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Newsroom

Dean Logan on BP Compensation Guidelines

Dean David A. Logan explains legal issues surrounding BP's Gulf oil spill compensation fund for the Washington Independent and its affiliates.

The Washington Independent (and several of its affiliate newspapers across the U.S.) ran a piece titled, ["Control of Oil Spill Compensation Fund Shifts to Independent Administrator"](#) by Andrew Restuccia, which prominently features the expertise of RWU Law's Dean David Logan:

August 23, 2010: Kenneth Feinberg takes over today the gargantuan task of distributing the \$20 billion BP is setting aside to reimburse victims of the Gulf oil spill. He has said he will approve compensation claims by relying on precedents set by state and federal law. But law professors following the issue say it is unclear just how Feinberg will interpret a key legal doctrine called "proximate cause," which will determine exactly who gets a slice of the compensation fund.



As independent administrator of the Gulf oil spill compensation fund, Feinberg says he will offer oil spill victims a sum equal to or better than the compensation a protracted legal battle with BP would yield. But to show proximate cause, a claimant must prove a connection between the spill and the damages they have suffered. The definition of proximate cause that Feinberg settles on — various Gulf states define proximate cause differently — will have a major impact on who receives compensation and who does not, experts say.

Feinberg has experience dealing with sensitive compensation issues — he was special master for the Sept. 11 Victim Compensation Fund — and like that job, this one is an unenviable exercise in difficult decisions. There are many regions in the Gulf of Mexico and beyond that never saw oil hit their shores, but have still been affected by significant decreases in tourism, the moratorium on fishing and shrimping, and various other consequences of the spill. Ultimately, lines have to be drawn somewhere, and some oil spill victims will inevitably be disappointed. The question going forward is, where will those lines be drawn?

Proximate cause “is without a doubt one of the most debated legal concepts, certainly within tort law,” says **David A. Logan, dean of the Roger Williams University School of Law**. Logan says the term can be easily misinterpreted because the word proximate often implies location or space in time. But in reality, Logan says, the term has a more “sophisticated and complex meaning.”

Richard A. Nagareda, a law professor at Vanderbilt University, says the number of steps in between the event in question and the damage incurred matters when determining proximate cause. “Does it flow naturally and in an unimpeded fashion from the defendant’s conduct or are there lots of other things that have to happen before the injury to the plaintiff results?” he says.

The definition of proximate cause varies state by state, as well. For example, **Logan says** that some states would hold a bartender who over-served a customer that later got into a drunken driving accident legally accountable, while other states would not. “Louisiana may answer that question differently than Florida, and Florida might answer it differently than Mississippi,” he says.

Feinberg is working to ensure that his compensation process is rooted in current law in order to discourage people from entering into “very risky and very expensive” litigation with BP, said Nagareda, the Vanderbilt law professor. But, law professors say, despite the best efforts of Feinberg and others to persuade victims to avoid protracted legal battles with BP, litigation is inevitable.

“There will certainly be cases, it seems to me, where the Feinberg claims process will not pay. In those cases, there will have to be litigation,” said Ed Sherman, a law professor at Tulane University. “A seafood restaurant in Idaho that didn’t get Gulf oysters for a period of time faces an uphill battle. I’m sure we’ll see lots of litigation from groups like that.”

Feinberg, for his part, acknowledged in a conference call with reporters on Sunday that determining how to take into account geographic proximity would be a significant challenge going forward. But he said proximity is just one of three factors he will consider when reviewing claims. A claimant’s dependence on the resources in the Gulf and how hard the industry the claimant works in will also be considered, he said.

"If you're a shrimp processor 100 miles from the Gulf and all you do is process Gulf shrimp and you can't process Gulf shrimp, you clearly have a claim," he said. Feinberg also noted that proving a loss of tourism revenue would be a challenge.

"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," he said.

Feinberg released on Friday a "Protocol for Emergency Advance Payments" for his Gulf Coast Claims Facility, the entity that will be processing the hundreds of thousands of claims filed by victims of the Gulf oil spill. In the protocol, Feinberg said his claims process will be guided by the Oil Pollution Act of 1990, which sets forth a process for compensating oil spill victims, as well as "applicable law."



Feinberg is being "purposely vague" in the document, **says Logan, the Roger Williams dean.** "Is he saying that the civil code of Louisiana is going to be the applicable law when a claim is made by a Louisiana resident? Will that apply to a Texas resident whose ship was in Louisiana at the time? Does it apply to a hotel in Pensacola that wasn't actually directly tarred by the pollution? The devil is in the details," he says.

On the conference call, Feinberg said he has drafted a detailed "internal claims processing manual," that he will not make public. That manual will guide the decision making process for claims evaluators and would also likely shed light on what state and federal precedents Feinberg will follow. He also said he has developed a geographic map of the Gulf that will aid him in evaluating claims in terms of proximity. Pressed for more information on the manual, Feinberg pointed reporters to the eight-page summary of the emergency protocol he released on Friday.

Under the protocol, individuals or businesses can file an emergency claim from now until Nov. 23. Emergency claims serve as interim payments before final claims are filed. Accepting an emergency claim — which covers one to six months of losses — does not require waiving the right to sue BP. But that's not the case with a final payment, which covers all future damages from the spill. Accepting a lump-sum final payment means signing an agreement saying you won't sue BP in the future, and some in the Gulf fear that this process will force victims to file final claims before they know the true extent of the damages in the region.

Acceptable claims fall into five categories. The categories include any individual or business that had to pay for cleaning up oil or preventing oil from damaging their property; property damages; loss of profits; a loss from the inability to use natural resources that were damaged because of the spill; and physical injury or death.

Feinberg, in the conference call with reporters, also dismissed criticism of his protocol by Florida Attorney General Bill McCollum. In a letter sent Friday to Feinberg, McCollum slammed the protocols reliance on the proximate causation doctrine. "This requirement places a heavier burden of proof upon a claimant than is required by [Oil Pollution Act of 1990]. This ambiguity disserves the public, is contrary to the goal of obtaining compensation for damages without the need for litigation, and violates OPA," McCollum said.

But Feinberg countered that the claims process he is setting up is completely voluntary. If an oil spill victim is not happy with the settlement that he or she is offered, he can still sue BP under the terms set out in the . It is "not the case" that this system is more restrictive than the act, he said, adding that claimants get a "free preview" of what they'll receive under the claims process with no obligation to accept the offer. If they aren't happy, they can then sue BP.

"They would be well-advised to test it by coming into this program and seeing how they would be treated," Feinberg said.

To read the full story, click [here](http://washingtonindependent.com/95442/control-of-oil-spill-compensation-fund-shifts-to-independent-administrator). [http://washingtonindependent.com/95442/control-of-oil-spill-compensation-fund-shifts-to-independent-administrator]