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For a Fistful of Dollars: Quick Compensation and Procedural Rights in the Aftermath of the 2010 Deepwater Horizon Oil Spill

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I
ABSTRACT

Created by BP at the behest of the White House in the wake of the Deepwater Horizon Oil Spill, the $20-billion Gulf Coast Claims Facility (GCCF) is not a proper model for government involvement in the resolution of mass torts. Like the Coast Guard-administered Oil Spill Liability Trust Fund (OSLTF), it requires that victims forego their right to litigate their legal claims in order to receive quick and much-needed financial assistance. In this respect, these programs are merely government-sanctioned—and in the case of the OSLTF, government-funded—settlement agencies. They do not provide claimants with the robust due-process guarantees of judicial adjudication.

In contrast, the Small Business Administration's Economic Injury Disaster (EID) loans program allows the government to provide victims with quick financial assistance without requiring victims to surrender any procedural rights, including the right to litigate their claims. Building on this concept, I propose an alternative form of government involvement for disasters, like the Deepwater Horizon oil spill, where a party is responsible for the damages suffered by victims.

In this proposed program, the government would provide victims with an advance on the expected pay-out of their claims. While traditionally victims bear the cost of accidents during litigation, these loans would spread that cost among taxpayers during the pendency of litigation. Further, the program would give victims the option of litigating their claims, while still receiving quick financial relief, thereby increasing their access to courts. Such a program would be valuable even if victims decided to settle their

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claims rather than litigate. Having received financial assistance, victims could negotiate fair outcomes by credibly threatening to take their claims to court.

II
INTRODUCTION

The April 20, 2010 explosion of the Deepwater Horizon rig and ensuing oil spill crippled the economy of the Gulf Coast. Energy, seafood, and tourism—the prime engines of the area's economy—suffered greatly as a result of the estimated 4.9 billion barrels of crude oil released into the waters.[1] In July 2011, some fifteen months after the explosion, nearly 5000 miles of coastline in Louisiana, Mississippi, Alabama, and Florida remained contaminated.[2] For months, the government was forced to ban fishing across thousands of square miles of the Gulf as a result of the presence of toxic tar balls and to impose a moratorium on oil and gas drilling in the Gulf.[3]

The residents of the Gulf Coast, who had already suffered so much as a result of Hurricane Katrina, which hit in 2005, needed quick financial assistance in the wake of this new disaster. Yet, traditional adjudication had a poor track record with regard to swift compensation. Indeed, litigation in the wake of the 1989 Exxon-Valdez oil spill stretched on for two decades. From 1989 to 2009, the Exxon-Valdez litigation made its way from the Federal District Court for the District of Alaska, to the Ninth Circuit, and ultimately to the U.S. Supreme Court, which ruled that the jury-awarded punitive damages were excessive and should not exceed compensatory damages.[4] After a pro-plaintiff ruling by the Ninth Circuit in June 2009, Exxon abandoned its appeals, and a Satisfaction of Judgment was entered in December 2009, two decades after the oil spill.[5]

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[1]Maureen Hoch, *New Estimate Puts Gulf Oil Leak at 205 Million Gallons*, PBS NEWSHOUR (Aug. 2, 2010, 10:07 PM), http://www.pbs.org/newshour/rundown/2010/08/new-estimate-puts-oil-leak-at-49-million-barrels.html.

[2]Jim Polson, *BP Oil Still Ashore One Year After End of Gulf Spill*, BLOOMBERG (Jul. 15, 2011, 4:50 PM), http://www.bloomberg.com/news/2011-07-15/bp-oil-still-washing-ashore-one-year-after-end-of-gulf-spill.html.

[3]Press Release, U.S. Dep't of the Interior, Interior Issues Directive to Guide Safe, Six-Month Moratorium on Deepwater Drilling (May 30, 2010), available at http://www.doi.gov/news/pressreleases/Interior-Issues-Directive-to-Guide-Safe-Six-Month-Moratorium-on-Deepwater-Drilling.cfm; John Collins Rudolf, *Fishing Banned in Stretch of Gulf*, N.Y. TIMES (Nov. 29, 2010 1:58 PM), http://green.blogs.nytimes.com/2010/11/29/fishing-banned-in-stretch-of-gulf/.

[4]Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

[5]Baker v. Exxon Mobil Corp, Nos. 04-35182 & 04-35183, D.C. No. 89-CV-00095-HRH (Dec. 15, 2009); see also Exxon Valdez *Oil Spill Litigation Update*, FAEGRE BAKER DANIELS (May 11, 2011), http://www.faegrebd.com/showarticle.aspx?Show=2881.

President Obama repeatedly underlined the importance of quick relief to victims of the Deepwater Horizon, noting that "some of [the victims], if they don't get relief quickly, may lose businesses that have been in their families for two or three generations."[6] The administration brought pressure to bear on BP in an effort to ensure victims would receive quick compensation.[7] The result, after much arm-twisting by the White House, was the creation by BP of the Gulf Coast Claims Facility (GCCF), complete with a $20 billion trust fund, to settle liabilities arising from the oil spill.[8] The BP leadership, with President Obama's approval, appointed Kenneth Feinberg, who, at the time, was finishing his tenure as the administration's "Pay Czar," to administer the GCCF. The White House heralded the creation of this "new, independent claims process . . . with the mandate to be fairer, faster, and more transparent in paying damage claims by individuals and businesses."[9]

Now that Feinberg's GCCF has closed its doors, replaced by a court-supervised settlement program, this paper will examine the costs imposed upon victims' procedural rights in exchange for these quick settlements.[10]

In addition to examining the procedural advantages and costs of the GCCF, which reviewed and paid out claims submitted to BP by victims of the oil spill, this paper will also consider two other legal processes deployed in the wake of the oil spill to provide quick relief to victims—the Coast Guard-administered Oil Spill Liability Trust Fund (OSLTF), to which victims could submit their claims if they were dissatisfied with BP's settlement offer, and the Small Business Administration's Economic Injury Disaster (EID) loan program, which offered low-interest loans to small businesses that suffered economic loss as a result of the oil spill.

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[6]Barack Obama, Statement by the President After Meeting with BP Executives (June 16, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives).

[7]See, e.g., Helene Cooper & Jackie Calmes, *In Oval Office Speech, Obama Calls for New Focus on Energy Policy*, N.Y. TIMES, June 16, 2010, at A1 (reporting that "[l]awyers at the White House and for BP have been negotiating for days about an escrow account").

[8]Obama, supra note 6.

[9]Press Release, Office of the Press Secretary, White House, Fact Sheet: Claims and Escrow (June 16, 2010), available at http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow.

