

Deepwater Horizon: The OPA Claims Process



Russell S. Kent
Special Counsel for Litigation
Office of the Attorney General



OPA

The Oil Pollution Act (OPA) of 1990

33 U.S.C. §§ 2701 et seq.

- Passed in response to the 1989 Exxon Valdez disaster.
- Chapter 376, The Pollutant Discharge Prevention and Control Act, actually predated OPA.



Responsible Parties

- The Coast Guard initially notified Transocean and BP of their potential liability under OPA. Coast Guard directed BP to establish a claims process.
- OPA defines who the Responsible Parties are; also allows actions for contribution against others. (33 U.S.C. § 2702)





Remedies

- Removal / response costs (33 U.S.C. § 2702(b)(1))
- Damages “that result from” spill (33 U.S.C. § 2702(b)(2))
 - Natural resources (compare to Fla. Stat. § 376.121)
 - Real or personal property
 - Subsidence use
 - Governmental revenues (net loss of taxes, etc.)
 - Lost profits or earning capacity
 - Increased cost of providing public services



Interim Claims

- A responsible party (like BP) must provide interim payments for short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled. 33 U.S.C. § 2714(b)(2).
- Claims for interim or final payments must be made within 3 years of the damage. 33 U.S.C. § 2712(h)(2).
- No release required for interim claims. Backwards-looking. May be made at least quarterly.
- Concern because GCCF has not paid more than 21,000 pending interim claims. Promises of payment this week.



Final Claims

- All claimants who elect to accept a final payment are required to sign an extensive release that would bar them from any future recovery from BP or any other responsible party, even for future unanticipated economic losses.
- Claimants are also strongly encouraged to consult with counsel before signing any release paperwork. GCCF is now providing the assistance of pro bono counsel.
- Claimants considering a “quick pay” claim should also evaluate whether their total possible damages exceed the set amount offered - \$5,000 for individuals or \$25,000 for businesses. 36,000 quick pay claims paid, \$355 million.



Final Claims Methodology

- GCCF has also not paid more than 28,000 pending final claims to date pending the release of a methodology.
- Attorney General Bondi commented on the draft methodology, indicating that it did not provide answers to the important issues surrounding the claims process – including the continuing lack of transparency. Moreover, the multiplier lacked scientific support and the proposed burden of proof for claimants was unduly restrictive.
- The Final Rules issued on Friday appear to be even worse than the draft methodology, especially given the emphasis on geographic proximity and business types.



MDL Filing

- Attorney General Bondi filed a brief, requesting: (a) the commencement of interim payments, with no further steering towards “quick pay” claims; (b) the creation of objective, transparent methodologies for evaluating claims along with the appointment of an independent auditor; (c) the establishment of a meaningful appellate process; and, (d) the revision of the release form. Hearing on Friday.
- Additional suggestions included hiring additional local claims adjusters with the authority to resolve claims on the spot, making claims procedures public so claimants understand how claim evaluations and payments are determined, and providing clear explanations to each claimant as to why a claim was reduced or denied.



Escrow Fund

- BP has agreed to fund a \$20 billion escrow account to pay claims.
 - \$3 billion will be added during this quarter
 - \$2 billion in 4Q 2010
 - Then \$1.25 billion in each subsequent quarter
- BP will set aside sufficient assets to secure the undeposited balance of the escrow fund.
- Governmental response and damage claims can be paid out of the \$20 billion fund but not civil or criminal penalties, such as the Clean Water Act civil penalties.



Presentation of Claims

- *OPA*: Presenting a claim is a **condition precedent** to filing the claim with the OSLTF or going to court.
- *Problem*: The GCCF is the **only** existing process to present individual or business claims to BP. The only “voluntary” claims are personal injury or death claims, which are not compensable under OPA, but may be paid by the GCCF.
- BP has not waived the presentation requirement.
- The Oil Spill Liability Trust Fund is limited to \$1 billion per incident, with no more than \$500 million for natural resource damages. First come, first served.

