

Multidistrict Litigation Against BP and Other Responsible Parties

Hundreds of lawsuits against BP and the other potentially liable parties have also been filed. Those suits have been consolidated for pretrial proceedings in the United States District Court for the Eastern District of Louisiana before Judge Carl Barbier.

Because no trials have been held or claims paid, it is too early to tell whether the litigation will be successful in making victims whole. There have been some encouraging signs, such as the case being transferred to Judge Barbier, who both sides respect, and BP agreeing to waive the \$75 million cap on damages set by OPA.¹⁵ Another encouraging development is the scheduling of trials for February 2012. In contrast, the *Exxon Valdez* trial began in Alaska five years after the oil spill.¹⁶

Yet, even if plaintiffs receive a favorable outcome at the trial court level, they will almost certainly be forced to proceed through the appellate gauntlet of the Fifth Circuit Court of Appeals, one of the most pro-business circuits in the country, filled with judges that have extensive ties to the oil and gas industry.¹⁷ Moreover, plaintiffs may face a hostile venue if the case ends up before the Supreme Court, which time and again has proved willing to bend the law to favor powerful corporations like BP over the rights of everyday Americans.



Gulf Coast Claims Facility (GCCF)

Overview of GCCF

Background

The Oil Pollution Act of 1990 (OPA) requires the party responsible for an oil spill to set up a procedure for paying claimants for their interim, short-term damages.¹⁸ The law was enacted in response to the *Exxon Valdez* oil spill, which destroyed the fishing industry and communities of Prince William Sound, Alaska. The lawsuits to recover damages for the victims of that disaster dragged out for nearly twenty years, during which one out of five plaintiffs died.

BP agreed to place \$20 billion in a trust fund to be administered by the Gulf Coast Claims Facility (GCCF).

To improve the plight of victims of future oil spills, Congress passed OPA, a law intended to address the deficiencies in the legal system revealed by the *Exxon Valdez* disaster, and to ensure fair compensation for those harmed by oil spills.¹⁹ The law expanded liability for oil spills, and created mechanisms to provide speedy compensation for victims to recoup the costs of oil spill

clean-up and damages.²⁰ OPA creates strict liability for oil spills, meaning that plaintiffs need not prove negligent conduct to recover. Individuals and businesses can recover a number of types of damages, including removal costs, damage to real or personal property, loss of subsistence use of natural resources, and lost profits and impaired earning capacity.

In the wake of the *Deepwater Horizon* explosion, BP fulfilled its obligation to provide relief for interim damages under OPA by processing claims directly. At President Obama's urging, on June 16, 2010, BP agreed to place \$20 billion in a trust fund to be administered by the Gulf Coast Claims Facility (GCCF) and headed by Kenneth Feinberg, well-known for his role in administering the September 11th Victim Compensation Fund. Individuals and businesses have been encouraged to submit claims to the Fund for removal costs and other economic damages provided for under OPA.

From the beginning of his tenure as administrator of GCCF, Feinberg has maintained that he is independent of BP.²¹ Attorneys representing plaintiffs in the multidistrict litigation against BP, among others, have countered that Feinberg is merely an extension of BP. The lawyers' concern has been that his claimed independence would confuse claimants trying to decide between filing with GCCF or joining the



combined lawsuits. In February, they secured a ruling from Judge Barbier, who is overseeing the litigation against BP, finding that Feinberg and GCCF are not fully independent of BP, and an order for GCCF to amend its disclosures by no longer claiming to be “neutral” or “independent,” and to prominently disclose the fact that individuals have a right to consult with an attorney and can join the litigation against BP if they decline to accept a settlement through GCCF. Feinberg has argued that the court does not have jurisdiction over GCCF’s process, and that GCCF is complying with all applicable laws.²² After Judge Barbier’s ruling was issued, the Department of Justice filed a statement asserting that Feinberg’s decisions were not controlled by BP and that, even though he has a contractual relationship with BP, Feinberg “operates as an independent decision-maker... He is not a government official of any sort, and his decisions are neither controlled by the government nor BP”²³

Others have claimed that Feinberg’s compensation set-up undermines his independence. Feinberg Rozen, Feinberg’s law firm, initially received \$850,000 per month from BP for its work administering GCCF, an amount that is to be renegotiated every three months. As of January 15, 2011, the rate of compensation was raised to \$1.25 million per month. This led some critics, including Senator Vitter (R-LA), to assert that Feinberg’s pay appears to be “performance-based,” and dependent on GCCF’s success in limiting payouts. Early in the process, Feinberg predicted that all of the claims could be settled for \$10 billion, or half of the \$20 billion fund that BP was getting credit for creating, though he later clarified that GCCF would pay whatever was required.²⁴ In a letter to Feinberg, Senator Vitter likened his arrangement to “a judge not only being paid by one of the parties to a lawsuit before that judge, but having the judge’s salary subject to a negotiation between the judge and that party every three months at exactly the same time as that judge hears and decides the case.”²⁵

However, in August 2010, Feinberg retained former United States Attorney General Michael Mukasey to review the reasonableness of Feinberg Rozen’s compensation from BP.²⁶ Mukasey issued two written opinions, one on October 7, 2010,²⁷ and another on March 22, 2011,²⁸ after the firm’s compensation had been increased. Both opinions concluded that the fee was reasonable in light of several factors.

Feinberg’s law firm initially received \$850,000 per month from BP for its work administering GCCF... as of January 2011, that compensation was raised to \$1.25 million per month.

Feinberg has attempted to be responsive to his critics and make improvements to GCCF. For instance, he has shared drafts of key policies with stakeholders and in some cases the public, and accepted some of the feedback received. In response to calls for transparency, GCCF agreed to release detailed daily reports providing statistics and numerical information about the claims processed by GCCF. Similarly, after repeated complaints about why claims were denied or valued



at a particular amount, GCCF has started to provide claimants with a more detailed breakdown explaining the offer.²⁹ Feinberg and GCCF also deserve credit for making free attorneys available to claimants, though attorneys were not made available for the emergency payment phase, and overall representation levels for claimants filing with GCCF have been very low.³⁰ GCCF has contracted with legal service organizations in Texas, Louisiana, Mississippi, and Florida.

Yet GCCF has proved less willing to make changes on more controversial issues. For instance, GCCF has not budged in response to widespread objection to unpopular policies, such as requiring claimants to sign a waiver releasing BP and all other responsible companies of liability for all future damages, and using a proximate cause standard despite the fact that OPA uses a “due to” or “resulting from” standard. And despite its efforts, GCCF has not been able to quell criticism over a perceived lack of transparency, which persists even now.

GCCF Has Offered Emergency, Interim, Final, and Quick Payments

GCCF offers several options for claimants. Some of its payments are meant to compensate for past losses on a short-term basis, while others are meant to compensate for future losses and require that the claimant give up his or her rights against the potentially responsible parties.

Emergency Advance Payments

GCCF began by paying claims called Emergency Advance Payments (EAP). These were open until November 23, 2010. They were meant to provide immediate relief, with no strings attached, and without any obligation to give up the right to sue BP or other potentially responsible parties. The protocol governing EAPs indicated that they would require less documentation and would be reviewed under a less rigorous standard for corroboration than other claims.³¹

Interim Payments

After November 23, 2010, GCCF began offering to pay interim and final claims. Interim claims are meant to cover past, documented losses, and do not require claimants to waive their right to sue. Most interim claims can be submitted once per quarter, with those who can prove special financial circumstances able to submit claims more frequently.³²

Final Payments

Final Payments are meant to compensate claimants for all of their past and future damages. Accepting a Final Payment requires waiving the right to sue BP and 123 other listed parties for all claims except those involving physical harm.³³ After an offer for Final Payment is made, claimants have 90 days to decide whether or not to accept



it and return the signed release of liability.³⁴ Claimants may reject the Final Payment and instead bring a claim in court, or return to submitting requests for interim payments, or resubmit a request for Final Payment with updated documentation.

Quick Pays

In December 2010, GCCF announced a new type of claim, the Quick Payment Final Claim (“Quick Pay”).³⁵ Any individual or business that received an EAP or Interim Payment could receive a Quick Pay without providing any further documentation.³⁶ Quick Pays are \$5,000 for individuals and \$25,000 for businesses. Accepting a Quick Pay requires signing the same waiver required of those accepting Final Payments. Unlike Final Payments, however, when a claimant receives a Quick Pay, GCCF will not deduct previously paid sums (including EAPs and Interim Payments), except for liens and garnishments.³⁷

These payments have been governed by various rules issued by GCCF during the process. In August 2010, GCCF issued a protocol governing EAPs. In November 2010, GCCF released the Final Rules Governing Payment Options Protocol for Interim and Final Claims. In February 2011, GCCF released rules governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology – which set forth how GCCF would decide which claims are eligible, what documentation would be necessary, and how awards would be calculated.

Interim, Final, and Quick Pay claims can be submitted to GCCF until August 22, 2013.

Individual or business claimants can appeal Final Payment offers of \$250,000 or higher and BP can appeal Final Payment offers of \$500,000 or higher.³⁸ Appeals must be filed within 14 days of the offer being issued, and will be decided by a three-judge panel. Louisiana State University Chancellor Jack Weiss has been selected to appoint a body of individuals to serve as appeals judges.³⁹

Interim, Final, and Quick Pay claims can be submitted to GCCF until August 22, 2013, the day on which the GCCF program will close and responsibility for handling claims will return to BP.⁴⁰

GCCF by the Numbers⁴¹

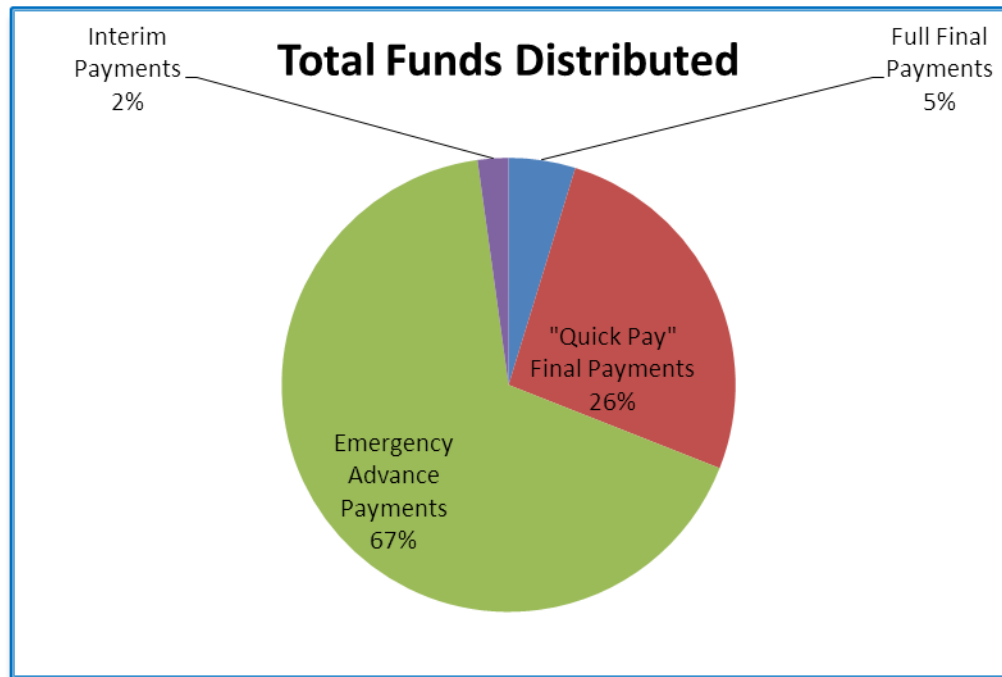
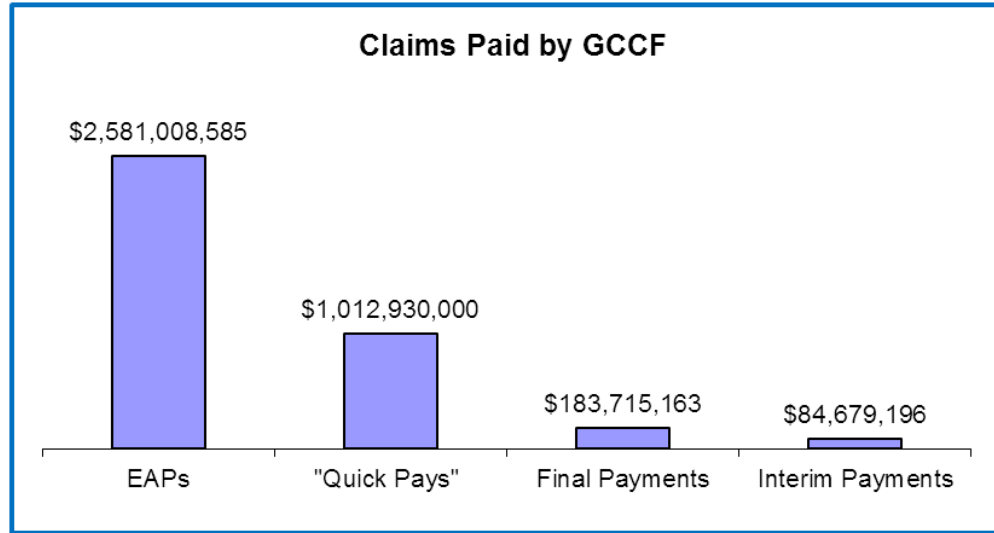
GCCF Has Paid Nearly \$4 Billion