[10]Following an Agreement-in-Principle between BP and the plaintiffs to settle lawsuits arising from the Deepwater Horizon oil spill, on March 8, 2012, Judge Barbier of the United States District Court issued an order creating a Transition Process and appointed a Transition Coordinator, Lynn Greer, to facilitate and oversee the evaluation and payment of pending Gulf Coast Claims Facility (GCCF) claims until such time that a Court Supervised Claims Program commences under the terms of a proposed settlement. Judge Barbier also appointed a Claims Administrator, Patrick Juneau, to oversee the Transition Coordinator and the Transition Process as well as the Court Supervised Claims Program. In re Oil Spill by the Oil Rig "Deepwater Horizon"in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. Mar. 8, 2012); GULF COAST CLAIMS FACILITY (May 1, 2012), http://www.gulfcoastclaimsfacility.com/.

All three of these programs are, at least in part, products of the Oil Pollution Act (OPA), a law passed in the wake of Exxon-Valdez, which governs recovery of economic losses resulting from an oil spill.[11] The GCCF satisfied BP's obligation to establish a process for victims to make claims against it. This duty stemmed from BP's acceptance of its designation as a "responsible party" under OPA.[12]

The Act also gave life to the OSLTF, which is financed through a per-barrel tax on domestic oil production and imports. While OPA requires victims to present their claims to BP and wait ninety days before taking any further legal action, once this period has lapsed, they may present unresolved claims to the OSLTF.[13] If a claimant accepts compensation offered by the OSLTF, the government is subrogated to their right to recover from BP.[14] The government then is left to recover from the responsible party.

Finally, OPA requires the President to "establish a loan program under the [OSLTF] to provide interim assistance to fishermen and aquaculture producer claimants during the claims procedure."[15] Implementation of this provision has mainly been through the Small Business Administration's (SBA) low-interest EID loans. These loans provide cash-flow loans based on pre-disaster economic activity to small businesses on the Louisiana coast that have been injured by the oil spill.

In this Article, I argue that far from being a "new [and] independent" process for adjudicating claims, the GCCF was, in essence, a settlement agency for BP. As with any settlement agency, the GCCF provided no procedural guarantees of fairness. While under Feinberg's leadership, the facility adopted a policy of principled generosity, such measures and any substantively just outcome they allowed for, depended entirely on the goodwill of the institution's administrator.

Because it is managed by the Coast Guard, which is not a party to the dispute, the OSLTF enjoys much greater independence than the GCCF in administering claims. However, like the GCCF, the OSLTF deprives victims of enjoying the full array of guarantees of due process afforded by the judiciary—the right to discovery, the right to a trial by jury, and the right to examine and confront adverse evidence.

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[11]33 U.S.C. §§ 2701-2720 (2012).

[12]Id. § 2714.

[13]Judge Barbier ruled that the Oil Pollution Act (OPA) and the Outer Continental Shelf Lands Act (OCSLA) preempt state-law actions given that the oil discharge from the Deepwater Horizon well occurred outside of state waters. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 808 F. Supp. 2d 943, 958 (E.D. La. 2011).

[14]33 U.S.C. § 2715.

[15]Id. § 2713(f).

In contrast, the low-interest EID loans offer the possibility of providing victims with access to quick financial relief without depriving them of any forum for seeking compensation for damages suffered. Rather, by providing victims with a degree of financial stability, such loans afford victims an opportunity to litigate their claims. Or, if they decide to settle, the loans allow their negotiations to take place in the shadow of credible threats of lawsuits.

III
THE GULF COAST CLAIMS FACILITY

A. Background

In the wake of the 1990 Exxon-Valdez oil spill, Congress enacted OPA. OPA replaced the common-law rule inherited from *Robins Dry Dock*, which limited economic damages under maritime law to (1) fishermen and (2) property owners whose property was damaged by the oil.[16] In its stead, OPA established a strict liability regime for certain economic losses in navigable waters and along shorelines.[17] OPA allowed persons to recover for economic loss if they could prove that they had suffered such losses because a spill had "damaged, destroyed or otherwise rendered physically unavailable to them property or resources that they ha[d] a right to put to commercial use."[18]

One important aspect of OPA is that it requires victims of an oil spill to present their claims to a "responsible party" and wait ninety days before being able to take further action—either by filing a claim with the Coast Guard's OSLTF or by bringing an action under OPA in federal district court.[19]

Following the process set forth by OPA, in the immediate wake of the oil spill, on April 28, 2010, the President, acting through the Coast Guard,

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[16]Robins Dry Dock *& Repair Co. v. Flint*, 275 U.S. 303 (1927).

[17]33 U.S.C. § 2702.

[18]JOHN C. P. GOLDBERG, ECONOMIC LOSS IN CONNECTION WITH THE DEEPWATER HORIZON SPILL (2010), available at http://dash.harvard.edu/handle/1/4595438. Professor Goldberg prepared this report at the request of Kenneth Feinberg. See Letter from Professor John C. P. Goldberg, Harvard Law School, to Kenneth R. Feinberg, Administrator, Gulf Coast Claims Facility, available at http://www.scribd.com/doc/45805004/Goldberg-memo-Feinberg-bp-Claims.

[19]OPA places a $75 million cap on the liability of an oil company responsible for a spill. 33 U.S.C. § 2704. However, this cap does not include the responsible party's liability for state and federal cleanup costs and does not apply if BP or any of its contractors acted with gross negligence or violated any federal safety law or regulation. In the context of the Deepwater Horizon oil spill, this liability cap never became an issue because BP filed court documents waiving the limit. Statement of BP Exploration & Production Inc. re Applicability of Limit of Liability Under Oil Pollution Act of 1990, In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. Oct. 18, 2010), 2010 WL 4151003.

named BP a "responsible party."[20] BP accepted the designation and began setting up a process for victims to make claims against it, as required by OPA. However, BP's early efforts to administer a claims department were met with deep skepticism. Many claimants expressed frustrations about the inadequacy of BP's payments.[21] BP had initially decided to pay $5000 per month to fishing-boat captains and $2500 to deckhands as a settlement of interim, short-term damages.[22] Shrimp fishermen were especially vocal in expressing the woeful inadequacy of these payments, which were significantly below their pre-oil-spill income.[23] They also complained that BP's requirements for documentation were too stringent and made it exceedingly difficult to present viable claims.[24] Furthermore, various commentators raised the concern that BP might declare bankruptcy and thereby leave claims under-funded.[25]

The administration brought pressure to bear on BP to encourage it to address these issues. The result, after weeks of arm-twisting by the President, was the creation of the GCCF, complete with a $20 billion fund to settle liabilities arising from the oil spill. This political victory by the administration was touted in a White House press conference on June 16, 2010.[26] The endowment was placed in escrow under the administration of Ken Feinberg, who, at the time, was finishing his tenure as the administration's "Pay Czar." BP agreed to cease paying dividends to its shareholders and to immediately place $3 billion into an irrevocable trust. The trust agreement provides that BP cannot recover any portion of the $20 billion until a substantial number of outstanding claims are resolved.[27] The rest of the money was paid on a quarterly basis over 3.5 years, out of BP's ongoing revenue.[28]

The GCCF thus replaced BP's internal claims processing arm to fulfill the firm's legal obligations under OPA. Indeed, after BP created the GCCF and shut down its internal claims processing facility in June 2010, the GCCF

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[20]Letter from James H. Dupree, President, BP Exploration and Production Inc., to U.S. Coast Guard Claims Division (May 3, 2010), available at http://www.uscg.mil/foia/docs/DWH/2886.pdf.

