

**THE *DEEPWATER HORIZON* DISASTER
COMPENSATION PROCESS AS
CORRECTIVE JUSTICE: VIEWS FROM THE
GROUND UP**

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INTRODUCTION

In the United States and other developed countries, technological disasters, such as the *Deepwater Horizon* (DWH) oil spill, have been shown to induce more serious social, psychological, and economic impacts on communities than natural disasters.¹ Specifically, technological disasters have been shown to cause social and psychological disruption at a community level as affected residents try to affix blame, deal with authorities they may feel are unresponsive, and worry about the future.² The potential of litigation can further affect communities if residents transition into an adversarial mode, becoming “suspicious and cynical” even toward each other.³

It would seem that processes designed to compensate disaster victims efficiently and rapidly, such as the claims facilities implemented after various disasters in the United States,⁴ would alleviate the trauma on affected communities caused by prolonged

¹ A meta-analysis of approximately 250 articles, chapters, and books published between 1981 and 2001 on the psychosocial consequences of different types of disasters revealed that in the United States and other developed countries, survivors of technological disasters suffer severe levels of impairment at a significantly higher rate than survivors of natural disasters. Fran H. Norris et al., *60,000 Disaster Victims Speak: Part I. An Empirical Review of the Empirical Literature, 1981–2001*, 65 *PSYCHIATRY* 207, 220 (2002).

² See William R. Freudenburg & Timothy R. Jones, *Attitudes and Stress in the Presence of Technological Risk: A Test of the Supreme Court Hypothesis*, 69 *SOC. FORCES* 1143, 1158 (1991); Duane A. Gill & J. Steven Picou, *Technological Disaster and Chronic Community Stress*, 11 *SOC’Y & NAT. RESOURCES* 795, 811 (1998).

³ Freudenburg & Jones, *supra* note 2, at 1158.

⁴ See Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 *STAN. L. REV.* 1361, 1361-62 (2005).

litigation. But to be successful, these processes should aim for the particular type of justice necessitated by considering disaster-specific variables.⁵ Thus, a process addressing an event where there is no private, liable party and the social risk is spread across society may strive for distributive justice; whereas a process addressing an event such as the DWH disaster, where the liable party is acknowledged (and even admits responsibility) and the victims are known and discernible, may strive for corrective justice.⁶ When the goals of a compensation process are not clear, the result can be that harm to the affected community is not alleviated, but exacerbated.⁷

This Article examines the DWH disaster compensation process and presents some perspectives from the “ground up”⁸ of claimants who were involved in that process. Part I details the history of compensation for maritime incidents that cause *relative* (i.e. indirect) economic loss up to its current post-DWH disaster state. Part II presents qualitative data from interviews with Gulf Coast claimants about their experience with the compensation process and how they believe the process could be improved. Part III discusses the role of corrective justice in claims facilities, whether the DWH process achieved that goal, and why it is important that the perspectives of claimants be considered in the development of a compensation process for the inevitable next large-scale technological disaster.

⁵ See John G. Culhane, *What Does Justice Require for the Victims of Katrina and September 11?*, 10 DEPAUL J. HEALTH CARE L. 177, 178 (2007).

⁶ *Id.*

⁷ *Id.* at 203-06, 210-11.

⁸ LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10 (2001) (referring to “the experience of communities that struggle daily with environmental degradation and with their disenfranchisement from the institutions and structures that control their living environments”).

I. ECONOMIC COMPENSATION FOR MARITIME INCIDENTS

The law of oil spill liability is a mixture of maritime law and modern statutes, of civil liability and criminal regimes.⁹ Claimants have diverse damage claims and are thus treated differently.¹⁰ This “patchwork” approach is the result of negotiation between industry and legislators, and it is subject to major shifts whenever a significant oil spill disaster occurs.¹¹

A. Pre-Oil Pollution Act

Before the Oil Pollution Act (OPA) was instituted in 1990, liability for relative economic loss caused by a maritime incident was governed by maritime tort law and eventually became subject to an incongruity in the law. First, liability was limited under a common law exclusionary rule instituted by the United States Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*,¹² which held that a plaintiff alleging a maritime tort must have suffered a *direct* physical injury to be eligible for compensation.¹³ This led to the “wholesale rejection” by federal district courts¹⁴ of numerous

⁹ NATHAN RICHARDSON, RES. FOR THE FUTURE, *DEEPWATER HORIZON AND THE PATCHWORK OF OIL SPILL LIABILITY LAW 1* (2010), available at http://www.rff.org/rff/documents/rff-bck-richardson-oilliability_update.pdf.

¹⁰ *Id.*

¹¹ *Id.*

¹² 275 U.S. 303 (1927).

¹³ In *Robins*, a boat was delayed in dry dock, due to the negligence of the dry dock, resulting in the loss of economic opportunities for the charterer. *Id.* at 307. The dry dock owner settled with the owner of the boat, and the charterer attempted to recover from the dry dock owner for its lost economic opportunities. *Id.* The Court held that there was no relationship between the charterer and the dry dock owner in contract or tort that gave the charterer standing to recover its losses. *Id.* at 309; see also Kristin Choo, *The Price of Oil*, A.B.A. J., Aug. 2010, at 34, 38.

¹⁴ See, e.g., Louisiana *ex rel.* *Guste v. M/V Testbank*, 524 F. Supp. 1170, 1174 (E.D. La. 1981), *aff'd per curiam*, 728 F.2d 748 (5th Cir. 1984), *aff'd en banc*, 752 F.2d 1019 (5th Cir. 1985) (After a chemical spill in the Mississippi River the court granted defendant's motion for summary judgment as to all claims unaccompanied by physical damage to property except claims asserted by commercial fishermen who had been making use of the closed waters.); *Barber Lines A/S v. M/V Donau Maru*, 615 F. Supp. 109 (D. Mass. 1984), *aff'd*, 764 F.2d 50 (1st Cir. 1985) (Judge Breyer followed *Robins* in a suit for economic loss arising from an oil spill.); see also Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at Robins Dry Dock v. Flint*, 20 J. LEGAL STUD. 249, 249 (1991).

claims for *relational* economic losses, which stem from physical injury to a third party's person or property or to an ownerless resource.¹⁵ An exception to the *Robins Dry Dock* exclusionary rule, however, was established after a 1969 oil spill in Santa Barbara in *Union Oil Co. v. Oppen*,¹⁶ when the Court of Appeals for the Ninth Circuit established an exception for commercial fishermen, oystermen, crabbers, etc., to recover for lost fishing profits following a tortious diminution of aquatic life.¹⁷

The exclusionary rule applied in *Robins Dry Dock*, "that claims for pure economic loss[es] are not recoverable in tort," is known as the economic-loss doctrine.¹⁸ Generally, even proponents of the economic-loss rule limit it to economic torts, which Posner defines as "tort claims that do not allege physical contact with the victim or his property or harm to such nonfinancial, or at least noncommercial, goods as business reputation and personal privacy."¹⁹ There are three primary rationales for the economic-loss doctrine. First, purely economic losses are private, merely resulting in a "transfer of wealth."²⁰ For example, if grocery store A located on one side of town is forced to close due to a chemical spill, but grocery store B located across town is not, A's lost profits are B's gain as customers will merely shop at a different store. Second, the estimation of purely economic harm is difficult, as there is significant uncertainty about how much should be invested in precautions to prevent the harm.²¹ Finally, with no accompanying physical impact, it is difficult to ascertain the victims.²²

In terms of corrective justice, however, these rationales obscure fair remedies. For example, in *Louisiana ex rel. Guste v. M/V Testbank*²³ the M/V *Sea Daniel* and the M/V *Testbank*

¹⁵ See Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 4 (2011).

¹⁶ 501 F.2d 558, 570 (9th Cir. 1974).

¹⁷ *Id.* at 568.

¹⁸ Goldberg, *supra* note 14, at 249.

¹⁹ Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 735 (2006).

²⁰ *Id.* at 736-37 (emphasis added).

²¹ *Id.* at 737-38.

²² *Id.* at 739.

²³ 752 F.2d 1019 (5th Cir. 1985).

collided, releasing hydrobromic acid and twelve tons of pentachlorophenol.²⁴ After the spill, the United States Coast Guard closed the affected outlet on the Mississippi River and temporarily suspended all fishing activity within a 400-mile radius of the site.²⁵ However, the Fifth Circuit, following the economic-loss doctrine of *Robins Dry Dock*, denied recovery to “marina and boat rental operators, wholesale and retail seafood enterprises not actually engaged in fishing, seafood restaurants, tackle and bait shops, and recreational fishermen” who sued for the economic losses they suffered as a result of the closures.²⁶ It was not until a maritime disaster with the magnitude of the *Exxon Valdez* oil spill (EVOS) that the economic-loss doctrine began to yield with the courts eventually expanding punitive damage awards to a few successful claimants.²⁷

B. Impact of Exxon Valdez Litigation

On March 24, 1989, the *Exxon Valdez* supertanker ran aground on Bligh Reef off the Alaskan coast, spilling eleven million gallons of crude oil into Prince William Sound and contaminating 1,300 miles of Alaskan coastline.²⁸ Exxon spent \$2.1 billion in cleanup efforts.²⁹ Lawsuits against Exxon were brought in both federal and state courts.³⁰ The majority of claims were consolidated into a federal maritime negligence tort claim.³¹ Exxon “paid \$303 million in voluntary settlements with private parties, [mainly] fishermen.”³² In 1994, a jury awarded plaintiffs, mainly commercial fishermen, \$287 million in compensatory damages.³³ Yet civil litigation related to punitive damages persisted. Plaintiffs initially won a \$5 billion punitive damage

²⁴ *Id.* at 1020.

²⁵ *Id.*

²⁶ *Id.* at 1020-21, 1032.

²⁷ See Perry, *supra* note 15, at 4.

²⁸ See Choo, *supra* note 13, at 36.

²⁹ *Id.* at 37.

³⁰ *Id.*

³¹ *Id.*

³² See Perry, *supra* note 15, at 3.