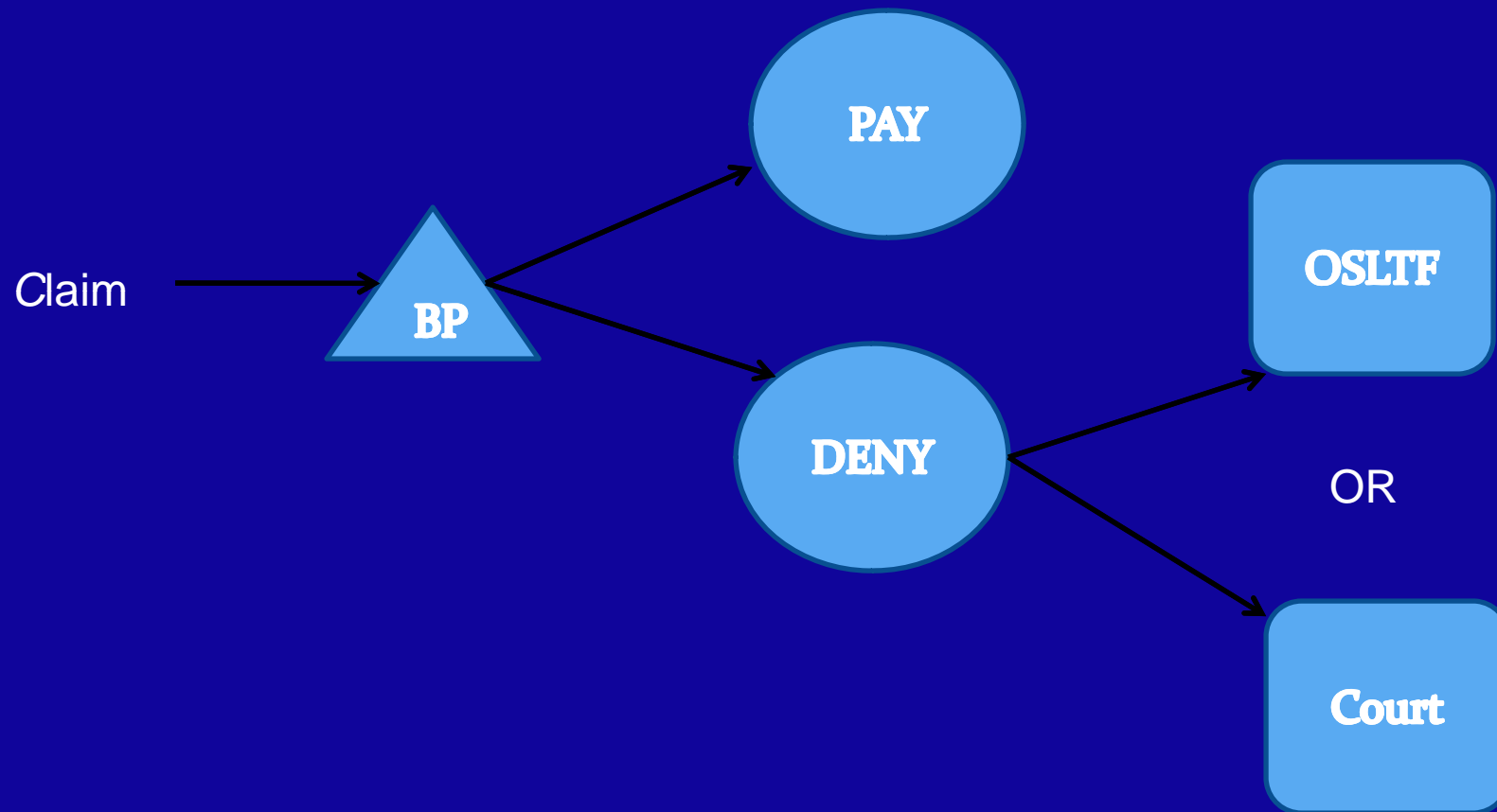


Governmental Claims

- BP handles state and local governmental claims, with the assistance of Witt Associates. There's a weekly report.
- There is a claims protocol for government claims.
- Local governments in Florida have requested roughly \$43 million and received \$22 million, with \$18 million still outstanding. Only \$3 million has been denied.
- Response and removal claims largely resolved.
- Just starting to see loss of revenue claims resolved.



Claims





NRDA

- Federal and state governments also participating in a Natural Resource Damage Assessment process, as is BP.
- Lead state agencies are DEP and FWC, with additional involvement by our office. Frequent trustee meetings.
- Process identifies the extent of resource injuries, the best methods for restoring those resources, and the type and amount of restoration required. Both scientific and legal.
- Historically, NRDA cases have been resolved through the implementation of restoration projects, not money.



Conclusion

QUESTIONS?