[21]Robbie Brown & Michael Cooper, *BP Pays Out Claims, but Satisfaction Is Not Included*, N.Y. TIMES, June 7, 2010, at A14.

[22]Id.

[23]Id.

[24]Id.

[25]*See, e.g.*, Andrew R. Sorkin, *Imagining the Worst in BP's Future*, N.Y. TIMES, June 8, 2010, at B1.

[26]Obama, supra note 6.

[27]Deepwater Horizon Oil Spill Trust, available at http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/gom_response/STAGING/local_assets/downloads_pdfs/-Trust_Agreement_Executed_Copy.pdf.

[28]U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-397R, DEEPWATER HORIZON OIL SPILL: UPDATE ON FEDERAL FINANCIAL RISKS AND CLAIMS PROCESSING 19 (2011), available at http://www.gao.gov/new.items/d11397r.pdf.

became the "official way for individuals and businesses to file claims for costs and damages."[29] The GCCF is therefore the mandatory first step for victims of the oil spill. They must go to the GCCF before they can take their OPA claim to the OSLTF or federal court. The GCCF protocols provide that "Feinberg and the GCCF are acting for and on behalf of BP Exploration & Production Inc. in fulfilling BP's statutory obligations as a 'responsible party' under OPA."[30]

B. The Gulf Coast Claims Facility as Settlement Agency

Although OPA mandates that victims present their claims to the responsible party and wait ninety days before filing suit, it does not require the responsible party to offer any guarantees that its settlement offers are fair. Rather, underlying this presentment requirement is the enacting Congress' beliefs that (1) lawsuits under OPA are appropriate only where attempts to reach settlements with the responsible party are unsuccessful and (2) oil-spill litigation is so costly and cumbersome that it should be avoided.[31] This legislative history makes clear that OPA did not require that the GCCF be anything more than a settlement agency for BP.

The GCCF functioned largely like a traditional settlement agency. Most claims payments required victims to release BP, as well as any other potentially liable parties, from liability. Furthermore, the contract appointing Feinberg as administrator of the GCCF—a private agreement between BP and Feinberg's firm, Feinberg Rozen—provided that either party could terminate the arrangement prior to its August 31, 2013 expiration.[32] In particular, BP could terminate the arrangement if it determined that Feinberg Rozen had "breached its fiduciary obligations to expend funds, and administer and resolve claims in accordance with the Claims Protocols."[33] In turn, the Claims Protocols, which spelled out the rules under which the GCCF operated, provided that the GCCF's role was to fulfill BP's obligation under OPA

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[29]GULF COAST CLAIMS FACILITY, GULF COAST CLAIMS FACILITY PROTOCOL FOR INTERIM AND FINAL CLAIMS (2011), available at http://www.afj.org/connect-with-the-issues/the-corporate-court/crude_justice/gccf-protocol-for-interim-and-final-claims-2010.pdf.

[30]Id.

[31]H.R. REP. NO. 242, at 66 (1989); 135 CONG. REC. H7962 (statement of Rep. Hammerschmidt); 135 CONG. REC. H7965 (statement of Rep. Lent); see also Johnson v. Colonial Pipeline Co., 830 F. Supp. 309, 310-311 (E.D. Va. 1993) (explaining that "[t]he purpose of the claim presentation procedure is to promote settlement and avoid litigation").

[32]*BP-Feinberg Agreement* at 14, available at http://media.al.com/live/other/feinberg%20exhibit%20Jan%2018%202011.pdf.

[33]Id.

to establish a claims process.[34] These terms afforded BP the ability to terminate the agreement with relative ease.

The GCCF's other contractual obligations toward BP were also consistent with its role as a settlement agency. The GCCF was required to provide monthly reports regarding distributions made to beneficiaries.[35] It was also required to turn over all information gathered from claimants to BP, with no restrictions as to its use, as well as to give BP prior notice before revealing any confidential information to any other party so that BP could seek a protective order.[36] In administering the GCCF, Feinberg Rozen, LLP agreed to comply with BP's Code of Conduct.[37]

C. A Publicly-Minded Administrator

Despite being a contractor hired and paid by BP to discharge the company's obligations under OPA, Feinberg endeavored to administer the GCCF with principled generosity toward claimants.[38] Nothing in OPA required such an approach. However, Feinberg had both the ability and willingness to try and make the GCCF as fair an institution as he could.

Part of the agreement between BP and the White House, in the wake of the Deepwater Horizon explosion, was that Feinberg would be appointed to administer the GCCF. Feinberg had established himself as the country's foremost expert on administering compensation funds for victims of mass torts.[39] President Obama announced the appointment himself in a speech from the White House.[40] In practice, Feinberg therefore enjoyed wide discretion in administering the fund, enforced by the risk of political backlash against BP. However, this discretion was constrained by the fact that, ultimately, the GCCF was a settlement agency created and funded by BP.

Federal District Judge Barbier, who presides over the multi-district litigation that consists of hundreds of consolidated cases stemming from the oil spill, recognized this when he handed down an order enjoining Feinberg

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[34]Id. at 26.

[35]In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 323866, at *5 (E.D. La. Feb. 2, 2011).

[36]Id.

[37]Id. at *6; BP's Code of Conduct provides BP employees and contractors with BP's internal rules. BP, CODE OF CONDUCT, available at http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/C/Code_of_Conduct_2011.pdf.

[38]Determining whether or not Feinberg succeeded in providing victims with adequate—or even liberal—compensation is beyond the scope of this Article.

[39]Jeff McDermott, *Kenneth R. Feinberg: A Profile in Public Service*, FED. LAW., May 2008, at 38.

[40]Obama, supra note 6.

from representing himself as independent from BP.[41] Plaintiffs had appealed to Judge Barbier to oversee or supervise communications between the GCCF and the putative class of victims under Rule 23 of the Federal Rules of Civil Procedure to ensure that communications were "neither misleading nor confusing."[42] In particular, plaintiffs had sought an order enjoining Feinberg and the GCCF from representing that they were "independent" or "neutral" as well as from directly contacting represented parties.[43]

In his opinion, Barbier granted the plaintiffs' motion and concluded that the GCCF was not "fully independent" from BP but rather a "hybrid entity."[44] He recognized that while BP had delegated to Feinberg and the GCCF independent evaluation and payment of individual claims, Feinberg's duties to BP greatly constrained this independence. Barbier concluded that "while Mr. Feinberg appears 'independent' in the sense that BP does not control Mr. Feinberg's evaluation of individual claims, Mr. Feinberg and the GCCF cannot be considered 'neutral' or totally 'independent' of BP."[45]

Feinberg's approach to the GCCF was that of a trusted repeat player, focused on integrity and credibility. Prior to his tenure at the GCCF, Feinberg held a number of similar positions, including serving as the administration's "pay czar" and as administrator of the government-operated 9-11 compensation fund.[46] In the latter capacity, he used his discretion as administrator to further policies he believed to be just. For example, although Congress had required payments to claimants to reflect economic loss, Feinberg used his discretion to narrow the gap between high end and low-end awards. His motivation was Senator Edward Kennedy's advice that he "make sure that 15 percent of the families don't receive 85 percent of the . . . money."[47]

As GCCF administrator, Feinberg understood himself as having two duties—one to BP and one to the White House, which had requested that Feinberg be appointed to head the GCCF. He understood his first duty as requiring him to act on behalf of BP to curtail litigation by offering settlements to potential claimants. His second duty, on behalf of the President, was to ensure that all eligible claimants received compensation. Feinberg managed these two conflicting duties by striving to maintain credibility with all sides. For example, he felt the GCCF should err on the side of generosi-

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[41]In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 323866, at *5-6 (E.D. La. Feb. 2, 2011).