³³ See Choo, *supra* note 13, at 37.

award.³⁴ The Ninth Circuit vacated the \$5 billion award of punitive damages for being too high,³⁵ and eventually reduced the award to \$2.5 billion.³⁶ In 2008 the Supreme Court ruled that a 1:1 ratio of punitive to compensatory damages was “a fair upper limit in . . . maritime cases.”³⁷ Exxon had paid out \$507 million in compensation in various settlements, thus punitive damages were limited to the same amount.³⁸ The entire legal decision-making process was prolonged to the detriment of the “[t]housands of plaintiffs [who did not] settle their last issues with Exxon until April [2010].”³⁹

Studies have shown that the protracted EVOS litigation and inequitable distribution of damages within communities were sources of trauma beyond the impact of the disaster itself and that the association between being a litigant and psychological stress grew stronger as the litigation continued.⁴⁰ Furthermore, thousands of individual plaintiffs were barred from recovery because the economic-loss doctrine initially mandated that only injuries caused by direct physical contact with the spilled oil constituted recoverable claims.⁴¹ For example, if a tour operator got oil on his boat, he could be compensated for the cost of removal, but if a tour operator had no customers because an unoiled Hawaii was more attractive than an oiled Alaska, she would receive no compensation.⁴² Finally, there was no compensation for “non-market-based, intangible values” that the resources provided.⁴³ These data set forth the irony that the legal

³⁴ *Id.*

³⁵ *In re Exxon Valdez*, 270 F.3d 1215, 1246-47 (9th Cir. 2001).

³⁶ *In re Exxon Valdez*, 472 F.3d 600, 602 (9th Cir. 2006).

³⁷ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008).

³⁸ *Id.* at 515.

³⁹ See Choo, *supra* note 13, at 37.

⁴⁰ J. Steven Picou, Brent K. Marshall & Duane A. Gill, *Disaster, Litigation, and the Corrosive Community*, 82 SOC. FORCES 1493, 1515 (2004).

⁴¹ Deborah S. Bardwick, Note, *The American Tort System's Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study*, 19 STAN. ENVTL. L.J. 259, 272-75 (2000).

⁴² *Id.* at 275. Commercial fishermen fall into an exception to this rule and can “recover economic damages for injuries not caused by direct physical contact.” *Id.*

⁴³ *Id.* at 262.

mechanism which was offered to make EVOS victims “whole” presented the greatest source of post-spill trauma.⁴⁴

C. Implementation of the Oil Pollution Act

EVOS, and a series of smaller highly publicized oil spills in subsequent months, galvanized public and political support for legislative reform. Legislation in effect at the time was “inconsistent [and] inefficient,”⁴⁵ and many separate pieces, such as the Pipeline Act of 1973,⁴⁶ were regional in their scope of impact.⁴⁷ Another example of inconsistency was that liability available under the Federal Water Pollution Control Act⁴⁸ was one-half the liability under the Outer Continental Shelf Lands Act;⁴⁹ thus a shipper could limit potential liability by not loading or unloading oil from facilities located on the continental shelf.⁵⁰ These inconsistencies created financial burdens for the government; between 1971 and 1982 the United States “spent \$124 million on oil spill cleanups” but only recovered \$49 million from liable parties.⁵¹ To address these issues, the Oil Pollution Act (OPA) was approved in 1990 by the Senate (99-0) and the House of Representatives (360-0), and was signed into law by President George H.W. Bush,⁵² who praised it for integrating “the prevention, response, liability, and compensation components . . . into a compatible and workable system that strengthens the protection of our environment.”⁵³ Because OPA was enacted in the

⁴⁴ *Id.*

⁴⁵ Daniel Kopec & H. Philip Peterson, Note, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597, 597 (1992) (quoting a letter sent by Gradon S. Staring, President of the Maritime Law Association of the United States, to Honorable Gerry E. Studds, Chairman of the Subcommittee on Coast Guard and Navigation, Committee on Merchant Marine and Fisheries, United States House of Representatives, on May 31, 1985).

⁴⁶ 43 U.S.C. §§ 1651-1655 (2012).

⁴⁷ Kopec & Peterson, *supra* note 45, at 617.

⁴⁸ 33 U.S.C. §§ 1251-1387 (2012).

⁴⁹ 43 U.S.C. §§ 1811-1866 (2012).

⁵⁰ Kopec & Peterson, *supra* note 45, at 618.

⁵¹ *Id.* at 617.

⁵² Perry, *supra* note 15, at 49.

⁵³ Kopec & Peterson, *supra* note 45, at 598.

wake of EVOS, it did not apply to any of the claims arising from that incident.

As it relates to recovery for economic losses, two basic provisions of OPA are that: (1) When oil is discharged from a vessel or facility into the navigable waters of the United States, adjacent shorelines, or the exclusive economic zone, the law makes each responsible party (RP) liable for removal costs and damages;⁵⁴ and (2) OPA imposes liability for damages to natural resources and property as well as for certain other losses suffered by individuals and governments.⁵⁵ In terms of private economic losses, the OPA allows recovery for three categories of damages:

1. Subsistence users of natural resources can recover damages for the loss of subsistence use “without regard to the ownership or management of the resources”;⁵⁶
2. Any “claimant who owns or leases [real or personal] property” can recover damages “for injury to, or economic losses resulting from destruction of” the property;⁵⁷ and
3. Any claimant may recover “[d]amages 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.”⁵⁸

There has been much debate about the meaning of “due to”⁵⁹ in the third category of damages above. The ambiguity may have been at the root of some dissatisfaction with the post-DWH claims

⁵⁴ Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) (2012).

⁵⁵ *Id.* § 2702(b)(2).

⁵⁶ *Id.* § 2702(b)(2)(C).

⁵⁷ *Id.* § 2702(b)(2)(B).

⁵⁸ *Id.* § 2702(b)(2)(E).

⁵⁹ *See generally* Letter from John C. P. Goldberg, Professor of Law, Harvard Law School, to Kenneth R. Feinberg, Esq. (Nov. 22, 2010), *available at* <http://www.scribd.com/doc/45805004/Goldberg-memo-Feinberg-bp-Claims> (providing an in-depth analysis of the meaning of “due to” in the Oil Pollution Act of 1990). Professor Goldberg concludes that the statutory language regarding economic losses “due to” harm to property or resources “resulting from” a spill is best understood to limit recovery to those economic loss claimants who prove that they “suffered economic loss because a spill has damaged, destroyed or otherwise rendered physically unavailable to them property or resources that they have a right to put to commercial use.” *Id.* at 3.

process. Gulf Coast Claims Facility (GCCF) administrator Kenneth Feinberg seemed to waver⁶⁰ on the issue, and OPA is unclear about whether individuals and businesses who suffer indirect losses from the spill can claim compensation.

D. The Deepwater Horizon Disaster Compensation Process

On April 20, 2010, in the Gulf of Mexico, a gas explosion engulfed the *Deepwater Horizon* oil drilling rig, which was being operated by Transocean Offshore Deepwater Drilling Inc. for British Petroleum Exploration & Production Inc. (BP).⁶¹ The explosion killed eleven workers and injured seventeen more.⁶² On April 22, oil was discovered to be spreading at the rig site.⁶³ After several failed attempts to contain the oil leaking deep underwater, BP finally temporarily stemmed much of the leaking oil in late June/early July.⁶⁴ However, it was not until September 19, 2010, that “the federal government’s point man,” retired United States Coast Guard (USCG) Admiral Thad Allen, declared that the well

⁶⁰ Compare Bryan Walsh, *Oil Spill: Is the Claims Process Fair?*, TIME (Aug. 23, 2010), <http://science.time.com/2010/08/23/oil-spill-is-the-claims-process-fair/> (In August 2010, Feinberg made clear that proximity (directness) “would be taken into . . . account when determining the validity and value of . . . claims.” This meant that seafood restaurants “far from the coast” would be unlikely to recover and that homeowners who suffered property value drops would not be able to recover at all.), with Jim Snyder & JoAnne Norton, *Feinberg Says Proximity Won’t Be Weighed in BP Claims*, BLOOMBERG (Oct. 4, 2010, 9:45 AM), <http://www.bloomberg.com/news/2010-10-04/feinberg-says-proximity-won-t-affect-bp-claim-being-processed.html> (By October 2010, Feinberg changed his mind and announced that a geographic test would not be used to determine eligibility regarding economic harm due to the spill.).

⁶¹ See OFFICE OF THE MAR. ADM’R., REPUBLIC OF THE MARSH. IS., DEEPWATER HORIZON MARINE CASUALTY INVESTIGATION REPORT 1 (2011), available at <http://www.register-iri.com/miReports> (follow “Low Resolution” hyperlink).

⁶² See Leslie Kaufman, *Search Ends for Missing Oil Rig Workers*, N.Y. TIMES (Apr. 23, 2010), <http://www.nytimes.com/2010/04/24/us/24spill.html>; Chris Kirkham, *Rescued Oil Rig Explosion Workers Arrive to Meet Families at Kenner Hotel*, TIMES-PICAYUNE (Apr. 22, 2010, 6:04 AM), http://www.nola.com/news/index.ssf/2010/04/rescued_oil_rig_workers_arrive.html; CNN Wire Staff, *Oil Slick Spreads from Sunken Rig*, CNN (Apr. 22, 2010, 6:11 PM), <http://www.cnn.com/2010/US/04/22/oil.rig.explosion/>.

⁶³ See CNN Wire Staff, *supra* note 62.

⁶⁴ See Joel Achenbach, Steven Mufson & William Branigin, *BP Finishes Pumping Cement in Final Stage of ‘Static Kill’*, WASH. POST (Aug. 5, 2010, 5:07 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080503076.html>.

was “effectively dead” and that it “posed no further threat to the Gulf.”⁶⁵ By then it was estimated that a total of 4.9 million barrels (about 206 million gallons) of oil had leaked into the Gulf of Mexico, making the disaster the largest oil spill in history.⁶⁶ However, BP strenuously disputes these numbers.⁶⁷ Oil began washing up on the Gulf Coast shores in Louisiana, Mississippi, Florida, and Alabama in June 2010, and a little more than one year later, almost 500 miles of coastline in the four states had been contaminated.⁶⁸

After the DWH disaster in April 2010, the USCG’s National Pollution Funds Center identified BP as an RP under OPA, and the company was charged with establishing a claims process.⁶⁹ Representatives for BP publicly vowed to compensate affected parties.⁷⁰ The company established initial facilities to receive and process claims and began paying emergency compensation to individuals and businesses by May 3, 2010.⁷¹ BP was in charge of paying claims until August 23, 2010, and paid out \$395,619,857 to individuals and businesses during this time.⁷² In June 2010,

⁶⁵ See Harry R. Weber, *Blown-Out BP Well Finally Killed at Bottom of Gulf*, BOSTON.COM (Sept. 19, 2010), http://www.boston.com/news/nation/articles/2010/09/19/blown_out_bp_well_finally_killed_at_bottom_of_gulf.

