

OP-ED: JEFF REYNOLDS

# An update on the Gulf Oil Disaster

One year has now passed since the tragedy of April 20, 2010, struck the Gulf Coast. Although early projections of the extent of environmental damage seem to have been overblown, the real toll will not be realized perhaps for decades. Just as uncertain is the legal landscape taking shape in Judge Carl Barbier's courtroom in the Eastern District of Louisiana. Judge Barbier is in charge of overseeing the 300+ federal lawsuits that have been consolidated into one Multidistrict Litigation (MDL) proceeding, known as In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 2:10-md-02179. These lawsuits will remain consolidated for all pretrial proceedings, after which any case that doesn't settle is returned to its original forum to be tried.

To highlight the enormity of this undertaking, as of the writing of this article this proceeding's docket contains over 2,120 entries, and the first case is not set to be heard until early 2012. Documents have just begun to be produced, the first deposition has yet to be taken, thousands of plaintiffs are involved and on the one-year anniversary of the tragedy, BP filed cross-claims, counter-claims and third-party complaints against the other potentially liable parties: Transocean, Cameron and Halliburton. Mississippians choosing this route to seek reimbursement for economic damages stemming from the disaster may be tied up in litigation for years to come.

### Sophie's Choice

BP set aside an escrow fund in the unprecedented amount of \$20 billion to reimburse those affected economically by the tragedy. After initially managing the fund itself, BP relinquished control of the claims process to Mr. Kenneth Feinberg and the Gulf Coast Claims Facility (GCCF) on August 23, 2010. Mr. Feinberg, whose experience with disaster claims payments includes administering the 9/11 victims' compensation fund, has the formidable task of analyzing claims, calculating final payments in an expedited manner and maintaining the appearance of independence from the company signing his paychecks -BP. Ruling on pleadings filed by various plaintiffs and other parties, Judge Barbier recently determined that Mr. Feinberg was not a truly independent third-party and ruled that the GCCF could no longer insinuate that to potential claimants.

The conundrum facing individuals, companies and states alike is whether to enter the MDL arena and file suit against the responsible parties, risking not seeing a penny of reimbursement for many years as issues of liability unfold, or to file a claim with the GCCF. While a GCCF claim would ensure a faster payout, claimants have begun to express concern with their options: either file a claim for a low "interim payment" or accept a higher final payout for possibly less than their claim is worth. Further, final payments come with the requirement of waiving all legal rights against BP and the other companies involved.

### Transparency within the GCCF

At first, it appeared that Attorney General Jim Hood may have chosen to forgo litigation and utilize the GCCF claims process. However, on Jan. 24, Attorney General Hood submitted a "Statement of Interest on Behalf of the State of Mississippi" with respect to the plaintiffs' previously filed Motion to Supervise Ex Parte Communications between the GCCF and potential claimants (which led to Judge Barbier's ruling discussed

immediately above). At this time Hood merely stated that he agreed that "there are serious deficiencies in the structure and operation of the GCCF, and that this Court is in the best position to correct them."

The intensity of Hood's accusations increased on April 7 when he filed papers declaring that Mr. Feinberg and the GCCF have been continuously violating the OPA by purposefully delaying and denying claimants' timely payments and that Mr. Feinberg's recent increase in compensation by BP is indicative of his allegiances. Attorney General Hood also submitted to the Court that "BP, through the GCCF, continues to use economic duress and manipulate financially desperate claimants into providing BP, and other responsible parties, with an improperly broad release of claims and legal rights in exchange for inadequate consideration in violation of [the] OPA, state law, and basic principles of fairness and due process." On behalf of the State of Mississippi, Attorney General Hood has asked Judge Barbier to either appoint an independent monitor to oversee the claims process or to order an immediate audit of GCCF's activities to ensure compliance with the OPA. Attorney General Hood maintains that court intervention is the only way to ensure transparency of the GCCF claims process and fairness to claimants.

Counsel for the GCCF fired back on April 12 noting that Mississippi is not even a party to the MDL litigation and claiming that Attorney General Hood's allegations were not grounded in fact. The GCCF's responsive pleading set forth statistics showing that "in just nine months of operation, the GCCF has paid almost \$4 billion to over 174,000 claimants in honoring approximately 300,000 claims." The GCCF also stated that "[i]n Mississippi alone, over 15,100 claimants received emergency compensation totaling \$231 million" in the GCCF's first 90 days of operation, and that "[t]hese emergency payments were made without requiring any release whatsoever ...." The GCCF asserts that facts like these summarily prove that Attorney General Hood's requested relief is not only unnecessary but that the relief requested, not the GCCF, would only serve to delay the processing of claims of Mississippi residents. The GCCF also states that Attorney General Hood's comment on Mr. Feinberg's compensation "almost rises to the level of defamation."

This dispute between the Attorney General and Mr. Feinberg is probably a good thing. Judges tend to see through all of the shrill accusations and make just rulings. The GCCF is fulfilling its purpose by administering expedited payments to those affected who cannot wait years before being compensated. Judge Barbier's rulings should improve this process. The only thing certain at this point is that the showdown between Attorney General Hood and Mr. Feinberg is far from over.



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