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GULF COAST CLAIMS FACILITY

Although three months have passed since President Obama and BP established the Gulf Coast Claims Facility to resolve damage claims resulting from the Deepwater Horizon oil spill, ''how the facility is operating or is even supposed to operate is still largely unknown,'' says Professor Alfred R. Light in this BNA Insight. The author, an expert on intergovernmental relations, ruminates broadly on the process and various trade-offs, and predicts that even after claims administrator Kenneth R. Feinberg releases the final claims protocol in November, key details on the criteria for payment will remain unresolved.

Protocols for the Gulf Coast Claims Facility: An Etiquette of Equivocation

BY ALFRED R. LIGHT

This article describes the Gulf Coast Claims Facility (GCCF) which President Obama and BP established to resolve claims by individuals and businesses for damages resulting from the Deepwater Horizon oil spill and the protocols under which the Facility is to operate. It examines the Draft Protocol shared with state officials in July and the Protocol for Emergency Advance Payments released by the GCCF in August.

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A comparison of the two documents suggests that the protocols are being ''negotiated'' in a way that makes its provisions less precise and more ambiguous. As a result, claimants will not be able to rely on them to determine whether a claim is eligible for compensation. Claimants will be relying on Kenneth Feinberg's more particularized judgments about compensation rather than precise standards deriving from the language of the protocols.

After the White House tapped Kenneth R. Feinberg in June to head a new Gulf Coast Claims Facility (GCCF) to pay claims from BP's $20 billion Trust Fund, the former director of the 9/11 Victim Compensation Fund elaborated his philosophy in a speech to the Economic

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Club of Washington, ''Under this program, you will receive, if you're eligible, compensation without having to go to court for years, without the uncertainty of going to court, since I'll be much more generous than any court will be. At the same time, you won't have to pay lawyers and costs.''[1] Until Feinberg took over in August, BP paid emergency claims without requiring that those accepting payments waive the right to sue or agree to pay BP back if it was subsequently determined that they had been ''overcompensated.''[2]

Potential claimants from around the nation initially seemed to take BP and Mr. Feinberg at their word. First, BP set up a separate claims process for local governments seeking recovery for loss of revenues and other losses arising out of the spill. Moreover, considerable BP expenditures occurred outside the individual claims program based on special arrangements with BP. For example, on May 20 BP agreed in a Memorandum of Understanding with Florida state officials to pay $25 million for Florida's emergency marketing campaign to preserve the state's tourism industry and an extra $10 million for marketing support in impacted counties.[3]

Florida spread this money broadly – for example, the Greater Ft. Lauderdale Convention and Tourism Bureau received $850,000 to promote tourism there, despite the obvious remoteness of that Atlantic coast city from the spill.[4] Second, some individual and business claims which BP began paying on an emergency basis also ranged far beyond the gulf coast. For example, BP made some emergency payments to compensate the fishing community in the northern neck of Virginia, which had lost a market for its baitfish in the Gulf and its historic supply of oysters to supplement local Virginia harvests.[5] Third, various entities tried to ''set up'' their or others' subsequent claims against BP. For example, on July 21 Florida Governor Crist signed an executive order intended to give homeowners and businesses in the Florida Panhandle stronger footing to seek financial relief from plummeting home values as a result of the BP oil spill.[6] His order allowed property appraisers in the 26 counties covered under a state-of-emergency declaration to give ''interim'' assessment to owners whose property values have eroded.[7]

In August, two things changed the situation. First, after a number of unsuccessful or only partially successful fits and starts, BP completed its ''static kill'' and the relief well which stopped the flow of crude into the gulf waters.[8] Until that happened, it was not even theoretically possible to assess the viability of lump sum payments to claimants for which it would be fair to obtain a release for additional damages arising out of the spill. In various forums, Feinberg indicated that his plan was to make comprehensive settlement offers ''once the oil stops leaking and full damages can be assessed.''[9] Second, BP completed its ''handoff'' of the BP claims handling process from BP Vice-President Darryl Willis (and its contractor ESIS) to Feinberg's ''Gulf Coast Claims Facility (GCCF),'' which Feinberg indicated would be operated independently of and would not be controlled by either the White House or BP.[10]

Although five months have passed since the Deepwater Horizon explosion on April 20 and over three months have passed since the announcement of the GCCF on June 17, how the Facility is operating or is even supposed to operate is still largely unknown, with Feinberg indicating that it may be Thanksgiving before his criteria for payment of final claims will be released.[11] Though criteria for interim payments were released in August, many details remain up in the air. My hypothesis here is that, after the final claims protocol is released in November, these matters likely will remain unresolved.