⁶⁶ See Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES (Aug. 2, 2010), <http://www.nytimes.com/2010/08/03/us/03spill.html>.

⁶⁷ See Harry R. Weber, *BP Expert Disputes Spill Amount; Billions in Fines at Stake*, HOUS. CHRON. (June 27, 2013), <http://www.houstonchronicle.com/business/energy/article/BP-expert-disputes-spill-amount-billions-in-4629668.php>.

⁶⁸ See Jim Polson, *BP Oil Still Ashore One Year After End of Gulf Spill*, BLOOMBERG (July 15, 2011, 3:50 PM), <http://www.bloomberg.com/news/2011-07-15/bp-oil-still-washing-ashore-one-year-after-end-of-gulf-spill.html>.

⁶⁹ See GULF COAST CLAIMS FACILITY, PROTOCOL FOR EMERGENCY ADVANCE PAYMENTS 1 (2010), available at http://www.restorethegulf.gov/sites/default/files/imported_pdfs/library/assets/gccf-emergency-advance-payments.pdf.

⁷⁰ See Tom Bergin, *BP CEO Says Will Pay Oil Spill Claims*, REUTERS (Apr. 30, 2010, 10:59 AM), <http://www.reuters.com/article/2010/04/30/idINIndia-48135020100430>.

⁷¹ See BDO CONSULTING, BDO USA, LLP, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY: REPORT OF FINDINGS & OBSERVATIONS 11-12 (2012), available at <http://www.justice.gov/opa/documents/gccf-rpt-find-obs.pdf>.

⁷² BP, GULF OF MEXICO OIL SPILL CLAIMS AND OTHER PAYMENTS PUBLIC REPORT – SEPTEMBER 30, 2014, at 1 (2014), available at <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/deepwater-horizon-accident-and-response/compensating->

Barack Obama and BP Chairman Carl-Henric Svanberg negotiated a \$20 billion compensation fund over four years for DWH disaster victims as a way to bypass potential legal logjams and distribute funds quickly and efficiently.⁷³ As part of the agreement, BP was willing to add more money to the fund if the costs exceeded the initial \$20 billion.⁷⁴ The fund was to be available to pay individual and business claims arising under OPA, as well as “the claims of local and state governments and claims of Federal, state and tribal trustees for natural resource damages.”⁷⁵

The Obama administration and BP created the GCCF to take over the claims process from BP.⁷⁶ On June 16, 2010, Kenneth Feinberg, managing partner of the Washington, D.C.-based law firm Feinberg Rozen, LLP, was appointed to administer the facility.⁷⁷ The GCCF was charged with receiving and paying “losses resulting from: (1) lost earnings or profits for individuals and businesses; (2) removal and clean-up costs; (3) damage to real or personal property; (4) loss of subsistence use of natural resources; and (5) physical injury or death.”⁷⁸ Unresolved claims that had been submitted to the BP Claims Process were transferred to the GCCF, although claimants were required to file new forms.

The GCCF received, processed, and paid claims in two distinct phases. Phase I, the Emergency Advance Payment (EAP) claims process, ran from August 23 to November 23, 2010.⁷⁹ The

the-people-and-communities-affected.html (follow “Claims and other payments report – September 2014” hyperlink).

⁷³ See Jonathan Weisman & Guy Chazan, *BP Agrees to \$20 Billion Fund*, WALL ST. J. (June 17, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748704198004575310571698602094.html>.

⁷⁴ Choo, *supra* note 13, at 36.

⁷⁵ BDO CONSULTING, *supra* note 71, at 12. Although the media covered these negotiations, it is unclear why “[t]here is no Executive Order creating the fund.” See Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 836 (2011).

⁷⁶ Again, although widely covered in the media, the legal basis for the creation of the GCCF is unclear. There was no Executive Order, and Congress was not involved in creating the fund or appointing an administrator. See Mullenix, *supra* note 75, at 836.

⁷⁷ See BDO CONSULTING, *supra* note 71, at 12.

⁷⁸ *Id.* at 12-13.

⁷⁹ See *id.* at 29, 34.

EAP allowed eligible claimants to receive compensation for any of the aforementioned five categories of loss.⁸⁰ Notable characteristics of the compensation process during Phase I were: claims were processed “for documented losses sustained during the first six months following the Spill”; claimants “who received a payment . . . [were] not required to execute a release and covenant not to sue BP”; “loss calculations were not decreased by any amounts received from the BP-operated facility”; claimants were categorized according to business type, location of business, and claimant’s role in the business; and “calculated losses . . . found eligible . . . were presumed to have been caused by the Spill and the claimant did not have to demonstrate further that any post-Spill reduction in earning or profits was the result of the Spill.”⁸¹

Phase II began on November 22, 2010.⁸² Claim forms were made available on December 18, 2010,⁸³ and Phase II claims were to be accepted until August 23, 2013.⁸⁴ There were three types of claims paid out during this phase: Quick Payment Final Claim,⁸⁵ Interim Payment Claim,⁸⁶ and Full Review Final Payment Claim.⁸⁷ There were notable differences between the Phase II

⁸⁰ *See id.* at 29 (“During Phase I, the GCCF implemented a claims process by which eligible claimants would receive compensation for the loss of earnings or profits, removal and clean-up costs, real or personal property damage, loss of subsistence use of natural resources and physical injury or death caused by the Spill . . .”).

⁸¹ *Id.* at 29-31.

⁸² *See id.* Exhibit P at 1.

⁸³ *See id.* at 35.

⁸⁴ *See id.* Exhibit P at 11.

⁸⁵ *See id.* at 34 (Claimants who had previously received an EAP or Interim Payment could receive \$5,000 for individuals and \$25,000 for businesses without further documentation of losses. No prior payment amounts were subtracted from this, but claimants were required to submit “a release and covenant not to sue . . . BP and all other potentially liable parties.”).

⁸⁶ *See id.* at 35 (Eligible claimants could “receive compensation for documented past losses or damages caused by the Spill *for which the claimant previously had not been compensated.*” Such claimants were not required to sign a release and were thus able to file future claims; however only one Interim Payment Claim was allowed per quarter.) (emphasis added).

⁸⁷ *See id.* (“[E]ligible claimant[s] could also file a Full Review Final Payment . . . Claim to receive payment for documented past and future losses resulting from the Spill for which the claimant previously had not been compensated” To receive a Final Payment, claimants had to “submit a release and covenant not to sue.” Additionally, Final Payments were reduced “by the amount of any previous payments.”).

process and the Phase I process. During Phase II, protocol was changed to reflect refinement of the determination of causation. Interim Payments were based on actual documented losses, and Final Payments were based on actual documented losses and a valuation of possible future losses determined by experts. Claimants were required to establish an identifiable link between an actual loss and the oil spill (as opposed to, for example, the economic downturn that was also occurring during this time). Eligibility was often based on proximity, thus individuals and businesses further from the shore were required to submit more stringent documentation, and compensation amounts were based on complex calculations involving consideration of previous annual revenues. Finally, claimants receiving Quick Payments and Final Payments were required to sign releases and covenants not to pursue litigation against the RPs.⁸⁸

The GCCF processed more than one million claims and paid out more than \$6.2 billion⁸⁹ to over 220,000 individual and business claimants during the one and a half years it was active.⁹⁰ The transition process from the GCCF to the court-supervised settlement program was initiated by Court Order on March 8, 2012.⁹¹ Since several appeals were pending before the GCCF at the time, the court clarified that BP and any claimant involved in a GCCF appeal would be allowed to settle the underlying claim and that the claimant could execute a GCCF Release and Covenant Not to Sue in connection with a settlement.⁹² The Transition Process lasted until June 4, 2012, and paid out

⁸⁸ See *id.* at 34-35.

⁸⁹ Compare BP, *supra* note 72, at 1 (indicating that the GCCF paid out \$6,670,096,503), with BDO CONSULTING, *supra* note 71, at 59 (indicating that the GCCF paid out “more than \$6.2 billion”).

⁹⁰ BDO CONSULTING, *supra* note 71, at 59.

⁹¹ See First Amended Order Creating Transition Process, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, No. 2:10-md-02179-CJB-SS (E.D. La. Mar. 8, 2012) (No. 5995).

⁹² See Order, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, No. 2:10-md-02179-CJB-SS (E.D. La. Mar. 21, 2012) (No. 6085).

approximately \$405 million for nearly 16,000 claims.⁹³ The *Deepwater Horizon* Court Supervised Settlement Program (hereinafter “Settlement Program”) commenced on June 4, 2012.⁹⁴ The Settlement Program is headquartered in Louisiana, with nineteen Claim Assistance Centers located throughout the Gulf Coast region, and is administered by Patrick Juneau.⁹⁵ Notification of potential class members was “substantially completed by July 15, 2012”—allowing a period which the court believed would provide adequate time for potential class members to make decisions before the deadlines for the objections (September 7, 2012) and opting-out (November 1, 2012).⁹⁶ BP moved for final approval of the Settlement Agreement on August 13, 2012,⁹⁷ and by December 11, 2012, the Settlement Program had paid out \$1.377 billion on 18,332 claims.⁹⁸ On December 21, 2012, the court found that “[n]one of the objections . . . have shown the Settlement to be anything other than fair, reasonable, and adequate”⁹⁹ and concluded that it should be approved as such.¹⁰⁰ On the same date, in accordance with its Order and Reasons, the court issued an Order and Judgment Granting Final Approval of Economic and Property Damages Settlement and Confirming Certification of the Economic and Property Damages Settlement Class.¹⁰¹

Despite the hope that the Settlement Program might streamline litigation, problems quickly surfaced. By October 2012, it was clear that the Settlement Program would be more extensive

⁹³ See Order and Reasons at 3, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, No. 2:10-md-02179-CJB-SS* (E.D. La. Dec. 21, 2012) (No. 8138).

⁹⁴ See *id.* at 8.

⁹⁵ See *id.*

⁹⁶ *Id.* at 4.

⁹⁷ See *id.* at 5.

⁹⁸ See *id.* at 9.

⁹⁹ *Id.* at 116.