[42]Id. at *1.

[43]Id. at *2.

[44]Id. at *5.

[45]Id. at *6.

[46]Kenneth R. Feinberg, *Symposium on Executive Compensation Keynote Address*, 64 Vand. L. Rev. 349, at n.a1 (2011).

[47]KENNETH R. FEINBERG, WHAT IS LIFE WORTH 47 (2005).

ty. He believed that the GCCF should find eligibility and calculate damages more generously than required by OPA.[48] However, he also believed all claims should be documented so as to distinguish the legitimate from the illegitimate.[49] In his own words, "[y]ou try to err on the side of being generous without being Santa Claus."[50]

The understanding between BP and the White House that Feinberg would enjoy broad discretion in administering the GCCF is reflected in a number of legal documents. First, BP granted the GCCF unfettered access to the $20-billion trust it created to fund its Deepwater Horizon-related liabilities.[51] The agreement creating the irrevocable trust provided that, as the GCCF administrator, Feinberg had the authority to "direct the [c]orporate [t]rustee [of the trust fund] to make . . . distributions directly [from the trust fund] to GCCF Beneficiary in respect of a GCCF Claim."[52] This provision thus constrained BP's ability to prevent pay-outs based on claims approved by Feinberg.

Second, Feinberg's contract with BP repeatedly affirmed his independence in administering the GCCF.[53] Thus, while he ultimately had a duty to BP, the contract provided him with broad license to administer the GCCF, as long as BP chose to retain his services. The "Recitals" section provided that the GCCF was established "to *independently* administer and where appropriate settle and authorize the payment of certain Claims asserted against BP."[54] Further, the addendum to the contract that outlined the services to be performed by Feinberg specified that:

> Feinberg Rozen shall *independently* determine whether a given Claim is compensable and, if so, the appropriate amount of compensation. . . . As the decisions of Feinberg Rozen regarding compensability of GCCF Administered Claims are *independent*, methodologies applied and decisions made by Feinberg Rozen in connection therewith shall not be deemed endorsed or concurred in by BP.[55]

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[48]Letter from Kenneth R. Feinberg, Administrator, Gulf Coast Claims Facility, to Thomas J. Perrelli, Assoc. Attorney Gen., U.S. Dep't of Justice (Nov. 30, 2010), available at http://media.al.com/live/other/2010-11-30%20Feinberg%20to%20Perrelli%20Letter%20corr.pdf.

[49]Interview with Kenneth R. Feinberg, former Administrator, Gulf Coast Claims Facility, in N.Y.C., N.Y. (Jun. 25, 2012).

[50]Kenneth Feinberg, *How To Give Away $5 Billion*, BLOOMBERG BUSINESSWEEK MAGAZINE, Sept. 22, 2011, http://www.businessweek.com/magazine/how-to-give-away-5-billion-09222011.html.

[51]Deepwater Horizon Oil Spill Trust, supra note 27.

[52]Id. at 6.

[53]*BP-Feinberg Agreement*, supra note 32.

[54]Id. at 6 (emphasis added).

[55]Id. at 24 (emphasis added).

In addition, the contract provided that Feinberg Rozen was an independent contractor and not an agent or representative of BP and that no attorney-client relationship existed between the two entities.[56]

Further, the contract provided that "BP shall not exercise . . . termination rights without first seeking the concurrence of the United States Department of Justice."[57] This clause would not have prevented BP from terminating the contract in the event that the Department of Justice (DOJ) had decided not to express any view or even had chosen to withhold its concurrence.[58] However, by requiring BP to inform the DOJ prior to terminating the contract, the clause would have increased the political visibility of any effort by BP to remove Feinberg.

D. Traditional Settlement Offers and Publicly-Minded Alternatives

As administrator of the GCCF, Feinberg served the interest of BP—to settle claims and avoid litigation. However, within this traditional settlement structure, he endeavored to create a system that was fair and generous. For example, he used this discretion to create a diverse menu of settlement options from which claimants could choose. The GCCF offered some very traditional settlement offers such as final payments, which compensated victims for documented damages, as well as future expected damages, in exchange for full releases from liability.[59] Others, such as the partial payments, allowed victims to receive compensation for documented damages but retain the right to sue BP for future damages.[60]

In addition, until November 23, 2010, the GCCF offered claimants the opportunity to receive Emergency Assistance Payments (EAP). These provided victims with immediate relief with no obligation to give up the right to sue BP or any other responsible parties. Rather, any EAP was simply deducted from any future final payment from the GCCF.[61] EAP claims were evaluated under a less rigorous standard than that applied to Final Payments.[62] Although these EAPs were only available for three months—from August 23 until November 23—169,204 claimants received a total of

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[56]Id. at 15-16.

[57]Id. at 15.

[58]Id.

[59]Gulf Coast Claims Facility, supra note 29.

[60]Id.

[61]Id.

[62]Gulf Coast Claims Facility, Protocol for Emergency Advance Payments (2010), available at http://www.restorethegulf.gov/sites/default/files/imported_pdfs/library/assets/gccf-emergency-advance-payments.pdf.

$2.5 billion under the program.[63] This menu of options reflected Feinberg's belief that the GCCF offered victims a better deal than they would get by going to court. Feinberg was therefore confident that most claimants who took partial payments or EAPs would return to the GCCF for a final payment after assessing their options.

Furthermore, Feinberg succeeded in imposing an internal appeals process that BP had to go through to contest any claims payments.[64] The GCCF Appeals Judges were retired judges, legal academics, mediators, and arbitrators appointed by Jack M. Weiss, the Chancellor of Louisiana State University's Law Center.[65] Weiss himself was appointed by Feinberg. The fact that BP was required to avail itself of this forum to appeal the GCCF's decisions suggested that the GCCF's decision-making process was independent from BP. Furthermore, because the pool of Appeals Judges was composed of legal figures whose ties to BP were less direct than Feinberg's, its creation tended to make it more difficult for BP to exercise tight control over the GCCF's decision-making process.

E. Further Limitations on the Gulf Coast Claims Facility's Independence

Although Feinberg was effective at leveraging political pressure on BP in order to increase the independence of the GCCF, the Facility was ultimately a settlement agency. It was the fruit of a private contract between BP and Feinberg's law firm, Feinberg Rozen; it was financed by BP; and its purpose was to satisfy BP's obligation under OPA to create a process through which victims could settle claims against the designated responsible party.