As of the one year anniversary of the spill on April 20, 2011, GCCF has paid approximately \$3,862,333,000 to more than 178,000 claimants, in addition to a separate \$60 million that has been paid from a special fund for real estate agents and brokers. Over two thirds of the payments have been for Emergency Advance Payments (EAPs), and about a quarter have gone toward Quick Payments. As of



April 20, 2011, only seven percent of the total paid by GCCF has gone toward Interim or Final Payments.

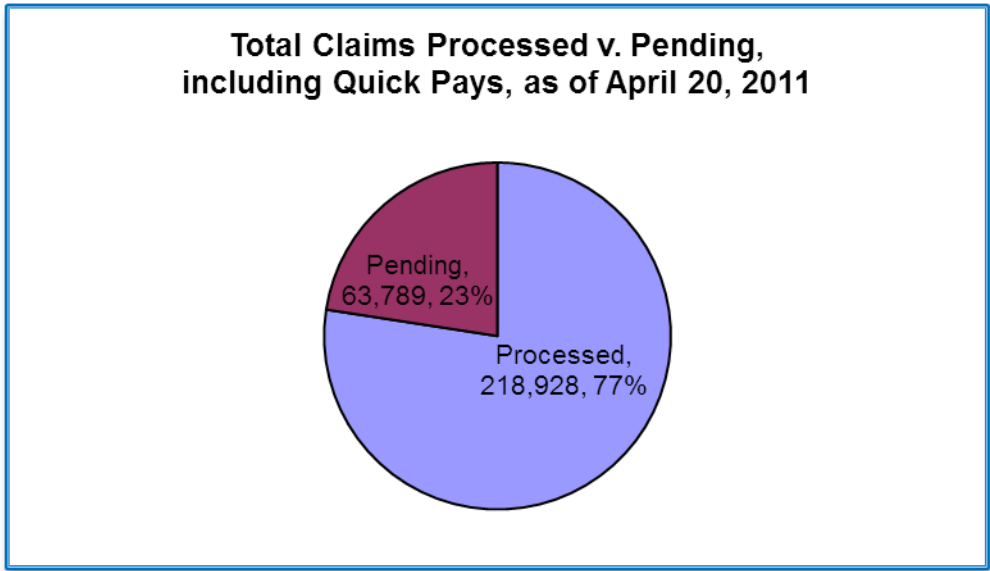
Distribution of Claims





More than Half of Interim and Final Claims Remain Pending

Of the non-EAP claims that have been submitted, about 77% have been processed – a figure GCCF has pointed to as a sign of its success in quickly processing claims.

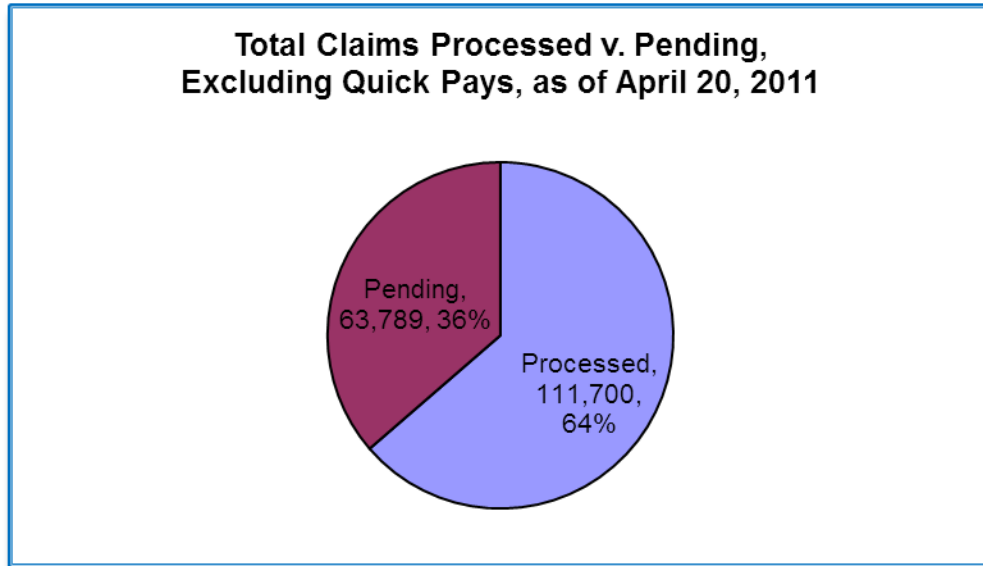


However, this figure has been characterized as overstating GCCF’s effectiveness because it includes Quick Pays, which require very little review by GCCF.⁴² When Quick Pays are excluded, the number of claims processed by GCCF drops to 64%.

When asked whether claims are being paid fast enough, in March 2011, Feinberg replied, ‘No. We’re moving as fast as we can. There’s been well-intentioned criticism about pace from the administration and from local politicians in the Gulf. But I do think the program is moving more expeditiously. . . [W]e’re picking up the pace.’⁴³



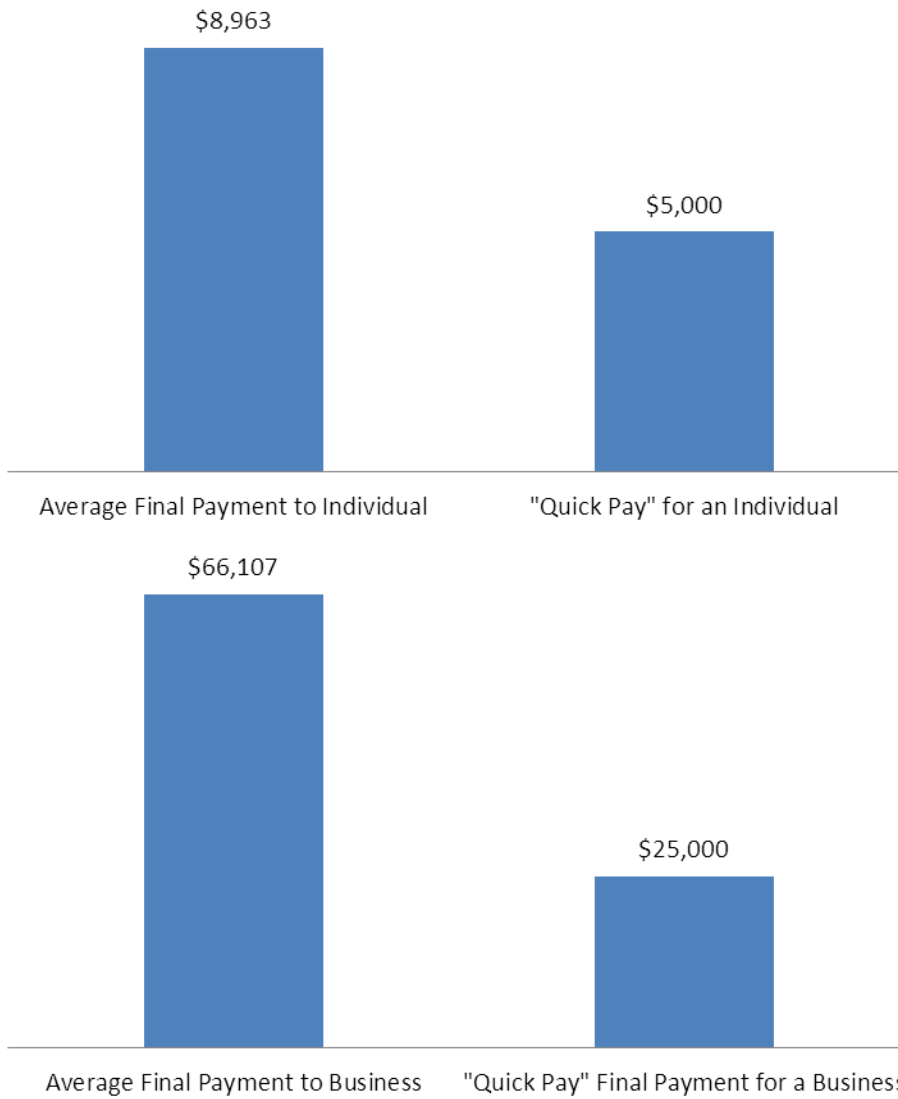
Many Claimants Have Opted for Quick Pays



On average, those who have opted to accept Final Payments have received much higher awards than those who have accepted the Quick Pays, which is \$5,000 for an individual or \$25,000 for a business. Individuals have fared about twice as well with Final Payment and businesses have fared more than twice as well. Final Payments may be higher, on average, because it is primarily claimants with little or no documentation who are opting to accept Quick Pays, or because claimants who receive a higher value Final Payment offer are the most likely to accept.