¹⁰⁰ See *id.*

¹⁰¹ See Order and Judgment Granting Final Approval of Economic and Property Damages Settlement and Confirming Certification of the Economic and Property Damages Settlement Class, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, No. 2:10-md-02179-CJB-SS* (E.D. La. Dec. 21, 2012) (No. 8139).

than many parties, including BP, assumed.¹⁰² This led BP to start filing appeals under the agreement by November of 2012, a mere three months after the corporation had moved for final approval of the agreement.¹⁰³ BP's main contention was the way Juneau had interpreted the "Variable Profit" component of business economic loss claims.¹⁰⁴ BP filed an emergency motion for a preliminary injunction to prevent Juneau's interpretation from being used, which was denied by the district court on April 5, 2013.¹⁰⁵ BP appealed the matter to the Fifth Circuit. The Fifth Circuit found that the settlement was "ambiguous as to whether claims that are not based on matching revenues and expenditures are to be matched" for determining payments to be made under the "Variable Profit" component of business economic loss claims,¹⁰⁶ and remanded the matter to the district court.¹⁰⁷ On remand the district court reversed its ruling and held that "the provision for subtracting corresponding variable expenses requires that revenue must be matched with the variable expenses incurred by a claimant in conducting its business, and that does not necessarily coincide with when revenue and variable expenses are recorded."¹⁰⁸ The issue was not further appealed.¹⁰⁹

In July 2011, Congress requested the Department of Justice (DOJ) to conduct an evaluation of the GCCF portion of the DWH disaster compensation process. The DOJ selected BDO Consulting, a division of BDO USA, LLP, to conduct the

¹⁰² See Jane Meinhardt, *BP Settlement: 'A Lot Broader than Most Businesses Assume'*, TAMPA BAY BUS. J. (Oct. 19, 2012, 6:00 AM), <http://www.bizjournals.com/tampabay/print-edition/2012/10/19/bp-settlement-a-lot-broader-than.html>.

¹⁰³ Brief for Appellants at 13, *In re Deepwater Horizon*, No. 13-30315 (5th Cir. May 3, 2013).

¹⁰⁴ *Id.* at 8.

¹⁰⁵ See *id.* at 9.

¹⁰⁶ *In re Deepwater Horizon*, 732 F.3d 326, 339 (5th Cir. 2013).

¹⁰⁷ See *id.*

¹⁰⁸ Order & Reasons at 5, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 2:10-md-02179-CJB-SS (E.D. La. Dec. 24, 2013) (No. 12055).

¹⁰⁹ See *In re Deepwater Horizon*, 744 F.3d 370, 373 (5th Cir. 2014) ("The district court made two rulings as directed by our October 2013 remand. One concerned an accounting question, which was resolved in a sufficiently satisfactory manner as not to be appealed by any party.").

evaluation.¹¹⁰ In the Executive Summary of its evaluation reports, BDO recognizes that “[t]he GCCF operated in an extremely time-sensitive, challenging and dynamic environment.”¹¹¹ The report notes that although “the GCCF appeared to have consistently applied its protocols and methodologies in processing claims,” there were, nevertheless, errors that negatively affected approximately 7,300 claimants, resulted in cases of overpayment, and caused erroneous denials of payment to 2,600 claimants.¹¹² The evaluators also investigated “concerns raised by claimants, public officials and other stakeholders,” including “whether communications with claimants were effective; whether the GCCF gave appropriate consideration to documentation submitted by claimants; and why there seemed to be inconsistent outcomes among claimants that [appeared to be] similarly situated.”¹¹³ These errors and concerns mirror those expressed by respondents in Gulf Coast communities. This paper will present qualitative data regarding residents’ concerns and discuss whether these issues prevented the DWH disaster compensation process, particularly the GCCF, from alleviating the disruptive effects on communities of post-disaster legal processes such as those experienced after EVOS.

II. ASSESSMENT OF GULF COAST COMMUNITY VULNERABILITY AND RESILIENCY

A. Background

Of recent technological disasters in the United States, EVOS is often used to illustrate how events that do not directly injure or kill can still have serious effects on community mental health.¹¹⁴

¹¹⁰ See BDO CONSULTING, *supra* note 71, at 1.

¹¹¹ *Id.* Exhibit B at 2.

¹¹² *Id.*

¹¹³ *Id.* Exhibit B at 9.

¹¹⁴ An assessment of 559 residents of the area affected by EVOS approximately one year after the event showed that psychiatric conditions such as generalized anxiety disorder and post-traumatic stress disorder were significantly increased in individuals who experienced higher exposure to the environmental damage than in those who were unexposed. Lawrence A. Palinkas et al., *Community Patterns of Psychiatric Disorders After the Exxon Valdez Oil Spill*, 150 AM. J. PSYCHIATRY 1517, 1520 (1993).

Research has shown that after EVOS, litigation, including *Exxon Shipping Co. v. Baker*,¹¹⁵ became an independent stressor that caused disruption and psychological stress for individuals. Prolonged litigation created “corrosive communities”¹¹⁶ where social relationships were eroded and conflicts emerged.¹¹⁷ After the DWH disaster, preliminary investigation indicated high levels of stress similar to those found among residents after EVOS and predicted that delayed damage awards through the compensation, settlement, and litigation processes would also cause community and individual level health problems.¹¹⁸ These disruptive and socially corrosive impacts can heighten community vulnerability, making it potentially less resilient, in the face of future disaster.¹¹⁹

In order to advance current knowledge on community vulnerability and resiliency, an interdisciplinary research team—consisting of a lawyer, a sociologist, and an anthropologist—designed a Community-Based Participatory Research (CBPR) project to qualitatively assess and improve upon indicators of social vulnerability and resiliency to technological disasters and identify successful strategies for resiliency in resource dependent communities along the Gulf Coast.¹²⁰ The current project is part of

¹¹⁵ 554 U.S. 471 (2008).

¹¹⁶ See William R. Freudenburg, *Contamination, Corrosion and the Social Order: An Overview*, CURRENT SOC., July 1997, at 19, 29-31.

¹¹⁷ See J. Steven Picou, *When the Solution Becomes the Problem: The Impacts of Adversarial Litigation on Survivors of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 68, 87 (2009).

¹¹⁸ See Duane A. Gill, J. Steven Picou & Liesel A. Ritchie, *The Exxon Valdez and BP Oil Spills: A Comparison of Initial Social and Psychological Impacts*, 56 AM. BEHAV. SCIENTIST 3, 16 (2012).

¹¹⁹ See *id.* at 8; Picou, Marshall & Gill, *supra* note 40, at 1501.

¹²⁰ See Brian Mayer, *Project 2: Community-Based Assessment of Social Vulnerability and Resiliency*, U. FLA. – HEALTHY GULF HEALTHY COMMUNITIES, <http://healthygulfoast.org/community-resiliency-2/> (last visited Oct. 12, 2014) (discussing the post-research report compiled by Mayer and his assistants). Included in the report is a transcript of interviews conducted by Mayer, author Joan Flocks, and research assistants. For the sake of the study, interviewees gave anonymous statements, providing only their job descriptions. The interviews were transcribed, and the transcription is on file with authors Flocks and Davies. Excerpts from the transcription are used in the remainder of this article. For a general discussion of CBPR, see Barbara A. Israel et al., *Review of Community-Based Research: Assessing Partnership Approaches to Improve Public Health*, 19 ANN. REV. PUB. HEALTH 173

a larger interdisciplinary program that includes physical and social science researchers from the University of Florida, University of Maryland, University of New Orleans, University of West Florida, University of South Alabama, and University of Arizona working with community-based organizations (CBOs) in Florida and Alabama Gulf Coast areas. This program, in turn, is part of a regional, multi-university consortium funded by the National Institute of Environmental Health Sciences (NIEHS) to investigate a broad range of effects from the DWH disaster. All research procedures were reviewed and approved by the Institutional Review Board of the University of Florida.

Between November 2011 and January 2013, researchers conducted twenty focus groups¹²¹ and ninety-three key informant interviews with residents in the following Gulf Coast counties: Baldwin County, Alabama; Escambia County, Florida; Franklin County, Florida; and Levy County, Florida.¹²² In each of these

(1998). This article discusses how CBPR involves community-centered research activities that ultimately ensure interventions are culturally appropriate and sustainable. Israel et al. define this research as “a collaborative approach . . . that . . . involves . . . community members, organizational representatives, and researchers in all aspects of the research process” and focuses on the larger social, political, and economic systems that influence behaviors and access to resources necessary to maintain health. *Id.* at 177. Some of the key principles of the CBPR approach include: the integration of “knowledge and action for [the] mutual benefit of all partners”; “a co-learning and empowering process [to] attend[] to social inequalities”; research that is “cyclical and iterative”; a view of “health from both positive and ecological” paradigms; and dissemination of “findings and knowledge gained to all partners.” *Id.* at 179-80.

¹²¹ Each focus group involved four to ten participants, recruited mainly by CBO partners. Moderators asked focus groups participants a series of open-ended questions about issues such as the nature of local resiliency to disasters and the overall impact of the DWH disaster on their communities. Results from these focus groups helped shape the development of semi-structured questions for key informant interviews with individual stakeholders, from which data on social comparisons concerning the compensation process were drawn.

¹²² Most of this eastern Alabama/western Florida region had less visible presence of oil than, for example, Louisiana, but still experienced a substantial impact on the tourism and seafood industries, thus creating an opportunity to explore the disaster’s long-term effect on communities even at a distance from the spill’s epicenter. As presented in the text, the communities are located in order moving away from the direct, visual presence of the oil spill. Respondents from the counties were primarily from the Alabama and Florida towns of Bon Secour, Gulf Shores, Pensacola, Pensacola Beach, Apalachicola, Eastpoint, Carrabelle, and Cedar Key (again listed in order moving away from visual presence of oil).

areas academic researchers worked with CBOs to develop research questions, methodological approaches and instruments, and data interpretation. For key informant interviews, project team members developed a series of open-ended questions focusing on topics such as how the impact of the DWH disaster compared to previous natural disasters; what characteristics of a community make it the most resilient and most vulnerable to technological disasters; what overall and current impact the DWH disaster had on the community; and how effective the response to the DWH disaster was at various levels of government. The last seven questions of the key informant interview were asked only of respondents that filed claims with BP or the GCCF and were intended to generate discussion about the compensation process.¹²³ Key informant interviews were recorded and transcribed. Transcriptions were sorted for discussion of the compensation process. A list of code words representing the major topics emerging from the interviews was developed.¹²⁴ This paper highlights the qualitative data generated specifically about the compensation process and focuses primarily on the GCCF.

B. Pre-Gulf Coast Claims Facility Compensation

A unique aspect of the DWH compensation process was that soon after the disaster, while oil was still leaking, BP admitted

¹²³ After an initial query into whether the respondent had filed a claim with BP or the GCCF, the interviewer asked the following questions of those who had filed such claims:

How satisfied have you been with the claims process?

