

The parties continued to work on finalizing the details of the settlements. On March 8, 2012, at the parties' request, the Court entered an Order creating a process to facilitate the transition from the Gulf Coast Claims Facility ("GCCF") to the "Court Supervised Settlement Program" envisioned by the settlement. (Rec. 5995). The Order also appointed a Transition Coordinator and Claims Administrator. In a separate Order, the Court appointed a neutral party to preside over the seafood component of the proposed settlement. (Rec. Doc. 5998). On April 16, 2012, the PSC filed a new class action complaint to serve as the vehicle for the proposed Economic and Property Damage Settlement. *See* No. 12-970, *Bon Secour Fisheries, Inc., et al. v. BP Exploration & Production Inc., et al.*⁵ The class action complaint was amended on May 2, 2012. (Rec. Doc. 6412). On April 18, 2012, the PSC and BP filed the instant Proposed Settlement (Rec. Doc. 6276) and Motions (Rec. Docs. 6266, 6269, 6414).

B. OVERVIEW OF THE PROPOSED SETTLEMENT⁶

The Proposed Settlement intends to resolve certain claims by private individuals and businesses for economic loss and property damage resulting from the "*Deepwater Horizon Incident.*"⁷ To effectuate the settlement, the PSC seeks to conditionally certify the "Economic Loss and Property Damage Settlement Class" pursuant to Federal Rule 23(a) and (b)(3). The

⁵ The PSC similarly filed a new class action related to the proposed Medical Benefits Settlement. *See* No. 12-968, *Kip Plaisance, et al. v. BP Exploration & Production Inc., et al.*

⁶ The Proposed Settlement is a lengthy and detailed document with many defined terms of art. This summary is intended only to convey a general description of the Proposed Settlement. Parties, claimants, etc. should refer to the Proposed Settlement (Rec. Doc. 6276) to understand any specific component or term of the Proposed Settlement.

⁷ The Proposed Settlement defines "*Deepwater Horizon Incident*" as:

the events, actions, inactions and omissions leading up to and including (i) the blowout of the MC252 WELL; (ii) the explosions and fire on board the *Deepwater Horizon* on or about April 20, 2010; (iii) the sinking of the *Deepwater Horizon* on or about April 22, 2010; (iv) the release of oil, other hydrocarbons and other substances from the MC252 Well and/or the *Deepwater Horizon* and its appurtenances; (v) the efforts to contain the MC252 Well; (vi) RESPONSE ACTIVITIES, including the VoO Program; (vii) the operation of the GCCF; and (viii) BP public statements relating to all of the foregoing.

(Proposed Settlement ¶ 38.43, Rec. Doc. 6276-1 at 99).

class would consist of individuals and entities defined by (1) geographic bounds and (2) the nature of their loss or damage. If both criteria are not met, or the individual or entity opts out of the class, then the individual or entity is not within the settlement class and the claims are unaffected by the Proposed Settlement. Where a person or entity has multiple claims, some falling within the settlement and some outside the settlement, only the former claims are included in the settlement. The latter claims are unaffected and reserved to the claimant.

Generally speaking, the geographic bounds of the settlement are Louisiana, Mississippi, Alabama, and certain coastal counties in eastern Texas and western Florida, as well as specified adjacent Gulf waters, bays, etc. Individuals must have lived, worked, owned property, leased property, etc., in these areas between April 20, 2010⁸ and April 16, 2012. Similarly, entities must have conducted certain business activity in these areas between April 20, 2010⁹ and April 16, 2012.

The Proposed Settlement recognizes six categories of damage:

- (1) Economic Loss (including individual loss of wages, business economic loss, multi-facility business economic loss, start-up business economic loss, failed business economic loss, failed start-up business economic loss)
- (2) Property damage (including loss of use/enjoyment of real property, coastal real property damage, wetlands real property damage, realized real property sales loss),
- (3) Vessel of Opportunity (“VoO”) Charter Payment
- (4) Vessel Physical Damage
- (5) Subsistence Damage
- (6) Seafood Compensation Program

⁸ For individuals that worked on a vessel in the specified areas, the date range is “after April 20, 2009.” Similarly, for “Seafood Crew” claims, the individual must have worked on a vessel that landed seafood in the specified areas “after April 20, 2009.” (Proposed Settlement § 1.1, Rec. Doc. 6276-1).

⁹ For entities owning, operating, or leasing a vessel that landed seafood in the specified waters, the date range is April 20, 2009 to April 16, 2012. (Proposed Settlement § 1.2.3 Rec. Doc. 6276-1).

Certain individuals, entities, and claims are specifically excluded from the Proposed Settlement, and thus reserved to the claimant.¹⁰ Class Members may submit multiple claims and receive compensation for multiple categories of damage.