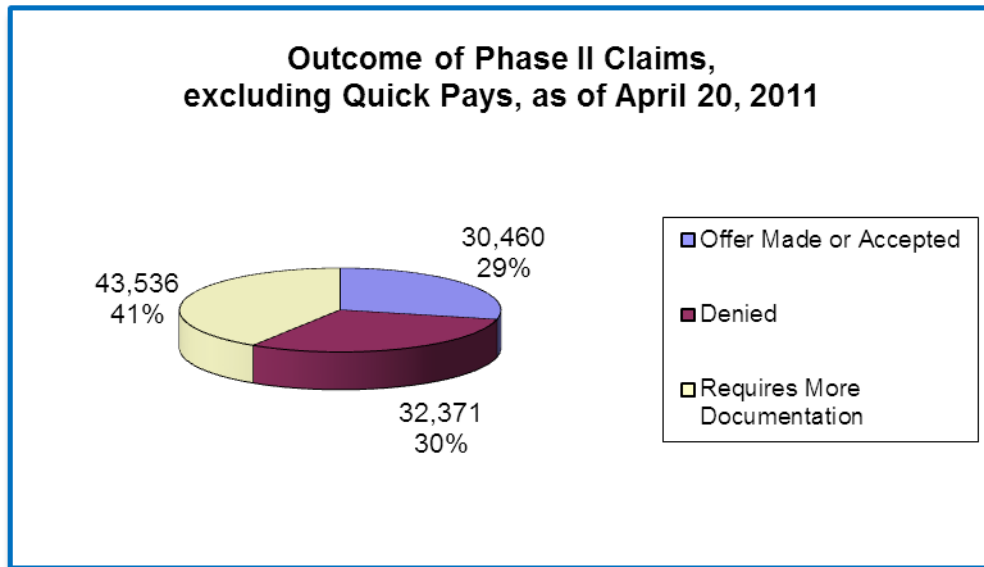
Quick Pays v. Full Review Payments for Individuals and Businesses, as of April 20, 2011





Many Claims Have Not Been Resolved Due to Insufficient Documentation

Excluding Quick Pays, more than one third of the claims that have been processed during after the EAP phase closed have not been resolved because GCCF required more documentation. Overall, that is over 43,000 claims. It does not include EAPs denied for insufficient documentation or other claims not paid in full because documents were lacking.⁴⁴ The Final Methodology released on February 18, 2011, noted that only 17% of claimants had submitted full documentation at that point.⁴⁵ According to the GCCF, “most filed claims are pervasively lacking documentation.”⁴⁶ Claimants who have been rejected can submit additional documentation and request re-evaluation of their claim.⁴⁷





The Administration of GCCF

The administration of the \$20 billion trust fund has been plagued by a variety of criticisms. Much of this ongoing criticism focuses on problems with the administration of GCCF, including ambiguity surrounding the documentation requirements for claims, the inability to access information about pending claims, and insufficient transparency and disclosure in GCCF policies and statistics.

Documentation Standards and Award Calculations Are Unclear

There have been numerous complaints that GCCF provides inadequate explanation for why some claims are paid and others are not, and the amounts paid on certain claims. “There has been no consistency in how the claims process has been handled,” according to Florida State Representative Doug Broxson.⁴⁸

Early on, claimants who were denied were simply notified that they did not provide adequate documentation, with no further explanation as to what should have been provided, and claimants whose claims were underpaid received no explanation as to how GCCF arrived at the award amount. As Alabama Attorney General Troy King wrote, “it seems only reasonable that, if a claimant is being asked to forever waive his right to sue BP and other responsible parties, he should understand how and why his damages were calculated by the Gulf Coast Claims Facility.”

It appears that GCCF is taking steps to address this problem. After Alliance for Justice and others called for clearer documentation standards and explanations of how those standards were applied to individual claims, GCCF included in its Final Methodology a sample form letter that claimants will receive, explaining the amount of compensation GCCF is offering, a breakdown of the way in which the figure was calculated, and an explanation of information that was missing.⁴⁹ Claimants now also receive the name and telephone number of a GCCF representative they can call with questions about their claim.

Anecdotaly, there have been widespread reports that some claims are being handled markedly differently by GCCF. Without accessing GCCF’s claims files and comparing supporting documentation, it is impossible to know whether there may be legitimate reasons for handling seemingly similar claims differently, yet reports of inconsistencies have continued to raise questions.

As an example, Robert Barbour, an owner of three shrimp boats in Alabama, said that GCCF offered him just \$1,000, despite the fact that his deckhands received offers of \$30,000.⁵⁰



Claimants Do Not Receive Adequate Information While Their Claim is Processed

There has also been widespread frustration over the inability to access information about pending claims, though GCCF has made various improvements to the process and increased information available to claimants. According to Florida Attorney General Bill McCollum, the onsite claims adjusters do not even have access to the GCCF database and “can do little more than pass on the toll-free number when claimants come in to seek assistance in getting their claims promptly paid.”⁵¹ Moreover, the GCCF website merely tells claimants that their claim is “under review,” which as McCollum notes, “does not tell a claimant whether the claim is complete, how long the review will take or the likely amount of any payment.”⁵²

Firsthand complaints regarding the lack of access to information about pending claims include:

George Barisich, an oysterman from Louisiana explained his frustration over the inability of claims adjusters in the St. Bernard Parish office to answer his questions about his claim: “All they do is take information, they don’t have any authority. When you get a denial letter or are shortchanged, no one can tell you why you’ve been denied. The whole process was a joke.”⁵³ He went on to suggest that the process could be improved by having “local people to deal with people and explain and deal with the problems that you’re not seeing.”⁵⁴

Elmer Rogers, a shrimper, filed a claim on August 24, 2010, and was still awaiting payment as of the end of December 2010, with no explanation for the delay. Staff at the GCCF claims office told Rogers that according to their computers, Rogers should have been paid \$46,000 on September 13, 2010, and were not able to explain why his claim had stalled.⁵⁵

Richard Reynolds, who filed a claim for losses on real estate investments, contrasts the lack of transparency he has encountered from BP and the GCCF with his experience with the Oil Spill Liability Trust Fund run by the Coast Guard.⁵⁶ Reynolds initially filed with BP but received no decision. He re-filed after the GCCF began handling claims but for weeks was only told that his claim was “under review.” After 90 days passed and Reynolds was unable to get more information from GCCF, he filed a claim with the Coast Guard fund. Reynolds was relieved to discover that he has a specific contact handling his Coast Guard fund case whom he can call any time for information about his claim.⁵⁷

In addition to the above-described efforts to increase information about the resolution of particular claims, it appears that GCCF has taken steps to increase claimants’ access to information about claims that are pending. In January 2011, Feinberg testified before the Senate Ad Hoc Subcommittee on Disaster Recovery



that GCCF was attempting to address these concerns by retaining local lawyers and “claims processing experts” to respond to individual inquiries about claims, as well as to provide explanations behind GCCF award calculations and denials.⁵⁸ GCCF also uses “escalation teams” for individuals facing eviction, or other circumstances necessitating accelerated processing.⁵⁹

There is Insufficient Transparency in the Administration of GCCF

GCCF has been called upon to allow more public involvement in developing its policies, and to be more transparent in sharing information about its operation. GCCF deserves credit for involving key stakeholders and the public in the development of its practices and policies. For instance, a draft of the claims protocol was shared with federal officials, governors, state attorneys general, and other key stakeholders so they could provide feedback.⁶⁰ GCCF adopted many of the recommendations made in comments from federal and state officials, the American Association for Justice, attorneys from the ABA, and several others.⁶¹ Ken Feinberg also attempted to make himself available to the public by, among other things, hosting 35 town-hall style meetings in the Gulf.⁶²

However, while GCCF adopted many of the recommendations made by interested parties; some stakeholders felt that the process was inadequate. For instance, Florida Attorney General Bill McCollum complained that the state’s input had been “completely disregarded.”⁶³ Alabama Attorney General Troy King wrote to Feinberg that “the concerns of the Attorneys General and those of the citizens of our States have fallen on deaf ears,” with regard to the Protocol for Emergency Advance Payments.⁶⁴

Feinberg has vigorously defended GCCF against such accusations, and attorneys for Feinberg have asserted that “[t]he openness and transparency with which the GCCF has conducted itself is unparalleled in the history of the [OPA] and nothing short of extraordinary.”⁶⁵

Yet Associate Attorney General Thomas Perrelli has noted that “[a]dditional transparency about the claims process is critical” and that “[f]or the people of the Gulf to feel fairly treated, they must have a greater understanding of the operation of the GCCF and its treatment of claims.”⁶⁶ Perrelli recommended that “[w]here non-personally identifiable, aggregated information can be provided to help critical stakeholders understand the process and principles being used to decide claims, there is very little reason not to do so.”⁶⁷ In response to this sort of criticism, Feinberg has explained that “I have to strike a very careful balance between the public’s right to know and the confidentiality of data submitted to the GCCF in the strictest confidence.”⁶⁸



GCCF does release non-personally identifiable statistical information every day, providing information on the number and types of claims that have been submitted, paid, denied, or not yet processed. However, Alabama Attorney General Luther Strange says that GCCF is “rearrang[ing] data in a way that hinders true transparency.”⁶⁹ And recently, GCCF has redacted the scope of information available in its daily statistical reports, no longer providing information about how many EAP claims were approved or denied, instead only disclosing the total number of EAPs paid. This omission is significant, as there were reportedly a high number of EAP claims denied.

Limitations on the Claims Eligible for Payment

GCCF states that it pays all claims for losses caused by the spill, so long as there is adequate documentation of the loss and an identifiable link between the loss and the spill. However, another criticism has been that GCCF is interpreting the OPA too narrowly and as a result may not be paying damages that would be recognized in court. For instance, critics say OPA does not contain a heightened causation standard and does not limit eligibility for damages based on geographic proximity or industry. They also argue that it is improper to limit claims that are based on reputational harm, and that subsistence use claims recognized under OPA are not being paid.

Claims May Be Limited Through a Heightened Causation Standard

One area of dispute has been whether or not OPA contains a proximate cause requirement – a heightened legal standard that limits liability to those injuries that were foreseeable and primarily attributable to the defendant.⁷⁰ The OPA does not explicitly use a “proximate cause” standard in setting liability, and instead holds the responsible party liable for damages that “result from” or are “due to” the incident.⁷¹ There have been complaints that by using a proximate cause standard, GCCF is forcing claimants to prove more than OPA requires and thereby not paying legitimate claims.

For instance, Florida Attorney General Bill McCollum wrote:

The inclusion of language concerning a Claimant’s alleged burden to prove ‘proximate causation’ between his or her damages and the Spill improperly increases the burden of proof imposed upon Claimants. OPA and its implementing regulations allow a Claimant to recover damages which are ‘the result of the



***Spill – a less onerous standard of causation, reflective of the fact that OPA is a strict liability statute.*⁷²**

Similarly, Associate Attorney General Thomas Perrelli recently noted, “over the past several months, we have reiterated that the [OPA] requires BP and other responsible parties to pay for damages that arise ‘as a result of’ the oil spill. Notwithstanding the terminology concerning causation used in the various GCCF protocols, you must apply OPA’s standards.”⁷³

To address the issue of whether OPA includes a proximate cause standard, Feinberg commissioned a 53-page memorandum of law from Harvard Law Professor John Goldberg, who concluded that a proximate cause standard is implicitly included in the law. Rejecting the causation standard championed by the state attorneys general and the Department of Justice, Professor Goldberg wrote that “[i]t is not plausible” that OPA was intended to cover “all the adverse economic ripple-effects flowing from a catastrophic spill.”⁷⁴

Having argued that a proximate causation standard is included in OPA, Professor Goldberg provided his assessment of what claims would or would not be recognized under OPA. He found that the claims for lost profits and impaired earning capacity are limited by proximity to a damaged natural resource, with more immediate users of damaged property and resources more likely to be eligible under OPA.⁷⁵ According to Goldberg, liability would extend to “any person whose business’s profitability depends on his or her ability to exercise a right physically to obtain or use property or resources that are damaged or lost because of an oil spill.”⁷⁶ On the other hand, Goldberg would find ineligible claimants who “cannot show that their right and ability to put certain property or resources to commercial use has been hindered by the spill’s having damaged, or deprived them of the use of, that property or those resources.”⁷⁷ For example, Goldberg would cover a fisherman who could no longer fish because of the spill, but not a Gulf shore tour boat operator who has seen a decrease in business but does not operate in polluted waters.