In his opinion, Judge Barbier mentioned one particularly flagrant example of BP's interference in the GCCF process.[66] In a news story published on January 31, 2011, the Associated Press reported that the GCCF made a $10 million payment to a company at the request of BP, without reviewing the claim's merits.[67] According to Feinberg's statements to the Associated Press

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[63]GULF COAST CLAIMS FACILITY, EXECUTIVE SUMMARY (2011), available at http://www.gulfcoastclaimsfacility.com/GCCF_Exec_Summary_FINAL.pdf.

[64]GULF COAST CLAIMS FACILITY, supra note 29.

[65]Id.; Press Release, Gulf Coast Claims Facility, Gulf Coast Claims Facility Announces the Appointment of Jack M. Weiss to Select Appeals Judges (Mar. 24, 2011), available at http://www.gulfcoastclaimsfacility.com/press19.php. The full list is available at *25 Appointed to GCCF Appeals Panel*, FOX10 (June 9, 2011 11:27 AM), http://www.fox10tv.com/dpp/news/gulf_oil_spill/25-appointed-to-gccf-appeals-panel.

[66]In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 323866, at *6 n.3 (E.D. La. Feb. 2, 2011).

[67]Wendy Koch, *AP: Of 91,000 Gulf Oil Spill Claims, One Final Payment*, USA TODAY (Feb. 1, 2011, 7:55 AM), http://content.usatoday.com/communities/greenhouse/post/2011/01/bp-gulf-oil-spill-claims/1#.T6AXiMRYvqo.

on the matter, BP reached a settlement with a private party and ordered Feinberg to issue the payment. Feinberg noted that the GCCF never reviewed the claim and merely "honored the request of the parties to fund the claim."[68] A BP spokesperson called it "a unique situation in which an existing BP partner and BP submitted a view on a specific claim" to the GCCF.[69] Whatever the exact process, the news story highlighted BP's ability to influence the GCCF claims process.

Furthermore, although BP granted Feinberg unfettered access to the trust fund, BP continued to have an interest in resolving claims as cheaply as possible. This interest provided BP with an incentive to restrain Feinberg's independence and exercise whatever pressure it could on him to ensure that claims were settled as cheaply as possible. First, the trust agreement provided that upon expiration of the trust term, any funds remaining would return to the Grantor.[70] That is, if BP's liabilities—which include claims resolved and settled by the GCCF, amounts owed pursuant to other settlements or final judgments, natural-resource damage costs, and state and local government response costs—ended up being less than $20 billion, BP would recover any funds remaining in the account.

The scheduled expiration date for the trust is April 30, 2016.[71] It should be noted, however, that this date could be substantially extended. At their discretion, individual trustees are authorized to extend the trust's term in order to satisfy claims that could foreseeably be presented to the trust.[72] Nonetheless, any unspent funds would, at some point, be returned to BP.

Second, if BP's liabilities end up exceeding $20 billion, it will have to provide funds in excess of those in the trust fund to cover them. In such a scenario, BP's interest is best served if the GCCF has resolved claims as cheaply as possible in order to keep total liabilities to a minimum.

F. The Problem with Settlement

Despite all the fanfare surrounding the creation of the GCCF—including the White House's claim that it constituted a "new, independent claims process . . . with the mandate to be fairer, faster, and more transparent"[73]—it failed to provide victims with a process that guaranteed that they would be justly compensated. Despite all of Feinberg's efforts to use the pressure of

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[68]Id.

[69]Id.

[70]Deepwater Horizon Oil Spill Trust, supra note 27.

[71]Id. at 20-21.

[72]Id.

[73]Press release, supra note 9.

public opinion to increase his discretion as administrator, the GCCF remained a creation of BP, funded by BP, and whose continued existence was at BP's discretion. It was an institution whose fairness rested entirely on its administrator's good will. Yet, it was a settlement agency with which victims were statutorily obligated to file claims before they could access the courts.

The resource disparity between the victims of the Deepwater Horizon oil spill and the party responsible for the disaster is stark. The former are largely individuals and small businesses whose livelihood was jeopardized by the oil slicks, while the latter is an international corporation with 79,700 employees and a market capitalization of $138.4 billion.[74] Such inequality between two parties would be problematic in any system for dispute resolution, but is especially acute in the context of settlement negotiations.

This resource disparity influences the settlement process in two important ways.[75] First, victims are less able than BP to amass and analyze the information needed to predict the outcome of the litigation and are therefore disadvantaged in the bargaining process. Second, victims who find themselves in dire financial situations as a result of the oil spill may need immediately financial relief. For these victims, lengthy litigation may not be an option and therefore settlement negotiations will not take place under credible threats of lawsuit. BP may thus be able to extract settlements from such victims for sums that are less than the ordinary present values of judgments.

Of course, BP faced pressures of its own. Indeed, the White House did not hesitate to use political pressure to "make BP pay for the damage their company has caused."[76] Given the Executive's broad authority to regulate the oil industry, BP could not afford to be deaf to the White House's demands. In addition, BP faced strong market pressure to quickly establish the overall extent of its liability in the wake of the spill by settling claims rather than facing lengthy lawsuits with indeterminate outcomes. However, while these factors may complicate power dynamics between the two parties, they do not solve the issues stemming from the vast differences in the parties' resources.

In this respect, the judiciary stands head and shoulders above other means of dispute resolution.[77] While economic disparity between parties can affect

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[74]*Key Facts and Figures*, BP. http://www.bp.com/extendedgenericarticle.do?categoryId=16003441&contentId=7020721.

[75]See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

[76]President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill).

[77]See Fiss, supra note 75.

litigation, a judge has a number of tools at his disposal to dampen the impact of distributional inequality.[78] For example, a judge may ask questions from the bench, call his own witnesses, and invite other persons and institutions to participate as *amici*.[79] Most importantly, perhaps, a judge is an impartial arbiter, whose sole duty is to evaluate the case before him and arrive at a fair judgment.

The GCCF, like any traditional settlement agency, offered victims the option of receiving quick compensation in exchange for their right to sue BP in court and enjoy there all the guarantees of due process offered by the judiciary. Feinberg tried to ensure that the GCCF's payments were fair. In the case of EAPs, he even allowed victims to receive relief without foregoing any of their legal rights to sue BP.[80] In addition, interim payments allowed claimants to retain the right to sue BP for future damages.[81] However, as the EAP's short existence exemplified, these programs could only exist as long as Feinberg would champion them, and BP would tolerate them. While the GCCF offered victims the opportunity to receive quick compensation, it lacked any of the safeguards necessary to guarantee claimants a fair process.