What have been the most problematic aspects of the claims process?

What aspects of the claims process have worked well for you and your community?

What suggestions do you have for improving the claims process?

What barriers do you see to improving the claims process?

Are you currently or thinking about suing BP and other related parties? Can you tell us more about that?

See Mayer, *supra* note 120.

¹²⁴ For analysis, responses regarding the compensation process were coded and categorized according to these recurring themes during the interviews: Lack of Consistency, Lack of Transparency, Lack of Accountability, Other Problems, Positive Experiences, Recommendations. *See* Mayer, *supra* note 120.

responsibility and vowed to honor legitimate damage claims.¹²⁵ Within a month after the disaster, BP had opened claims offices throughout the Gulf Coast region and had started distributing checks of up to \$5,000 to individuals with “straightforward cases” of lost livelihood evidenced with documentation such as “tax returns, fishing tickets or trip tickets.”¹²⁶ According to respondents, there was a major impact in their communities from the sudden availability of cash, especially among lower-income populations of seafood workers and service industry employees.¹²⁷ Many respondents felt the cash influx into communities that previously had limited resources was disruptive.

A lot of the people here work day-to-day; some get paid every day and they live from one day to the next. A lot of them have never seen \$5,000 at one time in their lifetime.

I knew when they came in and did that this place was going to go crazy. It did.¹²⁸

Others had never seen that kind of money in their life, so you had people running around buying wave runners and trucks and things of this nature and when the money dried up they were not able to make the payments on this stuff. Now you see a lot of homes being foreclosed . . . ; you see a lot of

¹²⁵ See Bergin, *supra* note 70.

¹²⁶ See Rebecca Mowbray, *BP Has Started Paying Some Claims in Gulf Oil Spill*, TIMES-PICAYUNE (May 16, 2010, 7:56 AM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/filing_claims_in_gulf_oil_spil.html.

¹²⁷ Ritchie et al. noted that after the DWH disaster in Gulf Coast communities there was a “money spill,” which they defined as “the large amounts of money being spent on oil spill mitigation and clean-up efforts.” Liesel Ashley Ritchie, Duane A. Gill & J. Steven Picou, *The BP Disaster as an Exxon Valdez Rerun*, CONTEXTS, Summer 2011, at 30, 33, available at <http://contexts.org/articles/summer-2011/the-bp-disaster-as-an-exxon-valdez-rerun/>. The money spill caused social and economic disruption when people perceived there were inequalities in chances for employment with the Vessels of Opportunity program. See *id.* The researchers compared the situation in the Gulf Coast communities with a similar phenomenon in post-EVOS communities where “those who made money on clean-up efforts were referred to as ‘spillionaires’ and ‘Exxon whores.’” *Id.* The immediate compensation payments were also a part of this money spill into the communities and likewise contributed to the social and economic tensions. *Id.*

¹²⁸ Interview by Brian Mayer with Seafood Industry Worker in Eastpoint, Fla. (June 5, 2012).

vehicles being repossessed because they were buying things that they never had in their life.¹²⁹

Some respondents explained that the cash influx also created a disincentive for some recipients to work and this disrupted the local economy.

Some of the oyster harvesters were given [\$5,000]; don't get me wrong[,] that is not necessarily bad[,] but all of a sudden now it created a division because those dealers who were not given anything, their workers that . . . would normally show up to harvest and bring in the product were no longer working, they were sitting on the sideline[,] . . . depending on these checks from BP. So it caused a division in the community, especially among the processors and the harvesters.¹³⁰

Yet the impact of BP's immediate payments was just the start of the issues that respondents experienced with the compensation process. Those who had larger, more complex claims or who were not satisfied with the smaller amounts distributed immediately after the disaster were soon routed to the GCCF where they began their application processes.

C. The Gulf Coast Claims Facility

As noted above, OPA generally divides private economic losses into three categories. Respondents mostly described experiences with recovery for Lost Profits and Lost Earning Capacity. This category was likely the most subject to change and scrutiny by GCCF administrators during the process, and the evolving rules regarding eligibility contributed to the respondents' frustration and dissatisfaction. The following results describe three major themes related to perceived discrepancies within the GCCF compensation process: lack of transparency, lack of accountability, and lack of consistency.

¹²⁹ Interview by Brian Mayer with Civic Leader/Seafood Industry Worker in Apalachicola, Fla. (Jan. 19, 2012).

¹³⁰ Interview by Joan Flocks with Civic Leader in Apalachicola, Fla. (Jan. 19, 2012).

1. Transparency

Transparency refers to the visibility or accessibility of information, especially concerning business practices.¹³¹ Transparency requires operating in a way that allows others to observe what actions are performed, and there must be openness and communication about the process. From the onset of BP's actions as an RP, the company sought to assure the public that they would "make this right."¹³² Later, when the \$20 billion escrow account was created, President Obama assured the public it would be "administered by an impartial, independent third party."¹³³ When Feinberg assumed control of the GCCF, he emphasized that he would operate transparently and independently of both the government and BP.¹³⁴ He stated he would be open "about budgets and payments, [including] his own compensation."¹³⁵ These assurances from BP, the President, and the GCCF Administrator led Gulf Coast residents to believe the compensation process would be transparent, which was important because they were still on the rebound from a disaster characterized by a prevailing atmosphere of uncertainty and anxiety. While the spill was occurring, Gulf Coast residents were alarmed by the general lack of accurate information about containment efforts, especially in light of the continuing negative focus they felt was being reflected on their communities by the national media.¹³⁶

Some respondents felt that when compensation was being handled by BP, the process worked well, but when the GCCF was

¹³¹ See WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1940 (2d ed. 1983).

¹³² Debbie Elliott, *BP Assures Governors It Will Restore the Gulf*, NPR (Aug. 30, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=129521779>.

¹³³ Remarks Following a Meeting with BP Leadership, 2010 DAILY COMP. PRES. DOC. 1 (June 16, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives>.

¹³⁴ See CNN Wire Staff, *Feinberg Plans to Be More Generous than Courts in Oil Claims Process*, CNN (Aug. 22, 2010, 3:57 PM), <http://www.cnn.com/2010/US/08/22/gulf.oil.claims/>.

¹³⁵ *Id.*

¹³⁶ See CNN Wire Staff, *Waiting Out the Spill: Anger, Frustration and Uncertainty*, CNN (May 30, 2010, 3:26 AM), <http://www.cnn.com/2010/US/05/29/gulf.top.kill.failure.reax/>.

established the learning curve of its administrators had to be reestablished. Although some recognized this was not necessarily Feinberg's fault, they believed he was likely overwhelmed by the number and nature of claims and that he did not immediately understand the regional economy.¹³⁷

For a guy from New York to come down here and not recognize that absolutely everything that happens in our community is related to that beach and that water, and for him to come down and say if you were across the street from the Gulf of Mexico, you're not eligible for a claim, . . . he set himself up to fail with that statement.¹³⁸

Thus, the frustration about a lack of industry and government forthrightness that residents experienced during the actual oil spill was repeated during the GCCF process. Although communication would have helped alleviate this, some respondents felt it was not forthcoming.

We thought we had really good communications; we had one of the vice presidents here with us and she was great. They kept pulling her out of it though and we would get some other person who didn't have a clue. So then we would have to start all over again.¹³⁹

Respondents felt that Feinberg and the GCCF had repeatedly been presented as neutral and independent from BP, yet they perceived this was never the case. Instead they felt that Feinberg and the GCCF were beholden to BP and that this relationship influenced the compensation process.

¹³⁷ Feinberg himself admitted he was overwhelmed. "I underestimated the degree of anger and frustration that emanated from the Gulf region. I also underestimated the volume of claims. I never anticipated over 1 million claims would be filed. Looking back, I should have anticipated the anger and braced myself for it. Instead, I was whipsawed pretty badly there for awhile." George Talbot, *Ken Feinberg: 'The GCCF Did What It Said It Would Do'*, AL.COM (Apr. 21, 2012, 7:12 AM), http://blog.al.com/live/2012/04/ken_feinberg_the_gccf_did_what.html.

¹³⁸ Interview by Brian Mayer with Tourism Industry Employee in Gulf Shores, Ala. (Sept. 28, 2012).

¹³⁹ Interview by Brian Mayer with City Employee in Apalachicola, Fla. (Jan. 19, 2012).

One of the things that has always been talked about with Ken Feinberg was that here he was being paid by BP and yet he is supposed to be giving money out fairly liberally to those who have been hurt in disasters. There seems to be a conflict there; they certainly don't want him to give out anymore than he has to. That feeling has always been there, that he has withheld money because he was working for BP and wants to continue to do that.¹⁴⁰

These sentiments were reflected in an order issued on February 2, 2011, less than a year after the GCCF was formed, by Federal Judge Carl J. Barbier, who is overseeing federal litigation. While simultaneously encouraging a claims process that could achieve fair and efficient resolution, recognizing the "enormity" of Feinberg's task, and vowing not to "interfere with [Feinberg's] ability to fairly and efficiently process claims," the court nevertheless mandated, among other things, that BP, Feinberg, Feinberg Rozen, LLP, the GCCF, and all of their representatives "[r]efrain from referring to [themselves] as 'neutral' or completely 'independent' from BP" in any of their oral or written communications.¹⁴¹ The court explained that such disclosure was consistent with OPA's intent, that claimants needed the ability to understand how the claims resolution facility operated so that they could "evaluate the rationale behind the communications" they received from the facility.¹⁴² The court also stated that such disclosure was important to protect the RP from "future legal attacks on the validity of the evaluation, payment, and release of claims."¹⁴³

¹⁴⁰ Interview by Joan Flocks with Realtor in Pensacola, Fla. (Mar. 6, 2012).

¹⁴¹ Order and Reasons at 8, 14, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, No. 2:10-md-02179-CJB-SS (E.D. La. Feb. 2, 2011) (No. 1098). The remainder of that item in the order continues: "It should be clearly disclosed in all communications, whether written or oral, that said parties are acting for and on behalf of BP in fulfilling its statutory obligations as the 'responsible party' under the Oil Pollution Act of 1990." *Id.* at 14.

¹⁴² *Id.* at 7-8.

¹⁴³ *Id.* at 8.

2. Accountability

Accountability is “the state of being accountable, responsible, or liable.”¹⁴⁴ Some respondents said that after they filed claims and submitted supporting paperwork they were frustrated by what they considered a lack of accountability by GCCF staff at several points during the process. First, they felt there was misrepresentation about how complicated the process would be. Many said the amount of paperwork and the repeated requests for more and different documents were overwhelming.