The Proposed Settlement would replace the GCCF with a “Court Supervised Settlement Program” (“Settlement Program”). The deadline for filing most claims with the Settlement Program is the later of April 22, 2014 or six months after the “Effective Date” of the Proposed Settlement.¹¹ Claims submitted to the Settlement Program will be evaluated and processed by claims administration vendors pursuant to the frameworks detailed in the Proposed Settlement for the various damage categories. The Proposed Settlement explains how compensation is determined and what documentation is required to support a claim. (Proposed Settlement § 5, and Exhibits cited therein, Rec. Doc. 6267-1). The Settlement Program also contains an internal appellate review process, and the Court maintains the discretionary right to review any appellate determination. Those who accept payments under the Proposed Settlement are required to release their claims against BP, government oil spill liability funds, and all other Defendants in MDL 2179 (except Transocean and Halliburton).¹² Under the Proposed Settlement, BP will also

¹⁰ For example, claims by individuals for losses arising from the federal moratoria on offshore permitting and drilling activities following the DEEPWATER HORIZON explosion are excluded from the settlement, but are reserved.

¹¹ Claimants in the Seafood Compensation Program must submit their claim within 30 days from the date of entry of a Final Order and Judgment of the Court after it rules upon final approval of the Proposed Settlement.

¹² According to the Joint Motion for Preliminary Approval, “The intent of the Agreement is for BP to pay all compensatory damages but to allow the plaintiffs to continue to seek punitive damage recoveries from Halliburton and Transocean, which is the sole basis for the exclusion of those defendants from the release. The plaintiffs, moreover, have agreed with BP to a set of special rules to effectuate the parties’ intent to allow the plaintiffs to seek exclusively punitive damages against Halliburton and Transocean, including the plaintiffs’ (1) agreeing not to seek compensatory damages against Halliburton or Transocean; and (2) agreeing, among other protections to BP, not to execute on any compensatory damages that might be awarded to plaintiffs against Halliburton and Transocean.” (Memo. in Supp. of Joint Mot. for Prel. Approval p.11 n.6, Rec. Doc. 6266-1 at 21 n.6; *see also* Proposed Settlement Ex. 21, Rec. Doc. 6276-39).

assign certain of its claims against Transocean and Halliburton to the settlement class.¹³

The movers note that the Proposed Settlement is different from many other class settlements in that payments are not delayed pending the Court's fairness hearing and final approval process. If preliminary approval is given, the Settlement Program will process claims and make settlement payments to class members so long as they execute an individual release.

In addition to baseline compensation payments, some claims also will receive a Risk Transfer Premium ("RTP"), which is a multiple of the baseline compensation.¹⁴ With the exception of the Seafood Compensation Program, there is no limit on the amount to be paid by BP. The Seafood Compensation Program is a fixed sum, \$2.3 billion. BP will pay all administrative costs of the Settlement Program, the cost of providing notice to the class, and reimburse claimants for accounting services required for filing their claims. BP will also provide a \$57 million to promote the Gulf Coast and its waters and up to \$5 million to fund a supplemental publicity campaign to be designed and administered by the PSC.

Turning to the enumerated damage categories, individual economic loss claims are calculated as the estimated difference between a claimant's expected earnings from a job within the class geography during May to December 2010 (or April 2011 in the case of certain seafood industry claimants), and the claimant's actual earnings during that claim period. Some claimants may be eligible for an RTP multiple of lost earnings. Some individuals may also receive additional compensation for lost health insurance, pension benefits, and qualified training costs

¹³ For example, BP proposes to assign its claims against Transocean and Halliburton relating to the repair, replacement, and/or re-drilling of the Well and the costs BP incurred to control the well and/or respond to and clean up the spill. (Proposed Settlement, Ex. 21 ¶ 1.1.3, Rec. Doc. 6276-39).

¹⁴ For example, if base compensation is \$2, and there is an RTP of 3, then the total compensation paid is \$8 [$2 + (2 \times 3) = 8$]. "RTP payments are meant to compensate class members for pre-judgment interest, the risk of oil returning, consequential damages, inconvenience, aggravation, the risk of future loss, the lost value of money, compensation for emotional distress, liquidation of legal disputes about punitive damages, and other factors." (Memo in Supp. of Joint Mot. for Prel. Approval p.14, Rec. Doc. 6266-1 at 24).

and qualified job search costs. Causation is presumed for some claimants; other claimants must demonstrate that a loss is due to the oil spill as outlined by the Proposed Settlement.

For existing businesses, economic loss claims are determined using a two-step process. Step one calculates the value of the business's reduction in profit during a claimant-selected loss period (any three or more consecutive months of the eight months following the spill). Step two accounts for expected profits by estimating the business's growth trend along with a general, economy-wide growth factor. The sum of step one (loss calculation) and step two (expected profit but for spill) results in the business claimant's base compensation amount. This amount may be enhanced by an RTP and/or offset by prior payments received, depending on the type of business. Again, causation is presumed for some businesses, and must be shown for others. The Proposed Settlement outlines other processes for multi-facility businesses, failed businesses, start-up businesses, and failed start-up businesses.