GCCF has continued to receive pushback from the state attorneys general and the Department of Justice, notwithstanding Professor Goldberg’s opinion.⁷⁸

Claims May Be Limited Based on Geographic Proximity

Proximity to oiled or damaged property has been one of the most controversial standards used by GCCF. Initially, the Protocol for Emergency Advance Payments contained a provision that “GCCF will take into account, among other things, geographic proximity...”⁷⁹ The Mississippi Attorney General’s Office criticized this provision as determining claims based on “a random distance in relation to the



shoreline” and recommended that “[a]ll claims incurred as a result of the oil spill should be paid regardless of the claimant’s physical location.”⁸⁰

In response to feedback, the geographic proximity requirement was not included in the final claims protocol. Yet proximity to injured natural resources continues to be an eligibility factor. The legal underpinning of the GCCF methodology is based on an assumption that proximity to damaged resources (i.e. polluted beachfront) is a key factor for OPA liability. This assumption is formally incorporated into the GCCF’s Final Rules Governing Payment Options, Eligibility, and Substantiation Criteria, which state that while

*neither physical proximity to the Oil Spill nor a particular type of work or business engaged in by the claimant is a prerequisite to eligibility . . . adequate documentation of damage attributable to the Oil Spill is required. Physical proximity to the Oil Spill, and the nature of the business or work engaged in by the claimant, are important factors when it comes to the proof needed to document a claim that the damage was caused by the Oil Spill.*⁸¹

GCCF also requires lesser documentation standards for individuals and businesses in close proximity to damaged natural resources. For claimants located in the immediate vicinity of the Gulf shore, simply contrasting income from before and after the spill will usually be sufficient to substantiate a claim.⁸² Businesses not in the immediate vicinity of the shore must submit “more exacting documentation” and “simply contrasting pre- and post-Oil Spill wages/income may not be sufficient.”⁸³ Claims by these businesses will be put through a financial test that takes into account pre-spill 2010 losses to determine whether the loss claimed can be attributed to the spill.⁸⁴

Using geographic proximity as a factor in adjudicating claims could result in the exclusion of large numbers of people and businesses located inland, or on unpolluted beachfront, that suffered severe economic loss as a result of the spill. Florida Attorney General Bill McCollum complained that OPA does not contain a requirement that claimants reside in an area with oiled property.⁸⁵

Claims May Be Limited Based on Industry Type

While many of the people most impacted by the spill are in the tourism and seafood industries, claimants range from hairdressers, to dentists, grocers, veterinarians, all of whom claim their business has suffered as a result of the spill.⁸⁶ There have been complaints that certain industries unconnected to seafood or tourism have been unfairly treated as automatically ineligible by GCCF. Alabama Representative Jo Bonner believes that GCCF has treated certain industries, such as titling companies,



as categorically ineligible for compensation from GCCF.⁸⁷ Similarly, Mississippi Attorney General Jim Hood noted that “claims filed by Mississippi casino workers... were arbitrarily and categorically denied solely on the basis of these claimants’ place of employment.”⁸⁸

While casino workers are apparently no longer categorically ineligible, it highlights the problem of claims from certain industries potentially being treated categorically rather than considered individually. Associate Attorney General Thomas Perrelli recently wrote that

it is important to note that OPA does not create categories of eligible and ineligible claimants. Rather, in determining whether a particular damage resulted from the spill, the GCCF must examine the facts and circumstances of each claim.

Claims for Reputational Harm are Not Recognized

The memorandum by Professor Goldberg also concluded that economic loss stemming from “reputational harm resulting from the circulation of misinformation” is likely not covered by OPA. In other words, if a claimant’s business suffers not because of oiled waters or beaches, but because of a belief that the resources are damaged, even if they are not, GCCF will not pay the claim. Using this presumption, lost profits suffered based on a mistaken belief that Gulf seafood is not safe to eat would not be eligible. Similarly, Feinberg has stated that “[i]f there is no physical damage to the beaches and it’s public perception... it is not compensable,” arguing that “Florida law would never recognize [such a claim].”⁸⁹ Yet, Florida Attorney General Bill McCollum wrote Feinberg a letter in which he cited Florida case law affirmatively holding that lost profits due to damaged reputation from an oil spill are recognized under Florida common law.⁹⁰

GCCF’s interpretation of the law regarding damages caused by mistaken perception mean that victims who suffered economic loss because of a mistaken assumption of the spill’s effects will not be compensated.

Lewis and Karen Mashburn ran an oyster bar in Montgomery, Alabama, for 15 years.⁹¹ Their children had once shucked oysters and waitressed there. Their oysters came from Apalachicola, Florida, where seafood was never deemed unsafe. Nonetheless, the perception of danger drove away their customer base. In addition, the prices they had to pay for oysters rose as more restaurants purchased from Apalachicola. Their already dwindling customer base was unwilling to pay more to cover the higher prices the Mashburns were forced to pay. As a result, the Mashburns closed their restaurant in late January and put the building up for sale.⁹²



To the extent that the Masbhurns' losses were caused by reputational harm, as opposed to the increased cost of purchasing oysters, their losses would likely not be considered eligible by GCCF.

Claims for Subsistence Use Have Been Limited

While OPA makes the responsible party liable for “loss of subsistence use of natural resources,” to date GCCF has paid just a handful of these claims. At the one-year anniversary of the spill, only 39 subsistence use claims have been paid, with an average of \$9,200 per payment. While GCCF no longer publicly releases this data, as of December 16, 2010, over 16,000 subsistence use claims in Louisiana alone were submitted but not paid.⁹³

The issue of subsistence use claims is particularly important to the Vietnamese community in the Gulf. East New Orleans has the most highly concentrated Vietnamese population outside of Vietnam, with many immigrants settling in the region because of the warm climate and lucrative fishing trade.⁹⁴ Within this community, the loss of the ability to fish is particularly devastating because in addition to living off a portion of their catch, bartering and mutual aid have cultural importance. For instance, Vietnamese fishermen may trade with others in the community to expand the diversity of their seafood diet, bring home a portion of their catch to feed their extended dependents, use a portion of their catch to barter for goods and services within the community, or provide a portion of their catch for community gatherings that they would otherwise be expected to support monetarily.⁹⁵

Phuong Nguyen was one of three local fishermen who filed GCCF claims with the assistance of the Mary Queen of Vietnam Community Development Corporation.⁹⁶ Nguyen submitted a claim for the retail value of the amount the fishermen testified that they had brought into the community. “Every time a friend had a birthday party, instead of a gift, I’d give seafood,” said Nguyen. “At weddings the same. I’d give a couple 100 pounds of crab, or when the local church has its annual fair, I might give four to five hundred pounds, at times even a thousand to help the church make money.” Nguyen received a form letter denying his claim and stating that it lacked supporting documentation.

Ve Nguyen, a member of the United Louisiana Vietnamese American Fisherfolks (ULVAF), recently testified before the Senate Ad Hoc Subcommittee on Disaster Recovery to address the impact of subsistence use within the Vietnamese-American community. He urged Congress to step in and ensure that subsistence use claims are properly paid:



The [ULVAF] . . . requests that . . . Congress clarify and reaffirm the definition of subsistence use in the Oil Pollution Act of 1990 - fully acknowledging and recognizing the local non-taxable practice of bartering, community gifts, and family consumption by commercial fishing communities of all ethnic background[s]. This definition was clearly intended by Congress in 1990.⁹⁷

The issue of subsistence use claims has proved difficult for GCCF, as it must determine what types of claims to pay (recreational fishermen in addition to claimants who depend on the fish for food?), what sort of documentation to require, and how to value claims (retail or wholesale price?). Testifying before the Senate Committee on Homeland Security, Feinberg stated that “the GCCF has not yet concluded that mere statements of subsistence loss are sufficient to document these claims.”⁹⁸ He went on to note that there have been thousands of subsistence use claims consisting of written statements along the lines of: “I live off the Gulf and can no longer fish in order to eat. So, now I must buy fish at the grocery store. Pay me.” He argued that these claims “must be denied.”⁹⁹

As of the one year anniversary of the spill, GCCF has reportedly created a new methodology for calculating subsistence claims and will soon begin processing subsistence loss claims.¹⁰⁰ Claims by recreational fishermen will reportedly not be recognized.¹⁰¹ GCCF says it will use scholarly studies to determine how much different groups of commercial fisherman and other subsistence users typically consume.¹⁰²

Calculation of Future Losses

GCCF received some of the most potent criticism over its methodology for projecting future losses. Based on expert opinions and reports, GCCF projected that a full economic recovery in the Gulf was likely for most businesses by 2012, and would calculate final award offers by doubling a claimant’s 2010 documented losses. The prediction that the Gulf would be largely recovered within two years raised ire amongst scientists, claimants, and lawmakers. GCCF retained John Tunnell of Texas A&M’s Harte Research Institute for Gulf of Mexico Studies to estimate the duration of the spill’s damaging biological effects on the Gulf. In a 39-page report, Dr. Tunnell projected that for businesses other than oyster harvesting, the Gulf will likely experience full recovery in 2012 – a projection that has been characterized as overly optimistic.¹⁰³ GCCF also commissioned Analysis, Research, Planning Corporation (ARPC) to study the effects of the spill on individuals and businesses and to help develop a future loss projection. Alliance for Justice submitted comments to GCCF arguing that because forecasts of future damages are inherently speculative, the



methodology should include a mechanism to address harms greater than those projected.

The Tunnell Report has been Widely Criticized

One marine expert noted that the Tunnell report does not give sufficient individualized consideration of the spill's effect on particular species.¹⁰⁴ The report was also criticized for not being subject to peer review, and not doing any empirical analysis, instead limiting itself to a review of literature. Additionally, the reports' independence has been called into question because Texas A&M University, the institution Dr. Tunnell works for, reportedly received \$500,000 from BP.¹⁰⁵

Louisiana Senator Mary Landrieu wrote, "I recommend establishing a peer review process for any scientific studies used in the award calculation methodology and actively engaging the scientific community in a public, transparent manner" in order to "foster the kind of substantive dialogue we will need to understand the ramifications of an ecological event of this magnitude."¹⁰⁶ She noted that "Dr. Tunnell's opinion represents one perspective, but it should not be construed nor presented as the definitive projection of recovery timelines."¹⁰⁷

Claimants Should Not Have to Waive Future Losses When Recovery in the Gulf is Uncertain

Even if one were to assume that the future loss projections used by GCCF represent the best possible predictions that can be made at this time, those projections are inherently speculative and there may be long-term ramifications that are currently unforeseen. The Tunnell report acknowledges that, "realistically, true loss to the ecosystem and fisheries may not be accurately known for years, or even decades,"¹⁰⁸ and points to the unexpected decline of the herring fishery five years after the *Exxon Valdez* spill as a "classic example" of damage to an ecosystem that can appear years later. While the analysis conducted by ARPC predicted a 2-3 year recovery timeline for the Gulf economy by comparing the effects of the oil spill with recoveries from other events affecting tourism such as 9/11 and Hurricane Katrina, ARPC's prediction of future recovery is speculative, and as GCCF acknowledges, "[p]rediction is not an exact science."¹⁰⁹

While claimants are free to reject a final payment offer and pursue their claim in court or continue to file interim claims, to receive a final payment, claimants must sign a waiver giving up their rights even for unforeseeable damages. The waiver makes no accommodation for additional future damages if the recovery does not occur as rapidly as predicted. The attorneys general of Alabama, Louisiana, Florida, and Mississippi jointly warned that



*if an unforeseen event such as a future hurricane causes more oil from the spill to be washed onshore, a claimant who has signed the GCCF release will have lost the right to recover for any resulting loss. Similarly, a fisherman who signs the GCCF release will be barred from any additional recovery even if sometime in the future the fish population is depleted or fishing waters are closed due to the oil.*¹¹⁰

Senator Landrieu complained that there has been “insufficient accommodation of the inherent uncertainties associated with a recovery of this magnitude.”¹¹¹

As a result, many claimants are opting not to sign the waiver. For instance:

*Greg Miller, the owner of a realty company in Fort Morgan, Alabama who has suffered \$156,000 of uncompensated losses said that he will not accept a final payment and sign the waiver of liability until he knows more about the long-term effects and recovery. He noted that he could not understand why anyone would do so, unless out of exasperation from dealing with GCCF.*¹¹²

*Mike Thierry, the owner of a fishing company whose bookings are down 30%, not because of lack of fish in the water, but because customers are worried about the safety of the catch, says that he plans to continue to file Interim Claims rather than a Final Claim because, “I don’t want to sign my rights away.” He said, “Everything looks great, but in Alaska, it took two years after the Valdez before they realized there was a problem. . . I hope and pray everything’s fine, but I think I’m going to hold off a little longer.”*¹¹³

Because of the inherently speculative nature of future loss projections, many have argued that claimants should not have to waive their rights to all future damages. One solution would allow claims to be “re-opened” to compensate for harms not presently foreseeable. This would ensure that the risk is born by BP, who can better afford to bear it, rather than on the shoulders of claimants. Another solution would be to explicitly limit the scope of rights claimants must release to those that GCCF includes in its projection.