III
THE OIL SPILL LIABILITY TRUST FUND

In addition to mandating that responsible parties create a system for processing victims' claim, OPA also created a claims process within the government.[82] The OSLTF is a fund managed by the Coast Guard and funded through a tax on oil companies. If BP fails to settle a claim within ninety days of presentment, victims can elect to initiate an action in court or to present the claim directly to the OSLTF.[83] If a claimant accepts payment from the OSLTF, the government is subrogated to their right.[84] The government is then left to recover from the responsible party.

The OSLTF's process offers victims more robust procedural guarantees of fairness than the GCCF's. While the GCCF is a settlement agency for BP, the OSLTF is a federal agency and therefore enjoys far greater independence in administering claims. First, the OSLTF is managed by the Director of the Coast Guard's National Pollution Funds Center (NPFC), a senior civil ser-

[78]Id.
[79]Id.
[80]GULF COAST CLAIMS FACILITY, supra note 62.
[81]GULF COAST CLAIMS FACILITY, supra note 29.
[82]33 U.S.C. §§ 2701-2720 (2012).
[83]33 U.S.C. § 2713.
[84]Id. § 2715.

vant.[85] Second, the operating costs for the OSLTF are funded through a per-barrel tax on oil companies, as opposed to being paid by BP.[86] Third, the NPFC Director is subject to oversight from the U.S. Comptroller General, who audits the OSLTF in order to assure that it "is being properly administered and that claims are being appropriately and expeditiously considered."[87] Finally, unlike the GCCF's, the OSLTF's claims decisions are subject to judicial review under the Administrative Procedure Act (APA). This imposes an obligation on the OSLTF to ensure that its decisions are not arbitrary and capricious.[88]

Despite these procedural advantages over the GCCF, the OSLTF is handicapped by both legislatively-imposed features as well as structural issues inherent in any claims mechanism. First, under current law, victims cannot file a claim with the OSLTF before filing a claim with the GCCF and waiting ninety days. In some cases, this wait may be longer than victims can afford. As a result, it may deprive some of the opportunity to avail themselves of the advantages offered by the OSLTF. Second, OPA constrains the Fund's ability to pay out claims by limiting both the amount it pays out to claimants and the scope of injuries it covers. The OSLTF has a per-incident cap of $1 billion.[89] This cap includes not only claims payments to victims for damages but also to state and federal actors for removal costs, as well as to federal, state, and Indian tribe trustees to conduct natural-resource damage assessments and restorations.[90] As a point of reference, as of March 22,

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[85] *Biography of Craig A. Bennett, Director, National Pollution Funds Center, United States Coast Guard*, U.S. COAST GUARD (Jan. 25, 2012), http://www.uscg.mil/flag/biography/CraigBennett.pdf. The current Director of the OSLTF is Craig Bennett. As a member of the Senior Executive Service (SES), the Director of the NPFC is appointed by the Department of Homeland Security with the assistance of the Office of Personnel Management. Members of the SES fill the ranks immediately beneath presidential appointees.

[86] JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R 41679, LIABILITY AND COMPENSATION ISSUES RAISED BY THE 2010 GULF OIL SPILL (2011), available at http://assets.opencrs.com/rpts/R41679_20110311.pdf. Most of the trust fund's revenue has come from a per-barrel tax on domestic and imported oil. The Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239) initiated the tax in January 1990 at 5 cents-per-barrel. Due to a sunset provision in the law, collection ceased on December 31, 1994. In April 2006, the tax resumed as required by the Energy Policy Act of 2005 (P.L. 109-58). In 2008, pursuant to the Emergency Economic Stabilization Act of 2008 (P.L. 110-343), the tax rate increased to 8 cents through 2016. In 2017, the rate will increase to 9 cents, but the tax is scheduled to terminate at the end of 2017. The OSLTF's total unobligated balance was approximately $1.7 billion at the end of FY 2010. The NPFC projects the fund will reach approximately $2.7 billion at the end of FY 2014.

[87] 33 U.S.C. § 2712.

[88] Int'l Marine Carriers, Inc. v. Oil Spill Liability Trust Fund, 903 F. Supp. 1097 (S.D. Tex. 1993); LAWRENCE I. KIERN, OPA 90 COMPLEXITIES AND RECENT LEGISLATIVE DEVELOPMENTS 4-5, (2010), available at http://www.winston.com/siteFiles/Publications/UT_Admiralty_Paper_LIK.pdf.

[89] 26 U.S.C. § 9509(c).

[90] Id.§§ 9509(c)(2)(A)(i)-(ii).

2012, the GCCF had paid out over $6 billion to claimants.[91] Furthermore, the OSLTF cannot provide compensation for personal-injury claims or for prospective losses.[92] All claims to the OSLTF must be for existing and documented economic losses.

In February 2011, the Director of the OSLTF, Craig Bennett, testified that the OSLTF had received 507 claims. Of these, the OSLTF had adjudicated 200, all of which had been denials.[93] In his testimony, Bennett attributed this to the fact that the GCCF accepted more types of claims than OPA required. In particular, the GCCF has paid out claims of personal injury, which are not covered by OPA and therefore are not compensable by the OSLTF. Furthermore, the OSLTF does not provide compensation for speculative future damages. In contrast, the GCCF's Final Payments compensate claimants for expected future losses. Finally, any payment by the OSLTF requires a claimant to release rights to recover from the responsible party.[94] Like the GCCF, the OSLTF offered claimants interim payments representing less than the full amount of damages to which the claimant ultimately may have been entitled. For such payments, subrogation only applied with respect to the portion of the damages reflected in the paid interim claim.[95] However, the OSLTF offered no programs like the GCCF's short-lived EAP, which allowed claimants to receive payments without requiring them to waive any rights.

As a creature of statute and regulation, the OSLTF will always lack the flexibility of a private settlement agency like the GCCF. However, the OSLTF offers victims a far greater guarantee of due process because first, the OSLTF is administered by the Coast Guard, a neutral third party, and second, as an administrative process, it is subject to both judicial scrutiny under the APA and oversight by the Comptroller General.

Though the OSLTF offers greater guarantees of due process, legislatively-imposed shortcomings—the ninety-day waiting period, the limits on the

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[91] GULF COAST CLAIMS FACILITY, OVERALL PROGRAM STATISTICS http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf (last accessed Mar. 22, 2012).

[92] 33 C.F.R. § 136.105 (2009).

[93] *Gulf Coast Recovery: An Examination of Claims and Social Services in the Aftermath of the Deepwater Horizon Oil Spill Before the Ad Hoc Subcomm. on Disaster Recovery of the S. Comm. on Homeland Security and Governmental Affairs*, 112th Cong. 20 (2011) (statement of Craig Bennett, Director, National Pollution Funds Center, U.S. Coast Guard), available at http://www.gpo.gov/fdsys/pkg/CHRG-112shrg66618/pdf/CHRG-112shrg66618.pdf.

[94] 33 U.S.C. § 2715(a).