[The amount of paperwork required] seemed to change from week to week[.] [S]o while we provided this amount of data all of a sudden they wanted this and then that wasn't good enough so they wanted something else. It seemed to change and it did for everybody, it wasn't just for us but an across the board type of thing.¹⁴⁵

They asked for this. They asked for that. You know, it was just like stall tactics or something and keep [sic] putting us off . . . I felt like I give [sic] them every damn thing, but my first born.¹⁴⁶

Possibly more frustrating for respondents were incidents when the GCCF lost applications or other paperwork.

My sister-in-law was a painter and she didn't hear anything for over [three] months and when I asked why didn't she call to follow up she said, “[T]hey said they'd call me if they needed anything.” I told her she had to call them! When she did, they couldn't even find her files so she had to produce it again.¹⁴⁷

Even when applications were complete, many respondents experienced long delays without information about their claims. For respondents whose livelihoods had been affected by the

¹⁴⁴ WEBSTER'S, *supra* note 131, at 13.

¹⁴⁵ Interview by Joan Flocks with Realtor in Pensacola, Fla. (Mar. 6, 2012).

¹⁴⁶ Interview by Brian Mayer with Seafood Industry Worker in Bon Secour, Ala. (Apr. 24, 2012).

¹⁴⁷ Interview by Joan Flocks with Restaurant/Seafood Industry Worker in Eastpoint, Fla. (June 5, 2012).

disaster, this meant periods with no source of income. Some respondents felt that “no one was really in charge[.] [N]obody had a handle on how things ought to be.”¹⁴⁸ Others were more suspicious, however, and said they felt the paperwork and processing demands were being used as a delay tactic or an attempt to make claimants give up or to be left with little choice but to transition into the Settlement Program, which is seemingly counter to the GCCF’s stated purpose of keeping potential claimants out of the court system.

We waited until it had been a full year, and sent in everything. We were told that we would hear something within three months. At four and a half months, we still hadn’t heard anything. I was calling almost every day. Finally, we got a letter that said they needed one more thing. It was like they had just picked it up to look at it. They needed an additional tax return. I sent that. As soon as I sent that, like the next day I got the thing about the whole change over to the transition, then started getting information about this lawsuit.¹⁴⁹

Not all criticism about the lack of accountability was directed toward the GCCF, however. Respondents described many instances of other residents filing fraudulent claims and taking advantage of the system in several ways. For example, in Franklin County, some respondents described how some residents who had not recently worked as oyster harvesters yet nevertheless still held or obtained the requisite seafood workers’ licenses filed claims for losses. Others filed claims before they could have possibly experienced any impact. In other areas, respondents described how some people, such as college students, who had worked temporarily in the beach side hotels or restaurants filed claims for the short period of time they had worked, even though they had no intention of returning to those jobs. The specter of fraud put both the GCCF administrators and the legitimate claimants on the defensive.

¹⁴⁸ Interview by Brian Mayer with Seafood Industry Worker in Bon Secour, Ala. (Mar. 6, 2012).

¹⁴⁹ Interview by Brian Mayer with Realtor in Cedar Key, Fla. (July 12, 2012).

If I look in the best light possible to Ken Feinberg and GCCF, I think they believed they were stewards of the money and they needed to make sure the right people were getting the funds and to avoid fraudulent claims. I think there were a number of fraudulent claims to sort through.¹⁵⁰

3. Consistency

Consistency refers to an “agreement or harmony with what has already been done, agreed on, or expressed,”¹⁵¹ equitably, across time and, in this case, across claims. Before BP had even effectively sealed the oil leak, the company was offering \$5,000 quick payments, with few questions asked, to certain claimants,¹⁵² and this had implications for later claimants under the GCCF. The first level of inconsistencies often noted by respondents occurred between Phase I and Phase II of the GCCF process. In December 2010, the GCCF reintroduced the quick payment option, providing \$5,000 for individuals and \$25,000 for businesses with minimal requirements for documentation, “provided [the claimants] waive . . . future claims against BP and other responsible parties.”¹⁵³ The option was envisioned as a way to compensate claimants such as service industry workers, who had indirect losses from the disaster, but who would not “be able to show more losses going forward” from that point.¹⁵⁴ It was not intended to satisfy those with larger claims, such as business owners or fishermen who experienced substantial losses because of their dependence on the coastline. Unfortunately, the policy created tension in some communities. Respondents explained how

¹⁵⁰ Interview by Joan Flocks with Attorney in Pensacola, Fla. (Apr. 25, 2012).

¹⁵¹ WEBSTER’S, *supra* note 131, at 389.

¹⁵² See Tom Brown, *BP Admits “Misstep” Over Oil Spill Claims Waivers*, REUTERS (May 3, 2010, 5:58 PM), <http://www.reuters.com/article/2010/05/03/idUSN03156966>. It was reported that BP required claimants who received these initial \$5,000 payment to waive their rights to sue, but when asked about this, BP Chief Executive Tony Hayward told National Public Radio this policy was a misstep that had been corrected.

Id.

¹⁵³ See David Hammer, *Most BP Oil Spill Claimants Opt for One-Time ‘Quick Payment’*, TIMES-PICAYUNE (Jan. 26, 2011, 9:40 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/most_bp_oil_spill_claimants_op.html.

¹⁵⁴ *Id.*

the limited documentation requirements allowed some people to take advantage of the situation.

People were looking at it as a way of making some money. Some people[,] when the claims came in, as soon as they heard you could file a claim EVERYBODY started coming in. Even people that didn't oyster or shrimp . . . immediately went to get their licenses so that they could apply for that BP money. . . . There were some conflicts in the community because of it; people felt like those who didn't deserve it were getting it . . .¹⁵⁵

Others described the seeming inconsistency of employees, such as wait staff, receiving compensation while their employers had to wait and struggle through a longer and more complex process.

[Y]ou would hear stories of a waitress in Atlanta getting \$20,000 because she used to work in a restaurant down here and then the restaurant wouldn't get anything. They were not paying the businesses; they still haven't paid the seafood industry businesses The bad thing about that is there is no business to come back to . . . , it's been closed up.¹⁵⁶

A variety of compensation inconsistencies was noted: between claimants in identical employment arrangements within the same industry (e.g., two boat captains), between claimants in difference industries (e.g., realtors vs. restaurant owners), and even between claimants in different regions (e.g., oystermen in Apalachicola vs. shrimpers in Alabama). The perspective, both perceived and real, that certain types of residents were unduly compensated in comparison with others had the debilitating effect of pitting community members against one another. Unfortunately, the sense that the GCCF tended to handle certain types of claims

¹⁵⁵ Interview by Joan Flocks with Social Worker in Apalachicola, Fla. (Jan. 19, 2012).

¹⁵⁶ Interview by Brian Mayer with City Employee in Apalachicola, Fla. (Jan. 19, 2012).

more quickly than others, even at the cost of consistency, was reinforced at the facility's administration level.¹⁵⁷

I had realtors that worked for me that basically do the same amount of sales every year; one would go in and get [\$15,000], the other would go in the next day and get paid [\$20,000]. There was no uniformity at all; I talked to a lot of the shrimpers and seafood folks and they had the same problem, they would go in and one of them would make [\$50,000] and the other would make [\$75,000] and there was no rhyme or reason why one did better than the other.¹⁵⁸

The way that money was sloshing around in the economy created some false situations. . . . BP paid the oyster catchers over there right off the bat[,] [\$5,000 and \$10,000] if they just presented a license because they were quote "impacted". . . . I don't think that Apalachicola Bay was ever shut down due to a threat of oil. The fishermen somehow qualified over there . . .¹⁵⁹

4. Positive Experiences

Not all discussion about the GCCF was negative. Several respondents recognized that the whole compensation process was a new experience and felt that BP tried to accomplish what it said it would. They felt the process improved over time, although some said that at a point, the claims facilities became too overwhelmed to function well. Others felt that the process worked well for those with smaller, initial claims (such as those who accepted the \$5,000 quick payments) but worked less well for those with larger, complex claims. Instead of stories about how recipients of initial smaller payout misused the funds, some respondents related stories of how those funds helped Gulf Coast residents, especially those who managed their money well.

¹⁵⁷ See Choo, *supra* note 13, at 40 ("It may be undercompensation or it may be overcompensation," Feinberg says. "It's a very murky crystal ball. What's important is that it is adequate to end the uncertainty and bring the matter to a close.").

¹⁵⁸ Interview by Joan Flocks with Realtor in Pensacola, Fla. (Mar. 6, 2012).

¹⁵⁹ Interview by Brian Mayer with Seafood Industry Worker in Bon Secour, Ala. (Apr. 24, 2012).

I think that quick \$5,000 was good for some because it probably kept them from getting behind on their house or car payments¹⁶⁰

[T]here is one particular guy that I know who bought himself a guide fishing boat, a piece of property and a mobile home to put on it. . . . He totally turned his life around. He got his BP money because he was a guide fishermen [sic], so he bought himself a nice guide fishing boat. He had already gone and gotten his captain's license and all of that. I can say that he really put his money to use and has done well and I'm so proud of him.¹⁶¹

Although there were a few reports of businesses that had to close, there were also stories of some that were able to remain viable because of the support that the GCCF offered their employees and the infusion of cash into the local economy.¹⁶²

[I]t was a Godsend in many ways in that there was a claims process. At least that gave people the sense that "alright, at least there is a safety net that is maybe going to supplement my pay." We didn't lay anybody off; you could lay everybody off and then say "we are not going to be able to operate, there's the claim facility and they will pay you." Or you could try to operate at some depressed level[,] so instead of them getting [35] hours a week they are going to get [25] or [15]

¹⁶⁰ Interview by Joan Flocks with Restaurant/Seafood Industry Worker in Eastpoint, Fla. (June 5, 2012).

¹⁶¹ Interview by Joan Flocks with Restaurant/Seafood Industry Worker in Eastpoint, Fla. (June 5, 2012).