GCCF Requires Claimants to Waive Rights That GCCF Payments Are Not Intended to Cover

The waiver and release has also been criticized as being excessively broad in a number of other respects. Mississippi Attorney General Jim Hood wrote that the waiver was so overly harsh that

*only people who are beaten down, poor, and/or desperate would agree to the terms of the release. The excessive breadth of the release will lead the public to believe that the GCCF's goal is not to assist people in the Gulf, but to assist BP in taking advantage of this downtrodden group of people.*¹¹⁴

The waiver was recently challenged by plaintiffs' attorneys in the Multidistrict Litigation as contrary to OPA. The OPA states that;

*Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.*¹¹⁵

Plaintiffs attorneys argue that this prohibits a responsible party from obtaining a waiver or release by any means other than paying a claimant the full amount ultimately owed.

Moreover, while the protocol does not cover damages for many types of claims – such as nuisance, trespass, punitive damages, and other statutory and common law theories of recovery – the waiver nonetheless requires claimants to give up the right to bring these claims. By requiring claimants to waive state law claims, Alabama Attorney General Troy King argues that GCCF is violating OPA, which explicitly states that the law is not intended to affect or preempt state law.¹¹⁶

The waiver has also been criticized as overly broad by requiring claimants to agree not to sue all potentially responsible parties, not just BP, 123 of which are identified by name in the release.¹¹⁷

A claimant's spouse is also required to sign the waiver, though only to waive interest in the claim being paid to their partner – not his or her individual claim if he or she chooses to file one. While GCCF has clarified this through its FAQs, confusion



persists as to whether a spouse is giving up his or her individual rights. The waiver could be reworded to eliminate this confusion.

The Future Loss Projection is Speculative

The GCCF methodology states that for industries other than oyster harvesting and processing, recovery will continue in 2011 with a full recovery by 2012, and that “recovery over this time period would result in a Final Payment Offer of two times the actual documented losses in 2010.” For businesses that harvest or process oysters, the GCCF formula will offer four times the 2010 losses. These future loss assumptions will be reassessed by GCCF every four months.

Ten years after the *Exxon Valdez* spill, oil remained on rock-covered beaches.

An attachment to the final methodology states that the “twice the 2010 losses” formula is based on “the analysis of the economic recovery experience of individuals and businesses subjected to other unanticipated and catastrophic events. Experts have studied many of these events from the past and recorded estimated rates of economic recovery.”¹¹⁸ However, the ARPC report released by GCCF contains very limited explanation of how the estimated rate of recovery of the spill was found to compare to that of other events, and how this comparison was used to predict future

recovery from the spill. Moreover, given the extreme magnitude of the BP spill – in which 200 million gallons of oil gushed from a wellhead deep underwater over a period of months, and an unprecedented amount of dispersants were used – it is not an event that can be easily compared to catastrophic events.

There are also other reasons to doubt the two-year recovery. As Alliance for Justice’s *Crude Justice* film illustrated, ten years after the *Exxon Valdez* spill, in which 1/20th of the oil BP spill volume of oil was released, oil remained on rock-covered beaches.

Ironically, BP also criticized the way in which the underlying data was used to project future losses, arguing that there was insufficient foundation to draw conclusions about the timeline for recovery. However, BP used this uncertainty to argue that GCCF’s projections were too *generous*. The company submitted official comments, asserting that “the draft methodology’s key assumptions regarding risk of future loss are not supported by actual data or by the analysis of the GCCF’s own consultants. There is simply no factual basis to assume ... that final payments should be twice the amount of actual substantiated loss.”¹¹⁹

Whether GCCF’s projection of future damages turns out to be an over- or under-estimate, the fact that it has been widely criticized as being laden with uncertainty raises serious concerns.



The Loss Assessment Does Not Account for Differences in Claims

GCCF's proposed methodology does not take into account the different rates at which various industries may recover because "it is not practical" to do so.¹²⁰

Under the final methodology, only claimants who suffered losses of \$500,000 or more in 2010 will receive individualized analysis rather than having the pre-determined formula automatically apply. Senator Landrieu submitted official comments to GCCF stating that there should be "formalized, individual assessment of losses for all claims, including those below \$500,000."¹²¹

The pre-set formula would not allow individualized consideration of a business whose highest volume occurs in the first four months of the calendar year, making the April-December 2010 range used by the GCCF methodology for future loss calculation an undervaluation of their projected losses in 2011 and 2012.

Additionally, the formula also does not in any way account for the fact that fisheries in some parts of the Gulf may take longer to recover than for other parts, despite the Tunnell report's conclusion that this sort of variation is likely.

Procedural Limitations on Claimants' Access to Justice

A number of procedural barriers, ranging from a limited right to appeal to limited access to attorneys, present hurdles that could prevent victims of the spill from receiving full compensation in a timely manner.

Access to Legal Assistance Should be Expanded

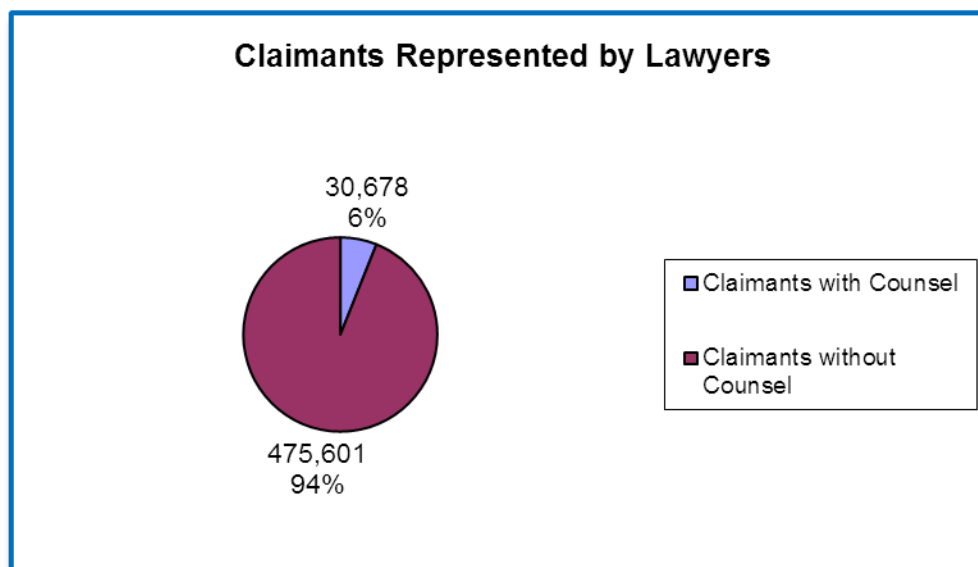
The ability of claimants, and in particular, low-income claimants, to obtain legal representation is another factor that will bear heavily on whether victims' rights are fairly vindicated. An attorney can help a claimant understand the choice at stake in deciding whether or not to sign the waiver, and can help a claimant present their claim in such a way that increases its chances of being fairly paid.

In early 2011, GCCF entered into a contract with legal service providers in the region to help ensure fair and equitable access to the claims process. The contract is administered by the Mississippi Center for Justice and supports fifteen legal services organizations in five states. The program is funded by BP, but the legal services organizations involved in the program are otherwise independent of GCCF and BP.



While the provision of legal services is a positive development, it is unfortunate that it took GCCF over four months to make free attorneys available, and that they were not available to claimants during the Emergency Advance Payment (EAP) phase, particularly as there is no way for denials of EAP claims to be reviewed or resubmitted. Instead, claims that were denied as EAPs can be resubmitted as Interim Claims, which will be evaluated under a “more exacting” standard.

Now that free legal help is available for claimants, a major challenge is making sure claimants are made aware that this help is available and ensuring that there is meaningful access to these services. As of the publication of this report, only 30,678, or 6%, of claimants to have submitted claims, were represented by an attorney.



Information about accessing free legal aid is currently disseminated through the GCCF website, posters in the GCCF claims offices, and in determination letters sent to claimants. GCCF could increase awareness of the availability of these services by prominently disclosing this information on all GCCF forms.

Widespread availability of free legal aid is also important because of predatory lawyering. There have been reports of attorneys who have taken advantage of claimants by convincing them to unwittingly sign a retainer agreement, and then providing little or no legal services to the claimant, other than receiving the claim check. Having free attorneys available to help claimants would also protect claimants that GCCF suspects of fraud.¹²²



Thoa-Thi Ta and her brother Doan Xuan Ta met with an attorney who asked them to sign documents without explaining what the documents were. The siblings were surprised to discover from a Vietnamese speaking volunteer that the document was a retainer guaranteeing the lawyer 40% of any recovery either sibling received from BP. “Of course I did not understand. But because [the lawyer is] Vietnamese, we trust each other,” said Thoa-Thi. “She said she would give us money.”¹²³

Interim Claims Can Only Be Filed Quarterly

In most cases, applications for Interim Payments, which allow a claimant to receive compensation for past, documented losses without giving up the right to sue, can be submitted only once per quarter.

Restricting the ability to file Interim Claims to once per quarter could run afoul of OPA, as Florida Attorney General Bill McCollum has suggested: “Interim Payments are a required part of the OPA claims process and payment of such claims cannot and should not be at the complete discretion of the administrator.”¹²⁴

The limitation on Interim Claims has also been criticized as overly harsh for claimants who are living paycheck to paycheck. Associate Attorney General Thomas Perrelli noted that permitting interim claims only once per quarter “imposes a burden that claimants should not have to bear.”¹²⁵

In response to this sort of criticism, GCCF has adopted a limited exception that allows claims to be filed more than once per quarter based on financial need. The Protocol for Interim and Final Claims states that claims are limited to once per quarter “unless the Claimant is able to demonstrate the presence of exigent circumstances, in which case an Interim Claim may be submitted more than once per quarterly period.”¹²⁶ The Frequently Asked Questions section of the GCCF website elaborates by stating that claimants with a “financial situation that requires immediate action” and who “cannot wait until the next quarter” to file an Interim Claim can file their claim along with an explanation of their financial situation.

Still, Mississippi Attorney General Jim Hood has complained that the limitation on Interim Claims coupled with the availability of Quick Payments, which are guaranteed to result in a check within 14 days of signing the release, “will unfairly encourage fast, low-dollar settlements for people who at this point are financially desperate.” Hood went on to argue that “[a]ll claims should be evaluated and paid quickly, not just ones where the claimant is willing to sacrifice monetary value for speed.”¹²⁷ One Alabama claimant, Robert Barbour, agreed with these assessments, noting “[t]hey’re just trying to stall us, hold us off until our bills pile up and we have to accept anything.”¹²⁸



The Right to Appeal is Limited

The appeal rights in the GCCF protocols have also been criticized as too limited. Individuals and businesses can appeal awards greater than \$250,000 and BP can appeal awards greater than \$500,000. Senator Landrieu called the \$250,000 threshold for appealing GCCF determinations “unreasonably high.”¹²⁹ Feinberg has rebuffed these complaints by pointing out that individuals who are dissatisfied with the amount offered by GCCF can “appeal” to the Oil Spill Liability Trust Fund, or join the litigation against BP.