[95] For example, a claimant could receive an interim payment covering damages suffered from the beginning of the oil spill until August 2010. 33 U.S.C. § 2715(b). The victim's claim for that period would be subrogated to the government, but any claim for damages suffered after that period would not. Id.

scope of injuries covered, and the spending cap—explain why an administration intent on being proactive after the BP oil spill backed the GCCF as the primary mechanism for claims recovery. Reforming the OSLTF would have required congressional action to raise the expenditure cap, to allow the fund to create new payment options, and to allow claimants to make claims to the fund without having to present their claims to BP and to wait ninety days. In addition, the OSLTF would have had to request funds from Congress to hire and train new personnel to deal with the deluge of new claims.[96] Furthermore, the administration would have had to take on the never-popular task of evaluating victims' claims in-house.

Nonetheless, disasters like the Deepwater Horizon oil spill create special opportunities for legislative action. Indeed, OPA, which created the OSLTF, was crafted in direct reposne to by the *Exxon-Valdez* oil spill. Similarly, the attacks of September 11, 2001 prompted the President and Congress to create a claims process for victims of the terrorist attacks.[97] The September 11th Victim Compensation Fund was also administered by Feinberg, whom the Attorney General was statutorily authorized to appoint as Special Master. The U.S. Treasury made claims payments. In contrast to the creation of the September 11th Victim Compensation Fund, the legislative action needed to allow the OSLTF to act as the primary non-judicial forum for oil-spill victims to seek compensation would have been far more modest.

Legislative reforms would allow the OSLTF to become a fairer alternative to responsible parties' claims processes, such as the GCCF. However, even improved by such reforms, the OSLTF would still lack certain procedural guarantees offered by a court of law. Inherent in any claims process is the problem that the process is not adversary and therefore a claimant does not have the opportunity to rebut adverse arguments. Rather, the evaluation usually takes placed behind an administrator's closed doors.

These challenges risk subordinating victim's rights to governmental interests. For instance, OSLTF evaluators may have a tendency to offer claimants less than they believe their claim is worth so as to be sure to recover fully from the responsible party and not run the risk of depleting the fund they manage. In addition, by encouraging claimants to forego their right to go to court, the government is also encouraging them to forego their right to discovery. With respect to fact-finding, the government's interests may not align with victims', especially given the government's role as a regulator of the oil industry. Thus, requiring claimants to forego the right to discovery

[96] *Gulf Coast Recovery*, supra note 93, at 21.
[97] 49 U.S.C. § 40101.

and the investigative privileges that a lawsuit process confers upon individual litigants is problematic.

IV
ECONOMIC INJURY DISASTER LOANS

In order to access the fast pay-outs that both the GCCF and the OSLTF promise, victims must forego their right to avail themselves of courts and the judiciary's robust guarantees of due process. This is a high cost to impose on victims in exchange for quick access to compensation. If instead, claimants had access to low-interest loans based on the merits of their claims, they would be able to receive rapid financial assistance without waiving any legal right to recover for damages. Having received these loans, victims could then exercise their rights from more financially secure positions. In particular, such loans would afford victims the option of suing BP in court before impartial judges and juries of their peers, put on their own evidence, cross-examine BP's witnesses, and take advantage of the guarantees of due process that the judiciary affords to all litigants.[98] Even if final adjudication lay months—even years—in the future, the loans would allow victims immediate access to at least part of the damages to which they were entitled. These loans would thus achieve the administration's aim of providing assistance to victims of the Deepwater Horizon spill without requiring such aid to come at the price of denying claimants access to courts.

Further, for those victims who choose to settle their claims, these loans would help ensure the fairness of settlement agreements. By giving victims the financial capacity to litigate, these loans would afford them important leverage in settlement negotiations by allowing them to reject seemingly unfavorable settlement offers. Without this option of negotiating in the shadow of credible threats of going to court, victims who cannot afford to wait for financial assistance may be coerced into accepting sharply discounted settlements. In particular, Gulf Coast fishermen whose livelihood was jeopardized by the oil slicks simply cannot credibly threaten to go to court absent some form of rapid cash influx.

Under this scenario, victims would present their claims to a government agency, such as OSLTF or the SBA, which would evaluate them. However, rather than paying out the claim and subrogating the victim's rights to the U.S. government, the agency would then issue the victim a low-interest loan based on the merit and expected pay-out of the claim. In order to recover

[98]See Fiss, supra note 75.

damages from BP and repay the loan, the victim would then have the choice of settling with BP or going to court and seeking a judgment.

By tying the availability and the amount of these loans to the merit of victims' claims and their expected pay-outs, the government would be able to forgive victims' debt in the event that ultimate recovery was less than the total amount of the loans. This would allow victims to undertake litigation without shouldering the entirety of the risk. Specifically, if despite good-faith settlement negotiations or litigation of the claim, the amount recovered by the victim were smaller than the amount of the loan, payment of the amount recovered would constitute full payment of the debt. If a victim received a $500,000 loan from the government under this program but was awarded only $100,000 in damages after trial, or settled for $100,000 after good faith negotiations, payment of that $100,000 to the government would constitute payment in full of the debt. Similarly, the government, not the victim-debtors would shoulder the risk that the responsible party was judgment proof.

It is important to note that in making OSLTF payments, the government is already willing to assume these risks. Indeed, once an OSLTF payment is made to a victim and the victim's claim is subrogated to the government, it is then up to the government to recover that amount from the responsible party. Should the government fail to recover the full amount from the responsible party, the loss falls entirely on the government.

Further, in order to ensure that this program does not increase public expenditures—especially in the current fiscal climate in Washington—this program could be funded out of the OSLTF. If the OSLTF were insufficient to fund this program as a result of increased participation, the per-barrel tax on domestic and imported oil could be increased. In this way, the program would be revenue-neutral.

In order to ensure that victims have an incentive to seek proper compensation, the loan might only represent a fraction of the total expected value of the claim, for example 75%. Doing so would minimize the chance that the amount recovered would be smaller than the loan amount, thereby minimizing the chance of loss to the OSLTF. Thus, if we consider the case of a victim whose claim has an expected value of $1 million, the government would offer them a loan of $750,000. The victim would then have an incentive to try to recover the full $1 million their claim is worth through litigation or settlement. While in the context of claims, under-estimating the value of a claim is a problematic issue because victims never receive the full damages they are entitled to, in the context of a loan, under-estimation provides victims with an even stronger incentive to seek full compensation through litigation or settlement.

If, however, as discussed above it turns out that the claim, valued at $1 million by the government, is actually worth less than $750,000, the victim would not be liable for the shortfall. However, if the victim succeeded in recovering more than $1 million, they would pay off the $750,000 debt and keep the rest of the money. As a result, victims would have a strong incentive to litigate or negotiate a settlement in good faith.

In order to prevent frivolous litigation, this program would also allow victims to subrogate their claim to the government as full payment of their debt. As a result, a victim who receives a $750,000 loan will only litigate if she believes that her claim is worth more than $750,000 plus the cost of litigation. Otherwise, she will allow the claim to be subrogated to the government.