The Protocols

In July, Feinberg began circulating a ''Gulf Coast Claims Facility Draft Protocol,'' intended to lay out in writing eligibility rules, the claims process, and review procedures, which he planned to use.[12] On August 23, as GCCF took over the claims process, it officially released the ''Protocol for Emergency Advance Payments.''[13] ''Protocol'' has several related definitions. Many domestic environmental lawyers probably conjure up images of the Toxicity Characteristic Leaching Procedure (TCLP), the testing procedure for deciding

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[1] John Pacenti, *Plaintiffs Attorneys Knock BP Administrator*, Daily Business Review, July 26, 2010, *available at http://www.law.com/jsp/article.jsp?id=1202463865302&src=EMC_Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW_20100726&kw=Plaintiffs%20Attorneys%20Knock%20BP%20Fund%20Administrator*.

[2] Claims process press conference, Orange Beach, Alabama, 5 June 2010, *available at http://bp.concerts.com/gom/audio/claims_orange_beach_AL_06052010.htm* (audio).

[3] Agreement between Douglas J. Suttler, chief operating officer, BP Exploration & Production, Inc. and David Holstead, Florida Division of Emergency Management, May 20, 2010 (on file with author).

[4] David Fleshler, *Oil spill threat to South Florida almost over, top federal official says*, Sun-Sentinel (South Florida), July 29, 2010 (''We had to spend hundreds of thousands of dollars of BP's money to deal with the what-ifs. Everything that we would normally do to build business for later in the year had to be redirected. It's been a very long 100 days.''), *available at http://www.sun_sentinel.com/news/florida/fl_oil_spill_florida_future_20100729,0,1030312.story*.

[5] Pamela A. D'Angelo, *Northern Neck oyster houses share pain of BP spill*, Richmond Times-Dispatch, July 26, 2010, *available at* http://www2.timesdispatch.com/news/2010/jul/26/oyst26_ar_350109/.

[6] Josh Hafenbrack, *Crist orders ''interim land reassessments*,'' Sun-Sentinel (South Florida), July 22, 2010, at 8B.

[7] *Id.*

[8] Angel Gonzalez and Brian Baskin, 'Static Kill' Begins, Raising New Hopes, Wall St. J., Aug. 2, 2010, *available at http://online.wsj.com/article/SB10001424052748703545604575407251664344386.html?KEYWORDS=static+kill*.

[9] Kristin Choo, *The Price of Oil*, ABA Journal, Aug. 2010, at 34, 40.

[10] Jesse Lee, *The White House Blog, A New Process and a New Escrow Account for Gulf Oil Spill Claims from BP*, The White House Blog, June 17, 2010, *available at http://www.whitehouse.gov/blog/2010/06/17/a_new_process_and_a_new_escrow_account_gulf_oil_spill_claims_bp*

[11] Neil King, Jr., *Faster Action for Spill Claims*, Wall St. J., Aug. 21-22, 2010, at A5.

[12] This article is based on a review of Draft Nine, July 9, 2010, 6:20pm, obtained as a public document from the State of Florida (''Draft Protocol''), *available* at *http://www.flgov.com/grtf/grtf_20100728_claims.pdf*.

[13] See the Gulf Coast Claims Facility Protocol for Emergency Advance Payments, August 23, 2010 (''Emergency Protocol''), *available at http://www.gulfcoastclaimsfacility.com/proto_1*.

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whether the toxicity of a waste is sufficient to make it a hazardous waste—a virtual formula for deciding the matter. International environmental lawyers might think of instruments that have been negotiated under the rubric of international framework conventions, such as the Kyoto Protocol to the Framework Convention on Global Climate Change. Many non-lawyers might remember Goldie Hawn from the 1984 movie or, more sublimely, conjure the image of those who follow the rules of etiquette of the diplomatic corps. An examination of the GCCF documents reveals something of these second two definitions, but very little of the first.

Both Protocols view the Gulf Coast Claims Facility as BP's way of fulfilling its obligations under the Oil Pollution Act of 1990 (''OPA'') to establish a claims procedure prior to presentation of a claim to the Coast Guard for payment from the National Pollution Funds Center. The July Draft Protocol states in a footnote, that ''presentation of the claim to the GCCF satisfies a claimant's obligation to present a claim to the responsible party before the claimant presents a claim to the Coast Guard for payment.''[14]

The Emergency Advance Payments Protocol, however, is equivocal about this matter and probably should be read as backing off from the position asserted in the July Draft Protocol. It states, ''The GCCF (and the protocols under which it operates) are structured to be compliant with OPA. A final claim may be presented to the GCCF at any time that the facility is receiving claims. Whether or not a claim has been presented shall be governed by OPA and applicable law.''[15] This latter Protocol *clarifies*, ''Submission of such claims shall be wholly voluntary and participation in the GCCF shall not affect any right that the claimant would have had absent such participation unless final resolution of the claim is achieved.''[16]

Perhaps this clarification simply lets the reader know that the presentation of emergency advance claims does not affect the OPA claims procedure, i.e., that the claimant has an obligation to present his entire claim separate and apart from the emergency advance claims process. In my opinion, the Emergency Advance Protocol equivocates about whether a claimant must present his final claim to GCCF before suing BP. Its clarification can be read to permit a claimant to present his or her claim to BP and settle the claim outside the GCCF (and, if BP refuses to settle, sue).