GCCF Materials Should Be Made More Accessible in Reading Level

It is important that communications from GCCF, including forms, announcements, the protocol, and the waiver, are sufficiently accessible in terms of reading level and availability of information for non-English speakers. The waiver, in particular, is written in a way that makes it very hard for a layperson to comprehend, presenting a serious barrier for claimants without counsel.



The Oil Spill Liability Trust Fund

Overview

In addition to filing a claim with the responsible party via GCCF or litigating a claim in court, victims of the spill can also seek compensation for their damages from the Oil Spill Liability Trust Fund (OSLTF), a government fund created by OPA and administered by the Coast Guard's National Pollution Funds Center (NPFC). The OSLTF was created to ensure the availability of federal funds for future oil spills should the responsible party be unable or unwilling to pay for cleanup and claims. It can be used to pay costs of oil removal, natural resource damage assessment and restoration, individual claims for damages, and other administrative expenses.¹³⁰ It is funded by a number of different sources, including damages recovered for injured natural resources and various taxes.¹³¹

A claimant wishing to bring a claim before the OSLTF must first try to settle the claim with the responsible party. If the responsible party denies liability or if the claim is not paid within 90 days, the claimant may then file an action in court, or submit a claim to the OSLTF. All the damages available under OPA are available through the OSLTF. However, unlike GCCF, only documented losses, and not future projections, will be paid. The NPFC can pay a claim in full, deny the claim, or make a settlement offer. A denial of the claim can be appealed pursuant to the Administrative Procedures Act. If the claimant accepts a settlement offer, they are precluded from bringing any subsequent action to recover costs or damages that are the subject of the claim.¹³² All rights that are the subject of the claim are then granted to NPFC, which can bring a claim against the responsible party.¹³³ Recovered sums are deposited into the Fund.¹³⁴

The Oil Spill Liability Trust Fund has a \$1 billion per incident cap on payable damages.

Few Claimants are Filing with OSLTF

Given its restrictions, only a handful of claimants have opted to file claims with the OSLTF. If that number were to increase, it could prove problematic, because OSLTF has a tiny staff and a \$1 billion per-incident cap on payable damages.¹³⁵ If the Fund were to be overwhelmed with claims, the cap places a finite limit on the amount of damages that can be paid, regardless of whether legitimate claims submitted to the Fund exceed that limit.

The Director of the NPFC, Craig Bennett, testified before the Senate Subcommittee on Disaster Recovery that as of January 2011, the NPFC had received 500 claims and processed 200 of them.¹³⁶ *All 200 of those were denied.*¹³⁷ No one has provided



and explanation for why all of the claims processed by NPFC have been unworthy. The NPFC does not maintain detailed statistics on the administration of claims submitted to the OSLTF and has published only a handful of examples of claims denials on the webpage dedicated to *Deepwater Horizon* claims.¹³⁸ There do not appear to be any examples of claims denied by the GCCF but paid by the OSLTF. While to some extent this may be vindication of Feinberg's claim that he would be more generous than what is required by OPA, it also raises questions about whether the OSLTF is truly a viable alternative means for claimants to vindicate their rights.

This week, the General Accounting Office is releasing a report about the OSLTF process that may shed further light on this option.



Multidistrict Litigation Against BP

Overview

Background

In the months after the spill, hundreds of claims were filed against BP America, Inc. (BP) and the other responsible parties in courts all across the country. Those actions have been consolidated into one Multidistrict Litigation (MDL 2179). Within the MDL, there are approximately 350 cases and 40,000 claimants.¹³⁹ The court has held off on certifying a class action,¹⁴⁰ but at some point, likely after the first trial – which is set for February 2012 – the Court will consider whether and how to consolidate claims by grouping litigants into a class (or classes). It is probable that a class, assuming one is certified, would be “opt out,” meaning that victims would automatically be included in the litigation unless they specifically choose not to participate.¹⁴¹

The Department of Justice (DOJ) joined the suit on behalf of the United States on December 15, 2010, claiming damages for the loss of property and natural resources. Attorney General Eric Holder said that DOJ’s goal is “to ensure that the American taxpayers are not forced to bear the costs of restoring the gulf area and its economy is moving forward.”¹⁴²

BP filed an answer to DOJ’s complaint on April 4, 2011.¹⁴³ The company denied acting with negligence, gross negligence or willful misconduct, and instead claimed the “spill was the result of a complex and interlinked series of factors that came together.”¹⁴⁴ BP also claimed that “defective design and/or manufacture” of Cameron International’s blowout preventer was a superseding cause of the spill, and that Transocean was negligent in the operation of the blowout preventer.¹⁴⁵

BP also argued that the government was incorrect in its assertion that damages should be calculated by the number of barrels discharged, and that the calculation should instead be based on the number of days the oil flowed. BP also argued that if the court chose to assess penalties based on barrels rather than days, the maximum penalty should be \$4,000 per barrel instead of \$4,300, due to differing Coast Guard and Environmental Protection Agency estimates of the price of a barrel of oil.¹⁴⁶

There are several defendants in the lawsuit, including BP, Transocean, Cameron International, Halliburton, and other companies involved in the operation of the well.

Within the Multidistrict Litigation, there are approximately 350 cases and 40,000 claimants.



The *Deepwater Horizon* rig was owned by Transocean. BP leased the rig and conducted the drilling operation. Cameron International made the faulty blowout preventer, which, had it functioned properly, purportedly could have prevented the explosion. Halliburton manufactured the cement casings which were intended to prevent the leakage of gas from the wellhead.

Motions were filed by many of the parties requesting a particular venue. Notably, BP and several of the other defendants argued for keeping the litigation in oil-friendly Houston. On August 20, 2010, the Judicial Panel on Multidistrict Litigation (JPML) transferred all claims related to the oil spill to the Eastern District of Louisiana before Judge Carl J. Barbier, a Clinton appointee whom the JPML described as an “exceptional jurist” with considerable MDL experience.¹⁴⁷ The consolidation was intended to “serve the convenience of the parties and witnesses and promote the more just and efficient conduct of these cases, taken as a whole.”¹⁴⁸ The JPML found the Eastern District of Louisiana to be the most appropriate district for the litigation because it constituted the closest thing to a “geographic and psychological ‘center of gravity’ in this docket.”¹⁴⁹

In August, 2010, Judge Barbier appointed James Parkerson Roy, Managing Member at Domengeaux Wright Roy & Edwards, and Stephen J. Herman, Partner at Herman Herman Katz & Cotlar and at Herman Gerel, to be Plaintiffs’ Co-Liaison Counsel.¹⁵⁰ A liaison counsel is the lead attorney for all plaintiffs or defendants in complex litigation and is responsible for managing communications between the parties and the court. Judge Barbier subsequently appointed 15 attorneys to serve on the Plaintiffs Steering Committee.¹⁵¹ Committee responsibilities include conducting discovery and running hearings and meetings.¹⁵² The Committee also coordinates the trial teams’ selection, management and presentation of any common issue and test cases.¹⁵³ Barbier appointed 9 attorneys to be Defense Co-Liaison Counsel and 13 to the Defense Steering Committee, with 6 serving on both.¹⁵⁴

Judge Barbier appointed Francis E. McGovern, Duke University Professor of Law, as a Special Master in the MDL.¹⁵⁵ A Special Master is responsible for maintaining lines of communication between the parties and facilitating coordination between them “in order to reduce costs, delays, and duplication of effort.”¹⁵⁶



Claims Have Been Grouped in Pleading Bundles

In an effort to expedite the litigation, Judge Barbier has implemented an unprecedented method of organizing claims into “pleading bundles.”¹⁵⁷ The plan, which plaintiff and defense lawyers jointly proposed, separated the claims into various types of injuries.¹⁵⁸ Claims have been divided into the following bundles:¹⁵⁹

- Personal injury and wrongful death claims.
- Losses suffered by private individuals and businesses, such as claims for economic loss under OPA or state law, and health claims or medical monitoring from exposure to oil or dispersants.
- Claims by governments for damages like lost tax revenue and oil clean-up.
- Claims by private parties challenging regulatory action or seeking injunctive relief.¹⁶⁰

Plaintiffs’ attorneys have submitted one master complaint for each bundle, and defendants have submitted one master answer for each complaint, except for claims for personal injury and wrongful death, which Judge Barbier ordered to be pled individually.¹⁶¹ The purpose of the pleading bundles is to group together similar cases and try them at the same time.¹⁶² Separating wrongful death and personal injury claims from the other bundles could potentially allow those claims to be handled on an expedited basis, something that plaintiffs’ attorneys representing rig workers and their families have advocated.¹⁶³

Test Cases Are Scheduled for 2012

Judge Barbier ordered Plaintiffs’ and Defendants’ Liaison Counsel to meet to discuss the identification of one or more cases brought against BP under OPA to serve as test cases. Test cases inform other potential litigants of the likely outcomes concerning liability and damages and often lead to settlements in other pending cases. Plaintiffs proposed that they be allowed to select eight test cases: two OPA cases, two maritime law cases, one wrongful death claim, and one personal-injury suit.¹⁶⁴ Plaintiffs are pushing for the test cases to be scheduled as soon as possible, with Plaintiffs Steering Committee co-liaison Steve Herman arguing that there is no reason not to schedule the trials quickly and that “Justice delayed is justice denied.”¹⁶⁵ Judge Barbier stated his intent to schedule one or more OPA test cases by June 2011.¹⁶⁶



More Damages May Be Available in Litigation than through GCCF

Attorneys representing victims of the spill are divided as to whether claimants will be better off in litigation or settling their claims with GCCF. Attorney Daniel Becnel believes GCCF presents a chance for a better deal for his clients than litigation. He is charging clients 10% of what they recover from GCCF, plus 2% for costs – a fee that he predicts will be a much lower than what plaintiffs in the litigation will end up paying.¹⁶⁷ Becnel also argues that settling with GCCF will allow victims to receive much-needed compensation more quickly than litigation, which he notes could take years to conclude.

Punitive damages are available from litigation, but not from GCCF.

On the other hand, advocates of litigating claims in court argue that several types of damages not being paid by GCCF may be available to those who choose to sue.¹⁶⁸ As discussed above, they include: nuisance, trespass, punitive damages, and other statutory and common law theories of recovery. The court may also apply a different causation standard than the proximate cause test being used by GCCF. And plaintiffs will be able to submit their own expert analysis of the damage to the Gulf and losses to themselves or their businesses

instead of having to rely on the Tunnell report commissioned by GCCF or GCCF's own calculations.

One of the biggest differences is the availability of punitive damages in the litigation. They are not available from GCCF. Even though punitive damages will likely be restricted under recent Supreme Court precedent, they could match the compensatory damages that plaintiffs can establish, thus doubling the overall award. In the litigation brought by victims of the *Exxon Valdez* disaster, the jury originally awarded victims \$500 million in economic damages and \$5 billion in punitive damages. The Ninth Circuit cut the punitive damages award in half, and the United States Supreme Court slashed the award by 90% in *Exxon Shipping Co. v. Baker*.¹⁶⁹ The Court limited the liability of wrongdoers like Exxon or BP by holding that punitive damages can never exceed compensatory damages in maritime cases. The Court's ruling left plaintiffs with an average of just \$32,000, a tenth of the jury's original award. The Court's ruling also severely undermined any deterrent effect the jury intended the judgment to have on Exxon, considering the company posted a record \$11 billion quarterly profit after the Court's ruling.¹⁷⁰

Additionally, in court, victims can present claims against multiple defendants, not just BP. In contrast, the GCCF is funded exclusively by BP yet requires claimants to give up their rights against all potentially liable parties to BP. This allows BP to attempt to



offset its costs by suing to recover from the other responsible parties for its share of the damages.