The three main types of disaster loans that currently exist are (1) Home Disaster (HD) loans, (2) Physical Disaster Business (PDB) loans, and (3) EID loans.[99] For the purposes of this Article, I will focus on EID loans, which are most relevant to the oil-spill context.[100] These allow eligible small businesses to borrow up to the amount of their uncompensated economic injuries at an interest rate capped at 4%.[101] The total value of the loan is capped at $2 million unless a business is a major source of employment.[102]

A surprisingly low number of these loans have been issued. As of February 9, 2011, the SBA had received 1,767 loan applications related to the oil spill. Of these, 410 were approved, totaling $37.2 million. In contrast, by November 2010, the GCCF had received over 315,000 claims. Of these 92,000 had been paid or approved for payment, totaling $1.7 billion.[103] While this disparity is likely related to a number of factors, such as the low level of public awareness of the existence of these SBA loans, part of it has to do with the strict eligibility conditions for businesses, which include having to show an ability to repay any loans they receive from the SBA. The pool of eligible businesses, as well as the attractiveness of these loans, would increase if debtors were allowed to pledge their claims against BP as collateral for their SBA loans.

In the context of the Deepwater Horizon oil spill, where a party—as opposed to an Act of God—is responsible for the damages suffered by victims, EID loans, whose amounts are based on the value of economic dam-

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[99] 13 C.F.R. § 123.5 (1998).

[100] OFFICE OF THE INSPECTOR GEN., U.S. SMALL BUSINESS ADMIN., REPORT NUMBER 11-12, SBA'S RESPONSE TO THE DEEPWATER HORIZON OIL SPILL (2011), available at http://www.sba.gov/sites/default/files/Audit%2011-12%20SBAs%20Response%20to%20the%20Deepwater%20Horizon%20Oil%20Spill.pdf [hereinafter INSPECTOR GENERAL REPORT 11-12].

[101] 13 C.F.R. § 123.202 (2011); ; 13 C.F.R. § 123.302 (1997).

[102] 13 CFR § 123.202.

[103] INSPECTOR GENERAL REPORT 11-12, supra note 100, at 3; GULF COAST CLAIMS FACILITY, supra note 91.

ages suffered, could be conceptualized as advances on expected pay-outs on victims' claims. By disbursing loans according to this framework, the government could fully implement a policy of providing rapid relief to the oil-spill victims without requiring them to forego their right to take their claims to court.

Currently, these loans are available only to small businesses that are already likely to recover from the disaster successfully. Applicants for EID loans must provide reasonable assurances that they will be able to repay the loan out of personal or business cash flow and must have satisfactory credit and character.[104] This analysis is largely retrospective and is based on a business's pre-disaster economic health. However, by estimating a claimant's expected pay-out and allowing her to use these claims as collateral for her loan, the government could ensure the eligibility of businesses that suffered cognizable losses.

Substantively, the standards for EID loan eligibility and for recovery under OPA are very similar. Both therefore share a common purpose of ensuring that victims of disasters receive compensation for damages suffered. EID loans are available to small businesses that are located in declared disaster areas and that have suffered substantial economic injury as a direct result of a declared disaster. The regulations further define substantial economic injury as a business' inability to meet its obligations as they mature or to pay its ordinary and necessary operating expenses.[105] Similarly, OPA provides for compensation for economic loss "due to" harm to property or resources that "result[s] from" an oil spill.[106] The OPA standard is understood to allow recovery only by those who can prove economic losses caused by damage, destruction, or physical unavailability of property or resources that they had a right to put to commercial use.[107] The domain of liability under both OPA and EID loan regulations are very similar. Indeed, both cover only economic losses or injuries with close causal connections to an oil spill. In addition, EID loan regulations require that an applicant's small business be located within the disaster area. This approximates OPA's requirement that a claimant must have had the right to exploit commercially affected property or resources. For example, neither standard would cover operators of beach resorts in areas physically unaffected by a spill, but that nonetheless have suffered economic losses because of a general downturn in tourism resulting from the spill.[108]

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[104]13 C.F.R. § 123.6 (2009).
[105]Id. § 123.300 (2009).
[106]33 U.S.C. §§2702(b)(2)(E) and (a) (1990).
[107]GOLDBERG, supra note 18, at 3.
[108]Id.

While EID loan regulations apply a stricter "substantial economic injury" standard than OPA, this difference reflects a reasonable policy of reserving low-interest EID loans for those small businesses hardest hit by a natural disaster and which, at least in the Deepwater Horizon context, are least likely to be able to afford the cost of litigating their claim. This policy choice is reflected in other provisions of the regulations. In particular, a small business may only receive EID loans if it and its principal owners—those with a twenty percent or greater ownership share—have used all reasonably available funds and are unable to obtain credit elsewhere.[109] This policy is consistent with the government's desire to focus its assistance on those who are most in need.

While the SBA has required some borrowers who receive claims payments from the GCCF or the OSLTF to use these funds to help repay their SBA loans, it has yet to offer loans based on the expected value of a victim's claims.[110] By tying EID loans to the expected value of victims' claims, the government would expand the availability of these loans and make them a more effective tool to provide financial assistance to those most injured by oil spills and similar disasters. Further, it would do so without requiring quick financial assistance to come at the expense of a victim's right to take their claim to court.

V
CONCLUSION

While providing victims of a disaster such as the Deepwater Horizon oil spill with quick financial relief is an important governmental policy, it is important not to overlook the procedural costs that these quick pay-outs impose on victims. Relying on a private settlement fund, like the GCCF, provides victims with no guarantees of fairness, especially where they are not in position to credibly threaten to blow-up settlement talks and take their cases to court. While under Feinberg's leadership, the GCCF has provided victims with generous payments—including EAPs, which afforded claimants the opportunity to receive financial assistance without waiving any legal rights—the availability of such remedies should not depend on the goodwill of future Feinbergs.

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[109]13 C.F.R. § 123.300

[110]Press Release, U.S. Small Business Admin., SBA Approves $571,000 in New Economic Injury Loans for Small Businesses Impacted by Deepwater BP Oil Spill (May 26, 2010), available at http://www.sba.gov/content/sba-approves-571000-new-economic-injury-loans-small-businesses-impacted-deepwater-bp-oil-spill.

Government-administered funds, like the OSLTF, are an improvement over private settlement funds. However, they too fall short of judicial adjudication in terms of guaranteeing claimants a fair process.

In contrast, low-interest government loans, such as EID loans, allow victims to receive quick financial assistance without foregoing their right to argue their cases in court. In the context of disasters like the Deepwater Horizon oil spill, where a party is responsible for victims' damages, such loans should be treated as advances on the expected pay-out of victims' claims. Doing so would allow the government to expand its policy of providing victims access to quick financial relief. Further, it would do so while allowing victims to take advantage of their full palette of procedural rights.

While traditionally victims bear the cost of accidents during litigation, these loans, which are based on the expected value of victims' claims, would spread that cost among taxpayers during the pendency of litigation. Further, they would give victims the option of litigating their claims while still providing them with quick financial relief, thereby increasing their access to courts. Even if victims decided that settlement was a better option, negotiations with BP would have taken place under the credible threat of litigation if the terms of the settlement offers were not satisfactory. This alternative would have provided victims with an important tool in negotiating fair outcomes.