Because the July Draft Protocol linked GCCF to OPA in its footnote, the scope of the GCCF in some respects has to be broader than the prior BP claims process had been and the Emergency Advance Claims process. For example, the Protocols make GCCF responsible for claims for removal and cleanup costs—which BP had excluded from its pre-GCCF claims process.[17] On the other hand, BP also had chosen to broaden the GCCF to encompass claims not cognizable under OPA, such as claims for physical injury or death.[18] The Protocols continue this expansion. The GCCF is limited, however, as was the pre-GCCF BP process, to ''claims by Individuals and Businesses.'' Kenneth R. Feinberg, the ''Claims Administrator,'' does not have jurisdiction over other types of claims under either Protocol.[19] Thus, claims by State and local governments, or the federal Government, are outside the scope of the GCCF. In this regard, the August Emergency Advance Payments Protocol follows the July Draft. It covers removal and cleanup costs and physical death/personal injury claims in addition to those within the scope of OPA but not governmental claims.[20]

The July Draft Protocol, when circulated among state attorneys general, precipitated a firestorm of criticism. Objecting to an obviously closed-door negotiation process leading to the Draft Protocol (designated as Draft 9), the Attorney General of Alabama was especially vituperative in his July 13 letter to President Obama, characterizing the Draft Protocol as an ''illegal attempt to limit BP's liability for the disaster and an effort by the Executive Branch of the federal government to usurp the constitutional authority of the Legislative and Judicial Branches, and the authority of the States and their judicial systems to protect their own citizens.''[21] He opined, ''Even though the determinations of the GCCF are in no way binding on State or even federal courts, the end result of the Draft Protocol, if implemented, would be to create a de facto adjudication process that can only serve to rob individuals and businesses of their fair and impartial day in court in the venue of their choosing.''[22] Florida's Deepwater Horizon Legal Advisory Group, while less vituperative, similarly objected to the ''exclusion of Gulf States and their local governments from negotiations framing the claims process'' and demanding that ''BP must be prohibited from seeking or obtaining releases in connection with any interim payments of compensatory damages.''[23] Attorney General McCollum claimed in a letter to Feinberg that the Draft Protocol ''appears to violate the law.''[24]

My hypothesis is that this reaction partially explains why the Emergency Advance Claims Protocol equivocates instead of clarifies and why November's Final Claims Protocol is likely to do the same. In the highly charged politicized environment of the BP Deepwater Horizon Disaster, neither the state attorneys general nor plaintiffs' attorneys have any incentive to be receptive to GCCF guidelines that suggest any limitations on compensation whatsoever. This may be part of the reason why BP did not include governmental claims as part of GCCF at the outset. The states especially fear that whatever limitations are included in the Protocols ultimately may be applied to them. For example, Florida's Legal Advisory Group has complained that ''*contrary to the Initial White House Fact sheet*, Mr. Feinberg and BP are now stating, in private conversations as well as recent press accounts, that, in the near future, *States and local governments will need to apply to Mr. Feinberg–*

[14] Draft Protocol, at 1 n.1.
[15] Emergency Protocol, at 1.
[16] Emergency Protocol, at 1.
[17] Draft Protocol, at 1.
[18] Draft Protocol, at 3.
[19] Draft Protocol, at 1.
[20] Emergency Protocol, at 2-5.
[21] Letter of July 13, 2010, from Terry King, Attorney General of the State of Alabama, to The Honorable Barack Obama, at 2.
[22] *Id.*, at 2.
[23] Letter from Robert A. Butterworth, Jim Smith, Eugene E. Stearns, and Daniel J. Gerber, Florida Deepwater Horizon Legal Advisory Group to Hon. Charlie Crist and Attorney General McCollum, July 19, 2010 (''Legal Advisory Group Letter''), at 1, 3.
[24] Attorney General Bill McCollum News Release, Attorney General McCollum sends letter to Feinberg criticizing newly released claims protocol, Aug. 20, 2010, at 1.

not BP – for payments of their claims as well.''[25] Since this adversarial posture is likely to continue, the Protocols probably should be viewed somewhat similarly to U.S. EPA's guidances for settlements. That is, Feinberg's Protocols should be viewed as an initial position in a settlement negotiation with claimants, rather than as binding criteria announced by a facilitator or mediator. Moreover, the character of the statements in the Protocols resembles the studied ambiguity often found in provisions of international protocols—the product of diplomacy—more than a clear formula enabling claimants to assess the likelihood of compensation in advance. Let's examine a few provisions that support these conclusions.