As Plaintiffs Steering Committee co-liaison Steve Herman argues:

It may be true that proceeding in the GCCF alone may be the best course of action for some people with small claims, limited standing, or who are in necessitous circumstances. However, we believe that the overwhelming majority of claimants will be better off by filing suit in Court (even while also potentially pursuing OPA claims in the GCCF with BP).¹⁷¹

One additional challenge for litigants is that even if they receive a favorable outcome at the trial court level, they will almost certainly be forced through the appellate gauntlet of the Fifth Circuit Court of Appeals, one of the most conservative circuits in the country, with 11 of the 16 sitting judges having been appointed by Republican presidents.¹⁷² As Alliance for Justice reported in 2010, judges in the Fifth Circuit have extensive ties to the oil and gas industry. For instance, 14 out of the 17 judges have financial holdings in the energy industry, and 13 of them represented oil and gas companies before taking the bench.¹⁷³ Moreover, plaintiffs may face an unfriendly venue if the case ends up before the Supreme Court, which time and again has proved willing to bend the law to favor powerful corporations like BP over the rights of everyday Americans.

Unless claimants accept a final offer from GCCF, they are free to pursue both litigation and the claims process.

BP Has Waived the Potentially Applicable Limitation on Liability

OPA requires BP to pay all clean-up costs but caps all other damages at \$75 million, *unless* the incident was proximately caused by the responsible party's gross negligence, willful misconduct, or violation of federal law.¹⁷⁴ BP faced strong public pressure to waive the cap as a defense because damages were estimated to far exceed \$75 million.¹⁷⁵ The company's willingness to place \$20 billion in escrow for expected damage pay-outs demonstrates the inadequacy of the \$75 million figure.

After Judge Barbier ordered BP to decide whether or not it would pursue the statutory cap as a defense,¹⁷⁶ BP agreed to waive the \$75 million cap,¹⁷⁷ stating that it would "pay all legitimate claims, regardless of the OPA statutory limit of liability."¹⁷⁸ BP noted that it had "paid claims many times over the OPA limit" and claimed that it "will live up to its public commitment to pay all legitimate claims made in connection



with the *Deepwater Horizon* incident and the resulting oil spill.”¹⁷⁹ In its filing, BP urged the other responsible parties involved to likewise waive the limit as it applies to them.¹⁸⁰ However, BP added that neither it nor its affiliates are “admitting anything about their conduct and, indeed, specifically deny that they have engaged in any gross negligence in connection with the *Deepwater Horizon* incident and the resulting oil spill.”¹⁸¹

Some experts have argued that the near certainty that federal safety violations caused the explosion renders BP waiver an empty gesture, as those violations would be sufficient to pierce OPA’s damage cap.¹⁸² Judge Barbier issued an order in December, 2010 barring BP from raising the statutory limitation on liability as a defense.¹⁸³

Transocean Is Attempting to Limit Its Liability

Transocean, which owned the *Deepwater Horizon*, has sought to dramatically curb its liability. Not only has Transocean denied any negligence or misconduct on its part, the company also made headlines by awarding its employees bonuses for safety performance in 2010, the year the rig blew up, killing 11 people and injuring 17 more, touting it as its “best year in safety performance in our company’s history.”¹⁸⁴

Transocean has petitioned to limit its liability to the value of the floating rig. If successful, it would profit from the disaster.

Less than a month after its drilling rig sank, Transocean petitioned to limit its liability to \$26,764,083 – equivalent to the value of the floating rig.¹⁸⁵ Unbelievably, if Transocean is successful in capping its damages at this amount, it would profit from the disaster, as it received insurance reimbursement of several hundred million dollars. Current estimates are that Transocean might be able to keep \$270 million of this reimbursement as profits after paying claims.¹⁸⁶ The legal basis of Transocean’s petition is the Limitation of Liability Act of 1851, a relatively obscure law that limits a ship owner’s damages to the post-casualty value of the vessel and its freight, so long as its owner was unaware of the negligence giving rise to the accident.¹⁸⁷ A vessel owner can initiate a civil action for limitation of

liability within six months of an incident, if it deposits with the court an amount equal to the owner’s potential liability.¹⁸⁸ This has the effect of terminating other claims against the owner.¹⁸⁹

The Act was passed in the mid-nineteenth century to help U.S. ship owners compete with foreign shippers from countries that limited liability. At the time, it was feared that without the Act, liability for injury, death, or property loss would have the effect of discouraging maritime commerce.¹⁹⁰ The law was famously invoked as a defense by the owners of the *Titanic* to limit liability to \$95,000 after that ship sank. Many maritime experts have argued that with the existence of liability insurance, the Act is



no longer necessary to incentivize commerce.¹⁹¹ Some legal experts have even argued that the Act was effectively repealed by OPA, to the extent the law applies to vessels involved in oil spills.¹⁹²

Transocean filed an action before Judge Barbier denying any fault or negligence. To prevail, Transocean will have to establish that the incident occurred “without the privity or knowledge” of the corporate office.¹⁹³ Judge Barbier has issued a subpoena ordering Transocean to produce all documents related to safety audits of its ships in the Gulf of Mexico at the time of the explosion.¹⁹⁴ Some maritime law experts believe that Transocean’s filing was more of a tactical decision to delay proceedings and select a venue than a bona fide attempt to limit damages.¹⁹⁵

Transocean’s liability limitation suit is important not just for the company; it could also affect parties injured by the spill because it will likely have to sort out all the potentially responsible parties’ level of fault.¹⁹⁶ The court may also determine if any of the parties were grossly negligent – a finding that could form the basis for a punitive damages award.¹⁹⁷ It is possible these findings may be applicable in actions other than the limitation action.

The deadline for plaintiffs to join Transocean’s Limitation Action is April 20, 2011, the one year anniversary of the spill. According to the Plaintiffs Steering Committee, joining the limitation action provides a way for victims to join the lawsuit without paying fees, and without having to retain a lawyer.¹⁹⁸ However, some lawyers representing claimants before GCCF worry that joining the Limitation Action could have the effect of obliging a claimant to contribute to the attorney’s fees for the litigation.¹⁹⁹

The Judge Overseeing the Litigation Has Ordered Modification of GCCF Practices

BP hired Kenneth Feinberg to administer GCCF to discharge its statutory duty to process claims for damages under OPA. The administration of the \$20 billion trust fund has been plagued by criticisms that it is not sufficiently consistent and transparent. Plaintiffs’ attorneys in the litigation, as well as the attorneys general from Mississippi, Louisiana, and Florida, recently filed motions arguing that serious deficiencies in the handling of GCCF necessitated judicial oversight. The Court has ruled in part on this request, finding that Feinberg and GCCF are not fully independent of BP and calling for more briefing on the issue of whether GCCF is compliant with OPA.



GCCF is Not Fully Independent of BP

One of the requests made by Plaintiffs' attorneys and the Attorneys General was for Judge Barbier to supervise GCCF's communications with potential class members. The thrust of their argument was that, despite the fact that Feinberg had represented himself and GCCF as being completely independent of BP, both Feinberg and GCCF were actually agents of BP, as Feinberg was under contract to receive \$850,000 per month (since increased to \$1.25 million per month) from BP for administering settlements to claimants. The plaintiffs argued that this financial relationship between Feinberg and BP made it impossible for Feinberg to fairly communicate with prospective class members without being supervised by the court.

Feinberg and GCCF's role has led to "confusion and misunderstanding by claimants, especially those who are unrepresented by their own counsel."

In response, BP argued that, notwithstanding their contractual relationship, Feinberg maintained the ability to make disinterested judgments with respect to claims against BP. In BP's view, because Feinberg did not report to BP, the court should characterize Feinberg as an independent contractor rather than as an agent, which would protect against plaintiffs' concern that BP was using Feinberg to impermissibly communicate with unrepresented claimants.

Judge Barbier ruled on the motion on February 2, 2011, holding that GCCF and Feinberg are not fully independent of BP.²⁰⁰ As such, the Court held that GCCF must abide by certain limitations when communicating with people who might have claims against BP.

The Court noted that Feinberg and GCCF's role has led to "confusion and misunderstanding by claimants, especially those who are unrepresented by their own counsel," – which has comprised about 94% of all claimants²⁰¹ – and that GCCF's claimed independence and neutrality constitutes a "direct threat" to the legal challenge currently underway against BP.²⁰²

Judge Barbier set forth a number of specific restrictions GCCF must abide by in communications with claimants, such as refraining from claiming to be "neutral" or "independent," prominently disclosing the fact that individuals have a right to consult with an attorney, and telling claimants that they can join the litigation against BP if they decline to accept a settlement through GCCF.



GCCF May Not Be Complying With OPA

A more interesting question, which Judge Barbier is expected to issue a ruling on soon, is the broader question of whether BP is fully complying with OPA. Such a ruling could address whether several GCCF policies run afoul of OPA, such as the requirement that individuals sign a release of liability in order to receive a final payment, as well as the methodology used to evaluate claims.

In supplemental briefing requested by the Court, plaintiffs' attorneys point to several aspects of GCCF they believe violate OPA, including the release claimants are required to sign to receive a final payment, the processing of interim claims, and the methodology for evaluation of claims.²⁰³

First, they claim that releases of liability procured by GCCF are prohibited by OPA and should be voided.²⁰⁴ In particular, they argue that the releases were made based on Feinberg's discouragement of legal representation for claimants, misrepresentations that Feinberg was fully independent of BP, and duress inflicted by the inability to earn a living and the need for immediate income. They also argue the waivers should be voided because OPA prohibits the release of unpaid claims, pointing to language in OPA which states that interim claims for short-term damages, even accompanied by settlement agreements, cannot preclude full recovery.²⁰⁵ Plaintiffs emphasize that OPA does not authorize a responsible party to receive a final release from a claimant by any mechanism other than payment of the full amount ultimately owed.

Plaintiffs challenge the GCCF's payment methodology on several bases, arguing that it better serves BP's objectives of obtaining as many settlements and releases as possible, rather than OPA's requirement of fully paying all interim damages.

Plaintiffs also argue that the interim claims payment mechanism currently in place violates OPA's requirement that such a mechanism—which is explicitly required by the law—be reasonably calculated to enable presentment, pay interim damages, and compensate claimants for all that they are ultimately entitled. Specifically, plaintiffs allege that the GCCF abrogates this requirement by (a) compensating people on a random basis, (b) creating uncertainty and confusion, (c) leaving large numbers of claimants uncompensated several months after the spill, (d) keeping key issues hidden, and (e) pushing people away from interim payments in favor of a “quick payment” that will relieve the responsible party from subsequent liability.²⁰⁶

Further, plaintiffs challenge the GCCF's payment methodology on several bases, arguing that it better serves BP's objectives of obtaining as many settlements and releases as possible, rather than OPA's requirement of fully paying all interim



damages. In addition to pointing to several specific criticisms of the methodology, plaintiffs also question the validity of the Tunnell report that limits payouts under GCCF's future payment methodology.²⁰⁷

Based on these criticisms, the plaintiffs request that the court order GCCF to:

- Void all final releases between BP and victims of the spill,
- Prohibit BP and GCCF from obtaining additional releases from victims,
- Provide an interim payment calculation to each unrepresented class member who signed a release,
- Disclose all eligibility requirements for obtaining interim relief,
- Explain the basis for previous denials of interim relief,
- Inform any victim whose claim was denied because of a lack of documentation which documentation was lacking,
- Disclose the reasons for the amounts of all previous payments, and
- Appoint a special master to oversee the creation of an interim claims protocol with joint input from BP and the Plaintiffs Steering Committee.