¹⁶² At a different level, BP diverted a lot of financial assistance into areas reliant on tourism, such as Pensacola Beach and St. George Island (Franklin County). The disaster had an immediate effect on the tourism economy in these areas because visitors cancelled their vacation reservations after viewing the drastic media coverage of the oil spill. This occurred even in areas that never had a visible presence of oil, such as St. George Island. But beginning in 2010, BP committed \$179 million through 2013 to Alabama, Florida, Louisiana and Mississippi for regional and national tourism campaigns. *Promoting Tourism Along the Gulf Coast*, BP, <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/restoring-the-economy/promoting-tourism-along-the-gulf-coast.html> (last visited Sept. 21, 2014). In Florida, much of this funding went to Tourist Development Councils in affected counties, who used the money to advertise and sponsor promotional events and activities. Several respondents in areas such as Pensacola Beach reported that tourism in 2011 and 2012 increased significantly and credited the BP funding for the increase.

hours a week depending on their position The claims facility will supposedly make you whole and that's kind of the model we chose and I think it was a good move. I don't have regrets at all. People will feel better.¹⁶³

[E]very day newspapers are shutting down. I think this oil spill actually kept some of those small newspapers alive longer. It slowed their death because BP . . . contacted local newspapers and they were buying full page ads weekly, if not more than that. . . . [T]hat was this ad revenue that we never would've gotten.¹⁶⁴

5. Recommendations for Improvement to the Compensation Process

Just as many of the respondents' criticisms of the compensation process focused on transparency, accountability, and consistency, so did many of their recommendations on how the process could be improved. For example, although there was little agreement as to what entity should control the process, some respondents felt that in order to improve transparency, there should be less connection between the Administrator and the RP.

My belief is that anytime there are [sic] a claims administrator that is acting for the benefit for the responsible party, there is something wrong with that process. There truly was not independence. . . . "Bring their checkbook but keep the responsible party at arm[']s length from the response and recovery processes[,] including the compensation of claimants."¹⁶⁵

Although many respondents recognized that the GCCF was a learning process for everyone, perceptions of accountability and consistency would be improved, they felt, by settling on rules early in the process; making eligibility guidelines clear, simple, and

¹⁶³ Interview by Brian Mayer with Seafood Industry Worker in Bon Secour, Ala. (Mar. 6, 2012).

¹⁶⁴ Interview by Brian Mayer & James Davies with Restaurant/City Employee in Cedar Key, Fla. (Feb. 10, 2012).

¹⁶⁵ Interview by Joan Flocks with Nonprofit Community Organization Leader in Pensacola, Fla. (Apr. 25, 2012).

accessible to the public; reducing turnover or transferring of staff at the claims processing facilities; and ensuring that all staff were operating according to the same, easily understood guidelines.

It should be laid out very clearly in the beginning of what is necessary[,] so at the time of the spill people know that right now they need to get their paperwork together because even if they don't know what their losses are right now, they should be prepared so whenever they do file their claim[,] this paperwork is ready.¹⁶⁶

They needed somebody that was a good, detailed, organized, office manager. They had insurance adjusters, that was who they basically had [sic]. They were estimating how much things were worth. They needed somebody who was very organized who could make sure that everything was being put into the right places and that the right criteria was [sic] met . . . This group needed to collect it then they needed to take it to this department who could maybe do the mathematics to it and this person needed to do approvals If there was anything that was additionally needed then send it to this department and have them send it to this person and make contacts and call up all the missing things they needed to find. There was none of that.¹⁶⁷

If the process cannot be simplified, some respondents said, there should be accessible assistance provided for people to reduce the resources that it takes to provide documentation.

When you've got someone who is already living off of substantially less than what they were living off of before and you are requiring them to engage in this documentation process that is not necessarily a part of what they would normally do for tax purposes, they are suddenly being forced to do it and prove all of this higher level work and this burden of proof. I think there should be something to account for

¹⁶⁶ Interview by Joan Flocks with Attorney in Pensacola, Fla. (Apr. 25, 2012).

¹⁶⁷ Interview by Joan Flocks with Restaurant/Seafood Industry Worker in Eastpoint, Fla. (June 5, 2012).

those smaller businesses because not everyone can hire an accountant and not everyone has that background.¹⁶⁸

I would've liked to have seen legal representation to help these people understand, legally, what they were taking on if they made a claim, and legally what they were taking by not making a claim. There were people who were making emotional decisions, rather than decisions that were based on fact, knowledge, and law.¹⁶⁹

Respondents also recognized there is always a potential for fraudulent claims and that part of the roles of the GCCF was to prevent fraudulent claims. Some even felt the GCCF offices should have been more discriminating in their processing. Nevertheless, many felt that once claimants legitimately proved their claim, there should be no negotiation or haggling about what they would be paid. Such negotiation, they felt, ran counter to the concept of re-establishing claimants' well-being.

[W]e would love to see a process that is a true process and doesn't change from time to time; one that can be carried through. I certainly understand there are people who are going to try to gain [sic] the system and try to make things they shouldn't make. I do think there should be checks and balances in place[;] there is no doubt about that. Once you have those in place and people have met those requirements you should pay them and go ahead and give them the money that they deserve.¹⁷⁰

Importantly, many respondents felt that the process could work better if affected residents and communities were respected and heard. This means being open to significant input from affected communities. It could also mean collaborating more effectively with community agencies and organizations that were designed to help their residents.

There has to be someone in that community that knows more about the local situation than they do . . . whether it be a

¹⁶⁸ Interview by Joan Flocks with Attorney in Pensacola, Fla. (Apr. 25, 2012).

¹⁶⁹ Interview by James Davies with Civic Leader in Cedar Key, Fla. (Feb. 17, 2012).

¹⁷⁰ Interview by Joan Flocks with Realtor in Pensacola, Fla. (Mar. 6, 2012).

seafood workers['] association or a county I just think we had this claims company that came in . . . with their plan to do something and they just started doing it without involving the community. There should have been more community involvement, and it should be based on each community because each community is different.¹⁷¹

Another thing is BP, when they would send out a check, give them flyers or put in a piece of information with those checks that said this agency would help you do this or that. They wouldn't allow us to do any of that.¹⁷²

BP should've come in and stocked up every food bank for three months, just cut a check to them. These food banks are still recovering.¹⁷³

III. DISCUSSION

Corrective justice, as classically conceived by Aristotle, and described by modern scholars, remedies the inequality that occurs when a party realizes gains at the expense of another party.¹⁷⁴ Corrective justice restores the initial equality by removing the gain from the first party and returning it to the second party.¹⁷⁵ The theory is founded on the premise of correlativity of the rights, injustices, responsibilities, and the appropriate remedies between the two parties.¹⁷⁶ Bolstered by a Kantian conception of rights and duties, a corrective justice paradigm includes recognition of normative equality that is independent of material holdings.¹⁷⁷ Thus, liability, the legal bond from a defendant to a plaintiff, is

¹⁷¹ Interview by Joan Flocks with City Employee in Apalachicola, Fla. (June 5, 2012).

¹⁷² Interview by Joan Flocks with Social Worker in Pensacola, Fla. (Apr. 24, 2012).

¹⁷³ Interview by James Davies with Civic Leader in Cedar Key, Fla. (Feb. 17, 2012).

¹⁷⁴ See Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349-50 (2002).

¹⁷⁵ See *id.*

¹⁷⁶ See Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 281 (1994) (discussing how the correlative nature of corrective justice is important because it is one factor that sets it apart from distributive justice, which follows a comparative logic); see also Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 433 (1992).

¹⁷⁷ See Weinrib, *supra* note 176, at 289-91.

solely defined by the gain and loss; factors such as a defendant's deep pockets or ability to distribute losses, or the respective party's character or wealth, should not be relevant.¹⁷⁸ There has been much jurisprudential debate among legal scholars as to the relevancy of corrective justice in tort law. Critics believe the concept of corrective justice to be simplistic, limiting, lacking in norms, and outdated. In cases of mass torts, the problems with adhering to corrective justice become even more confounding.¹⁷⁹ But proponents of the theory hold that it is flexible and can be expanded to be useful in tort law¹⁸⁰ and even in the formation of post-disaster compensation processes.¹⁸¹

As with the establishment of a tort action, it is important to characterize certain threshold factors, such as responsible parties (if any), victims, and the nature of risk, in the formation of post-disaster compensation processes. Each post-disaster situation will be a unique combination of these factors, ensuring that no single predefined compensation process can adhere in all cases. Nevertheless certain combinations can determine the type of justice and process that should follow.¹⁸² When these factors are not clearly determined, and the goals of compensation not identified, the result can be further harm to an affected community.¹⁸³ Culhane describes the lack of clarity in the formation of another Feinberg-administered post-disaster compensation process, the September 11th Victim Compensation Fund:

[T]he creation of the Fund showed Congressional failure to understand the differences between distributive and corrective justice. Full tort payment would be appropriate against any party deemed to be sufficiently at fault for the

¹⁷⁸ See *id.* at 292; John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1070 (2003).

¹⁷⁹ See David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 232-33 (1996).

¹⁸⁰ See Ernest J. Weinrib, *Toward a Moral Theory Of Negligence Law*, 2 LAW & PHIL. 37 (1983); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 449-50 (1987).

¹⁸¹ See Culhane, *supra* note 178, at 1077.

¹⁸² See Culhane, *supra* note 5, at 178.

¹⁸³ See *id.* at 210-11.

events of September 11, possibly including: the terrorists (most obviously but least likely to be accountable in this case); those responsible for security at airports; and the designers and engineers of the World Trade Towers. But government, assuming it was not at fault, was not such a party and should not have volunteered to behave as one, especially since “it” has no funds of its own, only those entrusted to it by the governed.¹⁸⁴

In contrast to the events of September 11, 2001, the DWH disaster did not involve a case of ambiguous responsibility; BP claimed responsibility early in the process. Likewise, the DWH disaster victims and the parameters of the risk were likely more easily identifiable than, for example, in an event like Hurricane Katrina.¹⁸⁵ A compensation process such as the GCCF was a viable response and an opportunity to strive for corrective justice. Recognition of the potential for these alternatives to litigation to achieve more appropriate forms of justice is just one reason why claims resolution facilities are being used with increasing frequency in a variety of post-disaster situations.¹⁸⁶

McGovern identifies nine critical variables that appear in various permutations in any claims resolution facility.¹⁸⁷ Flexibility and the ability to tailor the variables to address the particular situation are keys to the formation of successful facilities.¹⁸⁸ In the case of the GCCF, however, it can be argued

¹⁸⁴ *Id.* at 183.

¹⁸⁵ *See id.* at 186-206.