Causation

Before the July Draft Protocol surfaced, BP stated that it intended to pay all ''legitimate claims,'' that is, claims for damages and losses caused by the spill that are substantiated for reasonable and necessary expenses.[26] In his many public pronouncements in June and July, Feinberg offered only very loose guidelines as to what claims might be deemed meritorious in his forum: proximity to the coast, dependence on the natural resources harmed by the spill and the hierarchy of industries most clearly affected.[27] Academics wondered how far the GCCF might stray from limitations on recovery embedded in state statutory and common law, particular since the OPA is ''silent on the question of whether individuals and businesses who suffer indirect losses from the spill would be able to obtain compensation,'' such as ''an oyster restaurant that must now import oysters, or a travel agent who has seen her bookings sink as oil befouls the beaches.''[28]

OPA uses the language ''due to'' to define the damages for which claims may be made.[29] And, indeed, the Draft Protocol at times tracks this ''due to'' language, for example with a reference to a ''[c]laim for damages *due to* physical injury to real or personal property,''[30] and a separate reference to damages ''equal to the loss of profits or impairment of earning capacity *due to* the injury, destruction, or loss of real property, personal property, or natural resources used by the Claimant.''[31] As Martin J. Davies, director of the Tulane Maritime Law Center, has noted, ''OPA doesn't say 'proximately caused by.' ''[32] Interestingly, the language of the Draft Protocol changes when the subject turns to Physical Injury/Death, which is not recoverable under the OPA. There, the Draft Protocol permits claims ''for physical injury to the body or death *proximately caused by* the Spill or the explosion and fire associated with the Deepwater Horizon incident.''[33]

Notwithstanding the differential language for these various categories of claim, the Draft Protocol seems to require ''proximate cause'' in all cases due to a separate section of the Protocol directly addressing ''Causation.'' That general provision reads as follows, ''The GCCF will only pay for harm or damage that is proximately caused by the Spill. A claim is not compensable if: (1) the Claimant's loss is a consequence of an injury to a third party proximately caused by the Spill (for example, the Claimant is a customer of or supplier to a business that has been injured); (2) the Claimant's loss is remote in time or place from the Spill; or (3) the Claimant's loss is the result of intervening events triggered by the Spill. The GCCF's causation determinations will be guided, as applicable, by OPA and other federal law, and the law of the state that would be applicable to a tort claim brought by the Claimant.''[34]

The attorneys general attacked this provision of the Draft Protocol mercilessly. For example, Attorney General McCollum opined, ''The protocol includes language requiring a claimant to show that his or her damages were 'proximately caused' by the oil spill. This requirement places a heavier burden of proof upon a claimant than is required by the OPA. This ambiguity disserves the public, is contrary to the goal of obtaining compensation for damages without the need for litigation, and violates OPA.''[35] The attorneys general of Maryland, Delaware, and North Carolina indicated in a letter to Feinberg, ''[W]e request that the draft protocol clarify that state law on proximate cause applies only to state tort claims for damages that are not covered by OPA, and that state law on proximate cause does *not* apply to OPA claims under the protocol.''[36]

The Causation provision in the August Emergency Advance Payment Protocol reads as follows, ''The GCCF will only pay for harm or damage that is proximately caused by the Spill. The GCCF's causation determination of OPA claims will be guided by OPA and federal law interpreting OPA and the proximate cause doctrine. Determinations of non-OPA claims will be guided by applicable law. The GCCF will take into account, among other things, geographic proximity, nature of industry, and dependence upon injured natural resources.''[37] Notice how this provision is more general and less definitive than the Draft Protocol. To some extent, the revised language avoids any implication that a proximate cause requirement more stringent than the causation requirement in OPA will be applied to OPA claims. It also suggests that ''applicable law'' will define the causation requirement in non-OPA claims rather than Feinberg's own notion of ''proximate cause,'' perhaps derived from general principles of tort law or the Restatements. On the other hand, the first sentence still uses ''proximately caused'' as a criterion. Again, this revised provision's text smacks of the kind of compromise language found in diplomatic negotiations in, e.g., the Kyoto Protocol, than the formulas in a scientific protocol, e.g., TCLP. This is equivocation.