Mississippi Attorney General Jim Hood has also filed a motion arguing that GCCF is violating OPA.²⁰⁸ In its motion, Mississippi asks the Court to order an audit of the GCCF claims process, and conduct an evidentiary hearing to consider GCCF's compliance with OPA. Like plaintiffs, Hood claimed that GCCF is using financial duress to its advantage to obtain release of claims for inadequate compensation, processing few interim claims, and using Quick Payment final claims to "extract releases from claimants." Hood also stated that "BP has chosen to significantly reward Kenneth Feinberg for the manner in which he is administering the GCCF."

On April 12, 2011, GCCF responded to Hood's accusations, claiming that it "has accomplished an extraordinary amount of work in a short time, even while confronted with an unprecedented challenge."²⁰⁹ GCCF argued that its policies have been "far more generous than any envisioned by OPA."²¹⁰ Defending the use of Quick Pays, GCCF stated that it "is nothing more than an option made available to claimants for whom it makes sense,"²¹¹ and that Quick Pays allow for compensation "even if the claimant cannot substantiate further losses, or did not even incur further losses."²¹² GCCF also argued that it is "entirely consistent with OPA" not to pay claims that "lack the proof necessary to demonstrate a link between alleged damage



and the Oil Spill,”²¹³ pointing to the fact that the United States Coast Guard has upheld GCCF’s determinations in all cases it has reviewed.²¹⁴ GCCF also contended that Judge Barbier does not have the authority to hold an evidentiary hearing on GCCF’s compliance with OPA, as Hood requested.²¹⁵

In a statement to Judge Barbier, filed on February 18, 2011, the Department of Justice asserted that OPA does not provide the court with authority to manage the claims process.²¹⁶ The Department of Justice also stated that Feinberg’s decisions were not controlled by BP and that, even though he has a contractual relationship with BP, Feinberg “operates as an independent decision-maker.”²¹⁷

The outcome of this dispute could potentially affect thousands of claims.



Efforts to Reform Laws Affecting Victims' Ability to Recover

Since the spill, lawmakers have attempted – but failed – to expand the scope of damages available to victims of oil spills. These efforts have been aimed at a number of statutes that set forth the damages available to those who have suffered physical or economic injury from the spill. OPA governs economic damages, the Jones Act creates an action for physical injury or death suffered in the course of employment against their employer, the Death on the High Seas Act applies to sea workers killed at sea, and the Limitation of Liability Act restricts the damages available against the owner of a vessel. In the absence of the application of one of these statutes, general maritime law will cover most remaining claims. Additionally, the Supreme Court's landmark decision of *Exxon Shipping Co. v. Baker* will have a direct impact on the availability of punitive damages. All of these laws have been the subject of legislation following the spill.

There are currently two bills in Congress that would affect victims of the BP oil spill. Senate Bill 183, “*Deepwater Horizon* Survivor’s Fairness Act” would amend many of the statutes described above, but would only apply to this case and not to future disasters. Specifically, it would amend the statutes as follows:

- The Limitation of Liability Act would be amended to exclude claims for personal injury or wrongful death.
- The Death on the High Seas Act would be amended to allow a civil action to proceed under law or admiralty, and to include damages for non-pecuniary loss.²¹⁸
- The Jones Act would be amended to allow damages for non-pecuniary loss.²¹⁹

In addition, the bill would allow plaintiffs in the *Deepwater Horizon* incident to sever personal injury and wrongful death claims from other claims in the action, and prohibit the transfer of their claims for consolidated or coordinated pretrial proceedings. The bill was referred to the Senate Committee on Commerce, Science, and Transportation in January 2011.



Another bill currently before Congress would overturn the Supreme Court's *Exxon Shipping Co. v. Baker*²²⁰ decision. Introduced in March 2011, Senate Bill 529, the "Maritime Liability Fairness Act," would allow punitive damages to be assessed in maritime torts without regard to the amount of compensatory damages, which were capped in *Exxon* at the value of compensatory damages in maritime cases. This bill would allow juries full discretion to assess punitive damages.

Last Congress, legislation that was more expansive in scope than either of the bills currently being considered passed the House but failed to pass the Senate.²²¹ Michigan Representative John Conyers, a co-sponsor of H.R. 5503, the "Securing Protections for the Injured From Limitations on Liability (SPILL) Act," said that it would "not only modernize these laws, but... ensure that victims of the Gulf Coast Oil Spill, through BP's claims process, will receive the compensation they deserve."²²² The SPILL Act would have:

Expanding liability for oil spills was embraced by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling.

- Amended the Limitation of Liability Act so that it would not apply to damages for personal injury, wages, and death by a vessel owner and would allow for fishing vessel claims.
- Amended the Death on the High Seas Act to allow awards of damages for non-pecuniary loss, such as loss of companionship.
- Amended the Jones Act to allow awards of damages for non-pecuniary loss, such as loss of companionship.

The companion Senate Bill, S. 3600, would have done everything the Conyers bill would have done, but would also have allowed punitive damages to be assessed in maritime torts without regard to the amount of compensatory damages, reversing the *Exxon* decision. Additionally, the Senate bill would have repealed rather than amended the Limitation of Liability Act.

Expanding the liability for oil spills was also embraced by President Obama's National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling. The Commission recommended that Congress "significantly increase" the \$75 million cap, noting that "the relatively modest liability cap and financial responsibility requirements provide little incentive for oil companies to improve safety practices."²²³ In addition, the Commission recommended raising OPA's \$1 billion per incident cap so as to ensure that victims of future spills have access to compensation.²²⁴ The Commission also recommended that the Department of Justice conduct an



evaluation of the Gulf Coast Claims Facility process “to determine its effectiveness in adjudicating compensation claims and its value as a model for future [spills].”²²⁵ The Commission also made a number of other recommendations for lawmakers not directly affecting the liability of parties responsible for oil spills.



Looking Forward

Uncertainty has been the hallmark of this disaster. As BP, GCCF, and GCCF's hired experts acknowledge, forecasted recoveries in the Gulf are nothing more than speculation. No one knows how much harm was done to marine life, how long it will take for the Gulf economy to recover, whether residents of the Gulf will suffer long-term health effects, and whether those affected by the spill will be able to return to their previous way of life.

The ugly face of that uncertainty has reared its head in the form of hundreds of baby bottlenose dolphins washing ashore on the Gulf coast, some of which have been oiled, although scientists cannot conclusively explain the cause of death.²²⁶ Just weeks before the one-year anniversary of the tragedy, another bottlenose dolphin, coated with oil from the *Deepwater Horizon* well, washed ashore in Louisiana, presenting a stark reminder that the oil is not gone, and is still having a harmful effect on marine life.²²⁷

The long-term health impacts of exposure to oil and dispersants, and whether BP will be made accountable for such impacts, remain to be seen. The Times-Picayune reports that one three-year-old who visited the Gulf on vacation after the spill had blood levels with three times the normal level of ethylbenzene (a toxin).²²⁸ This result is mirrored in blood tests conducted on a broad swath of Gulf residents.²²⁹ Concerns over these sorts of claims have prompted calls for BP to pay for screening and treatment of all those who may have been exposed to harmful toxins through oil or dispersants. BP has contributed \$10 million to a National Institutes of Health (NIH) multiyear study on the health effects of the spill,²³⁰ though it is still unclear to what extent those who suffer health effects will be made whole for their injuries, especially when GCCF will close in 2013, perhaps before health effects begin to materialize.

No one knows whether those affected by the spill will be able to return to their previous way of life

Victims struggling to make ends meet are worried about the uncertainty of recovery of the Gulf ecosystem and the economy that is dependent on it. Scientists also fear that strong winds or hurricanes could stir up the water and bring ashore oil that has settled at the bottom of the sea.²³¹ Even if the ecosystem makes a full recovery, a full economic recovery will not necessarily follow. Expressing his frustration with the situation, Louisiana oysterman George Barisich said that, "As commercial fisherman you put up with a lot of uncertainty as it is, but the problem with this is it's a man-made uncertainty."²³²



All of these uncertainties leave victims in a precarious situation. It is difficult to decide whether to pursue GCCF's quicker, but potentially more limited, claims process, or the longer road of litigation. Regardless of which path victims choose to pursue, claimants will have to put a dollar figure on their lost profits and other economic damages based solely on the information available at the time they make their claims, despite the fact that recovery remains uncertain.

Accordingly, at the one-year anniversary, the jury is still out on whether victims of the BP oil spill will receive justice. As victims of the *Exxon Valdez* spill learned, the full ramifications of an environmental catastrophe of this magnitude can take years if not decades to appreciate. The very fact that victims have more than one path open to them is an improvement on the situation faced by *Exxon's* victims, and for some, GCCF has provided speedy recovery that ensured their economic survival. Yet others have chosen the traditional route of litigation out of exasperation with GCCF and its failure to provide compensation. While the addition of a process whereby individuals can seek recovery from the responsible party has clearly benefited some victims, the BP oil spill has also exposed several flaws in our legal system's capacity to fairly and quickly compensate victims, particularly when the full effects of a disaster are delayed or unknown.

No one knows what comes next and whether fishing and tourism will come back, or what the long-term health impacts will be. As President Obama noted, "[t]he millions of gallons of oil that have spilled into the Gulf of Mexico are more like an epidemic, one that we will be fighting for months and even years."²³³ The consequences for families and communities will linger for years. And so will the fight for justice for the victims of this tragedy.



Recommendations

Based on the findings of this report, Alliance for Justice makes the following recommendations:

1. GCCF should continue working to improve the transparency in its operation by providing clearer information about the standards it uses to process claims, by allowing for more public involvement in the development of its policies, and by increasing claimants' access to information throughout the claims process.
2. GCCF should recognize legitimate subsistence use claims and publicly release a methodology for processing and paying them.
3. GCCF should stop using a proximate cause standard to limit the claims eligible for payment and apply the more generous standards contained in OPA.
4. GCCF should reconsider its policy of requiring claimants to waive the right to future damages in order to receive a final payment, especially against parties not involved in the GCCF process, and for state law and non-OPA claims for which GCCF does not provide compensation.
5. Award calculation methodologies used by GCCF should be peer-reviewed and GCCF should stop relying on the controversial Tunnel report.
6. GCCF's should allow for more individualized consideration of how the future recovery factor is applied to individual claims, and how different industries and regions may recover differently.
7. Access to attorneys for claimants in the GCCF process should be more widespread.
8. Interim claims should not be limited to once per quarter; economic desperation should not be a factor claimants are forced to consider in choosing between a Quick Pay, Interim, or Final payment.
9. Those involved in the litigation should work to ensure that accurate information is disseminated to prospective class members so they can make an informed decision about which path to pursue.



Notes

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- ¹ CNN Wire Staff, *Gulf Oil Spill is Worst Accidental Spill Ever*, CNN (Aug. 3, 2010).
- ² Campbell Robertson and Henry Fountain, *BP Says Oil Flow Has Stopped As Cap Is Tested*, New York Times (July 15, 2010).
- ³ Henry Fountain, *U.S. Says BP Well is Finally "Dead,"* New York Times (Sept. 19, 2010).
- ⁴ Campbell Robertson and Clifford Krauss, *Gulf Spill is Largest of Its Kind, Scientists Say*, New York Times (Aug 2, 2010).
- ⁵ Maureen Hoch, *New Estimate Puts Gulf Oil Leak at 205 Million Gallons*, PBS Newshour (Aug. 2, 2010). The official government estimate puts the spill at 4.9 million barrels, or 205 million gallons. See Final Report by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Chapter 5 at 168 (March 11, 2011).
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