¹⁸⁶ *See* McGovern, *supra* note 4, at 1361-62. Examples of Claims Resolution Facilities that illustrate their breadth and diversity include the September 11th Victim Compensation Fund, the United Nations Compensation Commission established after the 1990 invasion of Kuwait by Iraq, and the Black Lung Program. *See id.* at 1363-66. Not coincidentally, Feinberg had served as administrator for several claims resolution processes, including the compensation fund for Dalkon Shield claimants, the Agent Orange compensation fund, the Sept. 11th Victim Compensation Fund, and the Virginia Tech shooting victims compensation fund, before he became the GCCF administrator. *See* Terry Carter, *The Master of Disasters: Is It Just Him, or Is Kenneth Feinberg Changing the Course of Mass Tort Resolution?*, A.B.A. J., Jan. 2011, at 32, 34, available at http://www.abajournal.com/magazine/article/master_of_disasters.

¹⁸⁷ The variables are: Function, Metaphor, Authority and Funding, Size and Similarity, Organization, Eligibility Criteria, Damage Methodology, Compensation, and Implementation. *See* McGovern, *supra* note 4, at 1362-75.

¹⁸⁸ *See* McGovern, *supra* note 4, at 1375.

that the flexibility in the design and implementation of the facility resulted in some of the dissatisfaction expressed by the Gulf Coast claimants. Although the GCCF was similar in some aspects of its function to other facilities charged with allocating a predetermined amount of damages to individual claimants,¹⁸⁹ it was still a unique incarnation with auspicious, yet ambiguous, roots.¹⁹⁰ The biggest ambiguity may have had to do with what McGovern describes as the claims resolution facility's "metaphor"¹⁹¹ which she describes as "[t]he applicable goals, standards, and yardsticks . . . [upon which] the facility plays in the context of the surrounding social and political fabric."¹⁹² Different types of facilities have different metaphors—a disaster relief facility is different from a tort facility—and an understanding of the metaphor for a particular facility is important for public acceptance.¹⁹³ From the beginning, Gulf Coast residents received mixed messages about the larger goals, the metaphor, of the GCCF. BP's public relations campaign implied that the company, in assuming the role of RP and establishing the facility, aimed to restore Gulf Coast residents' well-being.¹⁹⁴ The compensation process was originally presented as non-adversarial. When Feinberg became the administrator, he stressed that the GCCF would not operate under the assumption that claimants should be represented by counsel.¹⁹⁵ Yet, at the same time, it was publicly

¹⁸⁹ See *id.* at 1363-65; Deborah R. Hensler, *Assessing Claims Resolution Facilities: What We Need to Know*, 53 LAW & CONTEMP. PROBS. 175, 187 (1990).

¹⁹⁰ See Zygmunt J.B. Plater, *Learning from Disasters: Twenty-One Years After the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska?*, 40 ENVTL. L. REP. 11041, 11045 (2010); Mullenix, *supra* note 75, at 833-37; Byron G. Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 MISS. C. L. REV. 255, 256 (2011).

¹⁹¹ See McGovern, *supra* note 4, at 1365.

¹⁹² *Id.*

¹⁹³ See *id.* at 1366.

¹⁹⁴ "We continue to make significant progress cleaning the Gulf shoreline and supporting economic and environmental recovery in affected areas. Our goal is to provide a positive legacy in these coastal communities." *Gulf of Mexico Restoration*, BP, <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration.html> (last visited July 22, 2013).

¹⁹⁵ See Choo, *supra* note 13, at 40 ("The goal of this program is to minimize the legal technicalities and maximize efficient, swift payment.").

reiterated by the media and Feinberg that the goal of the GCCF was “to persuade . . . claimants . . . to settle claims through the escrow fund rather than [to] sue.”¹⁹⁶ Comments from Feinberg at the inception of the facility revealed that GCCF would partly be a proving ground for would-be litigants.¹⁹⁷ Furthermore, Feinberg had the authority to decide what standards to apply in disbursing money to claimants and revealed that determinations about applicable law and eligibility requirements would be an evolving process.¹⁹⁸

Nevertheless, both the goals of restoring Gulf Coast residents’ well-being and providing a tort replacement system for some claimants are not necessarily incongruous with an expanded notion of corrective justice.¹⁹⁹ The GCCF could have succeeded. But the overriding goal of the GCCF became more ambiguous as the process wore on and the problems with the lack of transparency, accountability, and consistency, such as those described above, emerged. In the face of these problems, some claimants began to feel that the real goal of the GCCF was not to restore their well-being, but to wear them down and make them

¹⁹⁶ See Sheryl Gay Stolberg, *Administering Fund, a Master Mediator*, N.Y. TIMES (June 16, 2010), <http://www.nytimes.com/2010/06/17/us/17feinberg.html>; see also CNN Wire Staff, *supra* note 134 (“It is not in your interest to tie up you and the courts in years of uncertain, protracted litigation when there is an alternative that has been created.”). Providing an alternative or replacement to tort litigation is a common variable to many claims resolution facilities. See McGovern, *supra* note 4, at 1365; Hensler, *supra* note 189, at 187.

¹⁹⁷ See Andrew Restuccia, *Control of Oil Spill Compensation Fund Shifts to Independent Administrator*, WASH. INDEP. (Aug. 23, 2010, 3:45 AM), <http://washingtonindependent.com/95442/control-of-oil-spill-compensation-fund-shifts-to-independent-administrator>. (“I’m going to have to draw some tough lines, but I’m hoping that I’m going to enjoy the benefit of saying, ‘If I don’t find you eligible, no court is going to find you eligible.’”).

¹⁹⁸ *E.g.*, Choo, *supra* note 13, at 36 (In an interview with the ABA Journal, Feinberg said, “I may use applicable state law or maritime law or other government law in order to leave open the possibility of applying a third standard.”); CNN Wire Staff, *BP Says It Has Paid \$399 Million as It Hands Over Claims Process*, CNN (Aug. 23, 2010, 5:44 PM), <http://www.cnn.com/2010/US/08/23/gulf.oil.disaster/> (Feinberg said that “[t]he farther a person or a business is from the Gulf, the less likely they are to be determined eligible,” explaining, “I don’t want to underestimate the importance of proximity to the Gulf, but we’ll have to be looking at the nature of your industry.”).

¹⁹⁹ See Culhane, *supra* note 178, at 1084-88. Although, it is more difficult to make the theory viable with certain types of tort replacement.

settle. What looked like an early move toward corrective justice became adversarial and transformed into a focused goal of distribution of trust funds and culling of potential litigants, leaving many affected residents with a feeling that justice had not been served.

In the realm of disasters it is very rare that compensation can make victims whole in the sense of restoring them to pre-disaster conditions.²⁰⁰ Instead, one theory is that compensation, like tort damages, can be conceptualized as a means to enable a victim to enjoy the aspects (such as health and well-being) of a “flourishing” life.²⁰¹ This is an abstract concept in any situation.²⁰² But in the case of disasters and economic loss, the formulation of what it takes to make claimants flourish is confounded by calculations of intangible harms and indirect and unforeseen losses. At the very least, however, a compensation process should not cause further harm to an affected community. Efforts should be made to never repeat the secondary trauma and community disruption caused by prolonged litigation after EVOS.²⁰³

The GCCF was heavily criticized by Gulf Coast residents, their elected officials, lawyers, legal scholars, and sometimes even BP itself.²⁰⁴ To his credit, Feinberg considered and analyzed the criticism launched in the early months of the process during an extensive series of town hall meetings.²⁰⁵ In recalling these meetings, Feinberg wrote:

I found that these meetings—involving neighbors, friends, and entire local communities—did not necessarily assuage anger so

²⁰⁰ See Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1577-80 (1997).

²⁰¹ See *id.* at 1585-94.

²⁰² See Culhane, *supra* note 5, at 206.

²⁰³ See Duane Gill, *Exxon Valdez Oil Spill Litigation and Community Resilience*, NAT. HAZARDS OBSERVER, Nov. 2008, at 1, 4; Picou, *supra* note 117, at 80-81; Liesel Ashley Ritchie, *Individual Stress, Collective Trauma, and Social Capital in the Wake of the Exxon Valdez Oil Spill*, 82 SOC. INQUIRY 187, 187-88 (2012).

²⁰⁴ See generally Mullenix, *supra* note 75; KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 145-62 (2012) (describing in detail the criticism from every possible angle of the GCCF and its administration, including many of the same issues with transparency, accountability, and consistency described by respondents in this article).

²⁰⁵ See FEINBERG, *supra* note 204, at 145-48.

much as compound it. The meetings reinforced each individual's determination to speak to power, to demand collectively what they would be reluctant to request in a private meeting. Those shouting the loudest received the most applause and encouragement. What developed was a type of "group think" and community reinforcement.²⁰⁶

Eventually, he felt he became a "human piñata" with "every conceivable type of criticism" directed at him.²⁰⁷ But the anger the Gulf Coast communities expressed was likely formed early on. It is possible that by the time the GCCF was implemented, the communities and the facility were already bound by different metaphors. Affected Gulf Coast residents were angered by the inequality that occurred when BP gained (through a negative externality) at their expense. They may have felt from the start that the compensation process was not addressing a fundamental need for acknowledgement of this breach of justice. In post-GCCF accounts, Feinberg related his belief that despite the intense criticism and obstacles, the GCCF successfully accomplished the goals commonly ascribed to claims facilities: paying out a significant amount of damages and averting lawsuits.²⁰⁸ He also believed the facility fulfilled "the [P]resident's commitment to come to the rescue of Gulf Coast" victims of the DWH disaster.²⁰⁹ Yet, he stated, it is unlikely the GCCF can be used as precedent or replicated in future situations, and he found this unfortunate.²¹⁰ For communities affected by technological disaster, however, the most unfortunate aspects of a lack of compensation process precedent would not be undistributed damages, unaverted lawsuits, or unredeemed Presidential promises—all of which were of equal or more benefit to other parties (BP and the President) than they were to affected Gulf Coast residents. The most unfortunate aspect would be the lost opportunity to learn from the past and improve on a process with the potential to heal communities with corrective justice. One need only compare the

²⁰⁶ *Id.* at 146.

²⁰⁷ *Id.*

²⁰⁸ *See id.* at 182-83.

²⁰⁹ *Id.* at 175.

²¹⁰ *See id.* at 179.

post-EVOS litigation chaos with even the idea of a facility like the GCCF to recognize that a tremendous leap was made. This progress should not cease just because a first attempt came under heavy criticism. Instead, those comments and perspectives from the ground-up should be scrutinized for recommendations on how a compensation process can be structured after the next technological disaster. Unfortunately, few would argue that there will not be a next time.