[25] Legal Advisory Group Letter, at 8 (emphasis in original).
[26] Claims Overview - Darryl Willis - 7 July 2010, *available at http://bp.concerts.com/gom/claimsoverviewdarrellwillis070710.htm* (audio).
[27] *Id.*
[28] Choo, *supra* note 9, at 38.
[29] 33 U.S.C. § 2702.
[30] Draft Protocol, at 2.
[31] Draft Protocol, at 2.
[32] Choo, *supra* note 9, at 38.
[33] Draft Protocol, at 3.
[34] Draft Protocol, at 3.
[35] Attorney General Bill McCollum News Release, at 1.
[36] Letter from Douglas F. Gansler, Joseph R. ''Beau'' Biden, III, and Roy Cooper to Kenneth R. Feinberg, July 22, 2010, at 2.
[37] Emergency Protocol, at 5.

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If one views the Protocols more as BP's settlement guidance than as the actual criteria that a judge would use to resolve compensation claims, perhaps there is a method in Kenneth Feinberg's madness.

Both the Draft Protocol and the Emergency Advance Payments Protocol provide some clarifications for certain types of claims, giving substance to these general ''proximate cause'' requirements. For example, for property damages claims, the Draft Protocol clarifies, ''A claim for damages due to physical injury to real or personal property may be made by an Individual or Business who owns or leases the property, but duplication of claims by owner and lessee will not be recognized.''[38] The Emergency Advance Payments Protocol is more specific but at the same time less definitive regarding duplicative claims. It states, ''In order to avoid duplication of claims, an owner or lessee of the property must provide notice to all others with an ownership or lease interest in the property of the intent to file a claim. If duplicate claims are received, the GCCF will determine the appropriate claimant.''[39] It is less clear under the revised language whether the GCCF might determine an owner and a lessee of the same property both to be an ''appropriate claimant.'' If this is permitted, then why does the Emergency Advance Payments Protocol use the article ''the'' before ''appropriate claimant''? Can other claimants with an ''ownership interest'' (e.g., those holding only an easement) obtain compensation? The revised language may open the door to that.

In the Draft Protocol, commercial fisherman were partially protected with the following definition for Lost Profits and Lost Earning Capacity, ''The Claimant need not be the owner of the injured property or resources to recover for lost profits or income.''[40] This makes the Protocol consistent with state law in this area.[41] The Emergency Advance Payments Protocol contains the same language.[42] The Draft Protocol further explains that the Proof Required is that ''Claimant's lost earnings or profits were caused by the injury, destruction, or loss of a specific property or natural resource (such as lost income by a fisherman whose fishing grounds have been closed or lost profits by a hotel whose beach or swimming area has been oiled).''[43] It seems unlikely, though, that the Draft Protocol would authorize compensation of some claims cognizable under existing law in some states, for example where pollution diverts the run of a fishery owner which diminishes the value of his riparian property.[44] The Emergency Advance Payments Protocol, however, more clearly opens the door to more remote claims by changing the phrase ''by a hotel whose beach or swimming area has been oiled'' to ''a hotel or rental property that has had decreased profits because beaches, swimming, or fishing areas have been affected by oil from the Spill.''[45]

It seems likely though that some claims for which BP provided ''emergency'' compensation are not compensable under either Protocol's standards. Under the language of the Draft Protocol, while the GCCF might compensate local oysterman for the loss of their catch, it seems highly unlikely that his Virginia customers would have a claim—the loss would be ''remote in . . . place from the Spill.''[46] Again, though, the latter Emergency Advance Payments Protocol is more equivocal. The ''remote in . . . place'' exclusion in the Draft Protocol is replaced with language that ''GCCF will take into account, among other things, geographic proximity. . . .''[47] Nonetheless, Virginia does not seem geographically proximate to the Spill.

On July 21, Florida Governor Crist signed an executive order intended to give homeowners and businesses in the Florida Panhandle stronger footing to seek financial relief from plummeting home values as a result of the BP oil spill.[48] His order allows property appraisers in the 26 counties covered under a state-of-emergency declaration to give ''interim'' assessment to owners whose property values have eroded.[49] The adverse and erroneous publicity about potential oiling of Florida beaches as well as Governor Crist's order would seem ''intervening events'' that negate recovery under the ''Causation'' provision of the Draft Protocol.[50] This ''intervening event'' language does not appear in the Advance Emergency Payments Protocol. The reader is left to infer a lack of compensability from other provisions such as the requirement that property be ''physically damaged or destroyed'' and that loss of earning capacity be ''resulting from such damage'' in order to support recovery.[51] Crist's apparent theory of recovery for lost property values absent physical damage, however, seems rather problematic under either Protocol. But it's a closer call under the Emergency Advance Payments Protocol.