Claimants with eligible coastal real property are compensated for loss of use and enjoyment by multiplying the "2010 Applicable Property Tax" (defined as 1.18% of the "County Appraised Value") by 30%-40% (percentage depending on the presence of oil and the environmental sensitivity of the property). This amount is enhanced by an RTP of 2.5.¹⁵ Additional compensation is available if claimants establish physical damage from response operations. Compensation schemes for wetlands real property are based on whether parcels contained oil. Oiled parcels are paid a minimum of \$35,000 per acre. Where no oil was observed, compensation is a minimum of \$4,500 per acre. Wetlands real property claims are

¹⁵ For example, if the "Country Appraised Value" of a certain piece of property is \$350,000, the "Applicable Property Tax" is \$4,130 [= 350,000 x .0118]. If this property falls into "Compensation Category A2," the "Applicable Property Tax" is multiplied by 45%, for a base compensation of \$1,859 [= 4,130 x .45]. After an RTP of 2.5, the total compensation is \$6,507 [= 1,859 + (2.5 x 1,859)]. (See Proposed Settlement, Ex. 11A ¶ 2.G., Rec. Doc. 6276-23).

In any event, the minimum base compensation (the pre-RTP calculation) is \$800-\$1,100.

enhanced by an RTP of 2.5. The Proposed Settlement also provides compensation for certain individuals and entities that realized sales losses as a result of the spill. The compensation amount is 12.5% of the sale price.

All working VoO participants (those who were dispatched or placed on-hire under the VoO program) may receive between \$41,600 and \$88,400 (depending on the size of the vessel), representing 26 days' work under the VoO Master Vessel Charter Agreement. Working VoO participants (who are not participants in the Seafood Compensation Program) that will also receive economic loss compensation, will have economic loss compensation reduced by any "VoO Settlement Payment Offset"¹⁶ and "VoO Earned Income Offset."¹⁷ VoO participants that were never placed on hire to perform actual services may receive between \$4,800 and \$10,200 (depending on the size of the vessel), with no offset.

Vessel owners whose vessels were physically damaged as a result of the oil spill or cleanup operations may recover the lesser of the costs necessary to conduct a reasonable repair or replace the vessel.

As to subsistence claimants—those individuals who fish, hunt, or harvest Gulf of Mexico natural resources, including seafood and game, in a traditional or customary manner and to sustain the basic dietary, economic, shelter, tool, or clothing needs of themselves and their

¹⁶ "VoO Settlement Payment Offset" is defined as "the offset whereby the Total Compensation Amount for a Natural Person or Entity relating to a non-Seafood-related business directly involving the use of the vessel that performed the VoO services, or employment in such business or service, shall be reduced by 50% of the amount of the Working VoO Participant Settlement Payment. The VoO Settlement Payment Offset shall be applied after the addition of any applicable RTP to the base Economic Damage Compensation Amount, excluding prior income from the VoO Charter Payments." (Proposed Settlement § 38.163, Rec. Doc. 6276-1).

¹⁷ "VoO Earned Income Offset" is defined as "the offset whereby, if a VoO Charter Payment Claimant has previously been paid under a VoO Master Vessel Charter Agreement, the Claimant's Compensation Amount for its Claim relating to a non-Seafood-related business directly involving the use of the vessel that performed the VoO services, or employment in such business or service, shall be reduced by 33% of the amount previously paid for services performed under a VoO Master Vessel Charter Agreement. This reduction shall be applied after the addition of any applicable RTP to the base Economic Damage Compensation Amount, excluding prior income from the VoO Charter Payments." (Proposed Settlement § 38.161, Rec. Doc. 6276-1).

families—they are entitled to compensation for the total value of the subsistence natural resources that they lost due to the oil spill, plus an RTP enhancement.

The Seafood Compensation Program is a \$2.3 billion fund to compensate economic losses of commercial fishermen, seafood boat captains, all other seafood crew, oyster leaseholders, and seafood vessel owners. The Seafood Compensation Program contains five separate plans to provide compensation, each with its own eligibility, documentation requirements, and compensation methods. There are also RTPs ranging from 2.25 to 8.75.

Finally, BP has agreed to pay any award for common benefit and/or Rule 23(h) attorneys' fees, as determined by the Court, up to \$600 million. The Joint Motion for Preliminary Approval and the Proposed Settlement state that the parties began negotiating this amount only after there was agreement on all material terms of this Proposed Settlement and the Medical Benefits Proposed Settlement and that information had been delivered to the Court. Consequently, the PSC has moved to modify the existing Hold-Back Order so that no payments made by and through the Settlement Program will be held back, reserved, or deducted. (Rec. Doc. 6286).

C. LEGAL STANDARDS

1. Preliminary Approval

Federal Rule of Civil Procedure 23 governs class actions, including the requirements for class certification and settlement. “‘Before an initial class ruling, a proposed class settlement may be effectuated by stipulation of the parties agreeing to a temporary settlement class for purposes of settlement only.’” *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, 2012 WL 92498, at *8 (E.D. La. Jan. 10, 2012) (quoting 4 William B. Rubinstein et al., *Newberg on Class Actions* § 11:22 (4th ed. 2010)); see also *Manual for Complex Litigation (Fourth)* [MCL 4th] § 21.612 (2004) (“Parties quite frequently enter into settlement agreements before a decision has been reached whether to certify a class.”). “Settlement classes—cases