Review Procedures and the Required Waiver

Press releases at the time the White House announced the GCCF stated that compensation awards

[38] Draft Protocol, at 2.
[39] Emergency Protocol, at 2-3.
[40] Draft Protocol, at 2.
[41] Curd v. Mosaic Fertilizer, No. SC08-1920 (Fla. June 17, 2010); Leo v. General Electric Co., 538 N.Y.S.2d 844 (N.Y. App. Div. 1989); Louisiana ex rel. Guste v. The M/V Testbank, 524 F. Supp. 1170 (E.D. La. 1981), aff'd 729 F.2d 748 (5th Cir. 1984); Pruitt v. Allied Chemical Corp., 523 F. Supp. 975 (E.D. Va. 1981); Burgess v. The M/V Tamano, 370 F. Supp. 247 (D. Me. 1973), aff'd 559 F.2d 1200 (1st Cir. 1977); Carson v. Hercules Powder Co., 402 S.W.2d 640 Ark. 1966); Hamilton v. North Carolina Pulp Co., 27 S.E.2d 538 (N.C. 1943); Columbia River Fisherman's Protective Union v. City of St. Helens, 87 P.2d 195 (Or. 1939).
[42] Emergency Protocol, at 3.
[43] Draft Protocol, at 2.
[44] Hampton v. North Carolina Pulp Co., 27 S.E.2d 538 (N.C. 1943) (cause of action for nuisance stated on these facts).
[45] Emergency Protocol, at 3.
[46] *See supra* note 5 and accompanying text.
[47] Emergency Protocol, at 5.
[48] Josh Hafenbrack, *Crist orders ''interim land reassessments*,'' Sun-Sentinel (South Florida), July 22, 2010, at 8B.
[49] *Id.*
[50] *See supra* note 34 and accompanying text.
[51] Emergency Protocol, at 3.

would be subject to ''judicial review.''[52] Subsequent public descriptions of the program stated that compensation awards would be subject to review by a panel of three retired judges.[53] The Protocol references the GCCF Appeals Board, to which a Claimant may appeal the GCCF's ''Final Decision'' within seven days of receipt of that Decision. In the alternative, the Claimant may pursue ''the claim as permitted under OPA (33 U.S.C. § 2013).''[54] The panel of three retired judges, the so-called ''judicial review'' of compensation claims to which BP committed itself, in effect is a voluntary alternative dispute resolution mechanism where a Claimant is dissatisfied with the GCCF's resolution of his claim. The Claimant may use the mechanism but does not have to before seeking ''real'' judicial review. The Emergency Advance Payments Protocol does not address appeal or judicial review of claims determinations.

The Draft Protocol addresses the issue of collateral sources. The Draft Protocol states that, ''The amount of compensation will be reduced by the collateral source compensation that the Claimant has received due to the Spill . . . includ[ing], but . . . not limited to, insurance and payments by federal, state, or local governments related to the Spill.''[55] This means that the GCCF avoids payment for injuries for which the Claimant was reimbursed under first-party insurance, e.g., Business Interruption Insurance or a Homeowner's Property Damages Insurance. Because the insurer's loss would be ''a consequence of an injury to a third party proximately caused by the Spill,'' presumably the GCCF will also not reimburse the insurer, forcing it to seek remedies as a subrogee under state law. The East Coast attorneys general commented with respect to this provision that it ''may be inconsistent with the liability of a responsible party under OPA and state laws.''[56] The Emergency Advance Payments Protocol does not address the issue of collateral sources.

Before the GCCF began, Feinberg indicated that a discovery rule was needed in processing claims in the Gulf as some ''latent'' claims arising out of the spill may not be known to potential claimants for months and perhaps for years.[57] But the Draft Protocol has a rather rigid cutoff date for GCCF claims, stating, ''No claim may be submitted to the GCCF more than three years after the date that this Protocol becomes operative.''[58] Feinberg's role in the process essentially would be over by 2013 under this timetable. The states objected vociferously to this provision. Florida's Legal Advisory Group, for example, stated, ''The proposed Feinberg claims process appears to acquire individuals and businesses to waive their right to future damages in exchange for payments now and artificially imposes a very limited time period for filing claims. . . .''[59] The Group then asserted that ''[t]his contradicts the statutory intent of OPA 90,'' citing 33 U.S.C. § 2714(b)(2).[60]

The most important and perhaps the most controversial feature of the Draft Protocol concerns the relationship of claims from the Fund and litigation against BP. Though BP asserted that it would not seek reimbursement where a subsequent evaluation of a claim revealed overpayment, the Draft Protocol clarifies, ''Any Emergency Advance Payment made to a Claimant will be deducted from the Final Payment of the claim.''[61] More importantly, the Protocol states, ''If the Claimant decides to accept the Final Decision, the Claimant shall return to the GCCF a signed Release. The Release will waive any rights the Claimant may have against BP to assert additional claims, to file an individual legal action, to participate in other legal actions associated with the Spill, or to submit that claim for payment by the National Pollution Funds Center.''[62] In essence, the Protocol sets up a binding election between administrative compensation and the pursuit of legal relief.

The states and the plaintiff's bar reserved their most vociferous objections for this provision of the Draft Protocol. For example, Florida's Legal Advisory Group complained, ''Mr. Feinberg has made clear his intention to make settlement payments from the Fund final and binding– providing BP with a 'total peace' (Mr. Feinberg's words).''[63] East Coast state attorneys general asserted that a ''requirement that the claimant sign a general release of all rights the claimant may have against BP . . . is inconsistent with OPA.''[64] The Alabama attorney general concluded more broadly after a somewhat rhetorical legal analysis, ''No governmentally negotiated and endorsed protocol should contain any requirement that any claimant sign any release.''[65]

A related issue, not addressed in either Protocol, has been the subject of much discussion. To the extent that agreements between Feinberg and a claimant are intended to ''settle'' claims against BP through Feinberg's required waiver, the question arises whether the settling claimant may sue potential defendants other than BP. If so, it is unclear whether those other defendants might not in some circumstances be able to implead BP into the suit brought against them, by way of an indemnification or contribution action. Under CERCLA, this matter was eventually resolved through an amendment to the statute providing ''contribution protection'' by operation of law. Without such a provision, the ''waiver'' to sue BP might not extinguish its participation in an oil spill suit unless there is also an effective ''waiver'' of the claimant's suit against other potential defendants. Earlier drafts of the Protocol obtained by the *New York Times* seem to have provided precisely

[52] Jesse Lee, *supra* note 1.

[53] Oil Spill Economic Recovery Task Force, BP Claims Process, June 23, 2010 @ 9am, Minutes, at 2, *available at http://www.flgov.com/pdfs/grtf_bp20100623minutes.pdf.*

[54] Draft Protocol, at 7.

[55] Draft Protocol, at 7.

[56] Gansler, *supra* note 36, at 3.

[57] ''Feinberg: *BP 'Trying to Do the Right Thing' But Claims Need Expedited*, PBS NEWSHOUR, (PBS Broadcast, June 18, 2010), *available at* http://www.pbs.org/newshour/bb/politics/jan_june10/oil2_06_18.html. (''There are similar claims here. I must say, here, you can't really deal with that problem until the oil stops. We have got to get a final spill end point, from which we then can decide how to deal with latent claims, where people come to me with an injury now, but they're concerned that it will get worse. And we will have to deal with how we strike that balance.'').

[58] Draft Protocol, at 8.

[59] Legal Advisory Group Letter, at 2.

[60] *Id.*

[61] Draft Protocol, at 6.

[62] Draft Protocol, at 7.

[63] Legal Advisory Group Letter, at 2.

[64] Gansler, *supra* note 36, at 3.

[65] King Letter to President Obama, at 3.

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that, though this provision is missing from the July draft analyzed here.[66]

The Likely Limited Role of the GCCF

There is an obvious tradeoff between generosity of compensation in an administrative compensation scheme and the likelihood that a potential claimant will accept administrative payment rather than participate in lawsuits. In July and early August, Feinberg consistently asserted in his public pronouncements, ''The goal of this program is to minimize the legal technicalities and maximize efficient, swift payment.''[67]

There is little in the GCCF Protocol, however, that conflicts with the interest of BP. As noted above, the Protocols instruct the ''neutral fund administrator responsible for all decisions relating to the administration and processing of claims'' to limit payment to harm or damage ''that is proximately caused by the Spill.''[68] The amount of damages is to be reduced for amounts received from both public sources, such as Small Business grants, and private sources, such as insurance.[69] Claims received more than three years after the Protocol goes into operation will not even be processed, a very short statute of limitations indeed.[70] Claimants do not receive one dime in compensation other than emergency advance payments in most cases unless they sign a complete release of liability to BP for additional damages, known or unknown at the time of the signing of the release.[71]

Etiquette of Equivocation

Literally hundreds of lawsuits were filed in the immediate aftermath of the blowout.[72] Immediately after the Facility agreement was announced in June, the *Wall Street Journal* quoted a prominent Louisiana attorney who had filed numerous claims against BP on behalf of fishermen, shareholders and others, ''People are firing their lawyers right and left.''[73] In August, the Multidistrict Litigation (MDL) Panel met in Boise, Idaho, and decided to consolidate and hear federal litigation in fifty cases pending before the panel, with over 268 cases in suit, in the United States District Court for the Eastern District of Louisiana, before Judge Carl Barbier.[74] Much of this litigation will go forward even if the GCCF is wildly successful. The GCCF is to process only claims by private entities. The United States Department of Justice is conducting a criminal investigation into the spill.[75] The CEO of BP resigned.[76] Remediation costs and potential natural resource damages claims by federal and state agencies are probably enormous.[77] Because of restrictions and ambiguities in the GCCF Protocols, more individual and business claimants, including some who took BP's six-month ''emergency advance payment,'' will decide to wait for the Justice Department's and various state attorney generals' discovery against BP, and hire an attorney, purchasing a ticket in the lawsuit lottery. Three years down the road, as Feinberg wraps up his GCCF, the first trials probably will just be getting underway.

On the other hand, as the years go by some may lose sympathy for those who want to charge BP for economic troubles only remotely related to the spill. After all, BP's spill compensation fund is not supposed to be an alternative means of stimulating the general economy or the financing of cash-strapped state and local government of the Gulf states, much less the Ft. Lauderdale tourism bureau or the Virginia oyster industry. At some point, ''adding in effect to the penalties of the statute by making the defendant liable for an unrelated harm could result in overdeterrence.''[78] As Professor Shapo notes, ''What is important, in the end, is that courts keep in mind not only the 'purpose' of a particular statute, but the purposes of the law of torts.''[79] If one views the Protocols more as BP's settlement guidance than as the actual criteria that a judge would use to resolve compensation claims, perhaps there is a method in Feinberg's madness. In the Protocols, he is implicitly telling us that he is settling, not adjudicating, compensation claims against BP. Like EPA's Settlement Guidances, the Protocol either lays out BP's position or, in the alternative, says little about how a particular claim will be resolved.

Which view is correct? I can't (or won't) say. That is the essence of the etiquette of equivocation.

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[66] Ian Urbina, *BP Settlements Likely to Shield Top Defendants*, *N.Y. Times*, Aug. 20, 2010, available at http://www.nytimes.com/2010/08/20/us/20spill.html.

[67] Choo, supra note 9, at 40.

[68] Draft Protocol, at 2, 3; Emergency Protocol, at 2, 5.

[69] Draft Protocol, at 7.

[70] Draft Protocol, at 8.

[71] *See supra* note 62 and accompanying text. BP had not paid emergency compensation for two-thirds of the claims which had been submitted to it when it handed over the claims process to the GCCF.

[72] *E.g.*, *The Gulf Spill scorecard: lawyers, cases, locales*, Nat'l L.J. , May 24, 2010, at 4.

[73] Dionne Searcey, *Lawyers Scramble for BP Claims Funds*, Wall St. J., July 1, 2010, *available at http://online.wsj.com/article/SB10001424052748704334604575339181601240578.html?KEYWORDS=bp+spill+lawyers ; see also* Dionne Searcey, *Oil Spill Lawyers Competing Against BP. . . and the Government*, Wall St. J., July 1, 2010, *available at http://blogs.wsj.com/law/2010/07/01/oil_spill_lawyers_competing_against_bp_and_with_the_government/?KEYWORDS=bp+spill+lawyers*

[74] In re Oil Spill by the Oil Rig ''Deepwater Horizon'' in the Gulf of Mexico on April 20, 2010, J.P.M.L., No. 2179, hearing set 7/29/10; *see generally* Scott Summy, *Managing Claims Arising from the Gulf Coast Oil Spill: Multidistrict Litigation v. the $20 Billion Fund,* 25 Toxics Law Reporter (BNA) 685 (July 8, 2010).

[75] David Ingram & Tresa Baldas, *Oil Cases Muddied: Lawyers say DOJ probe will complicate civil suits over spill*, Nat'l L.J., June 7, 2010, at 1.

[76] Guy Chazen & Monica Langley, BP*'s Dudley Faces Daunting To-Do List*, Wall St. J., July 26, 2010, *available at http://online.wsj.com/article/SB10001424052748703700904575391251924699166.html?mod=WSJ_hps_LEFTWhatsNews*.

[77] *E.g.*, *Gulf Damages Assessment in Early Stages; Officials Say Full Accounting Years Away*, 143 Daily Report for Executives (BNA) A-36 (July 28, 2010) (reporting natural resources trustee testimony before Senate subcommittee on July 27).

[78] William Landis & Richard Posner, *Causation in Tort: An Economic Analysis*, 12 J. Legal Studies 109, 131 (1983).

[79] Marshall S. Shapo, Basic Principles of Tort Law ¶ 56.05 (1999), at 261.