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## BP Claims Process Highlights Tensions in OPA 90

One of the guiding principles behind the Oil Pollution Act of 1990 (OPA or Statute) was the establishment of a simple claims process that would avoid costly and cumbersome litigation in the wake of an oil spill. Consistent with that objective, the Statute provides for a claim presentation procedure designed to promote settlement and avoid litigation, with the responsible party (RP) serving as claims manager. In most instances, the claims process has been viewed as simply one of the RP's many responsibilities following a spill and has provided compensation to eligible claimants without significant public scrutiny. As a result of the April 20, 2010 Deepwater Horizon spill (Spill), however, the OPA claims process, like many other provisions of the Statute, is being reevaluated at the highest levels of the U.S. Congress.

The claims-handling process established by British Exploration & Production Inc. (BP) has been both hailed as an effective and efficient way to promptly address damage claims and derided as a transparent attempt by the RP to prevent claimants from obtaining full recovery through the courts. The BP process highlights the tensions between the centralized and expedited claims process envisioned by OPA and the legal process available to individual claimants who resort to the courts.

### OPA CLAIMS OVERVIEW

One source of tension inherent in the OPA claims process is the incomplete overlap between claims covered under the Statute and all the possible damages that could potentially result from an oil spill. Under OPA, a responsible party is liable for all cleanup costs and costs associated with, among other things, the following:

- Loss resulting from injury or destruction of real or personal property (e.g., oil staining on a dock or boat)
- Loss in profits or impairment of earning capacity (e.g., a commercial fisherman's inability to fish due to damage to a vessel)
- Loss of subsistence use, if the natural resources someone depends on have been damaged by a spill (e.g., a lobsterman's inability to harvest due to contamination of lobster beds)
- Removal and cleanup costs

Among the claims that OPA does not address are those that relate to personal injury or lost use or enjoyment of private property as a result of a spill. Nor does OPA prescribe a specific process for the handling of claims. That is left to the discretion of the RP, and in the case of what has been called the

worst ecological disaster in U.S. history, that process has been subject to intense scrutiny.

## THE BP CLAIMS PROCESS

To handle the thousands of claims resulting from the Spill and to meet its obligations under OPA to review and compensate eligible claimants, BP established the Gulf Coast Claims Facility (GCCF) in August 2010. While the GCCF and the settlement monies it oversees are funded directly by BP, the GCCF is an independent body and does not report or answer to the RP. The GCCF is headed by Kenneth R. Feinberg, who is responsible for all decisions relating to the administration and processing of claims. Mr. Feinberg's credentials include the administration of other high-profile, multimillion-dollar settlement funds, including the fund established for victims of the 9/11 terror attacks.

The GCCF will compensate claimants for the full suite of OPA damages. Although not required by the statute, BP also has agreed to accept and evaluate claims for bodily injury due to exposure to oil or as a result of the cleanup process.

Under the GCCF's claims procedure, qualified individuals or businesses affected by the Spill have three payment options: interim, final, or quick pay.

- An **interim payment** provides compensation for past damages. A claimant for an interim payment is not required to execute a release or waive any rights to assert additional claims, to file an individual legal action, or to participate in other legal actions associated with the Spill. Consequently, a claimant who seeks an interim payment may make subsequent claims to the fund.
- A **final payment** resolves all of a claimant's claims, including claims for future damages resulting from the Spill. Importantly, accepting a final payment requires the claimant to sign a release and waive all past and future claims, and precludes participation in any subsequent legal action.
- On December 13, 2010, the GCCF also announced a **quick pay** program to allow certain claimants to obtain expedited final payments. Under the quick pay program, the approximately 166,000 individuals and businesses who received an emergency payment from the GCCF may receive a one-time final payment of \$5,000 for an eligible individual or \$25,000 for an eligible business. Emergency payments, which were accepted by the GCCF through November 23, were available to individuals and businesses that experienced financial hardship as a result of the Spill. Claimants under the quick pay program are not required to submit additional documentation to support their claim; however, a quick pay claimant must forfeit all rights to litigate past and future claims against both BP and all other potentially responsible parties.

## CONTROVERSY OVER THE CLAIM PROCESS

Despite the \$20 billion claims fund that BP established, far in excess of the OPA cap, the GCCF process is not without detractors from a range of sources, including government officials, state attorneys general, and the trial bar. In particular, critics have questioned the waiver requirements associated with final and quick pay payments and comments by Mr. Feinberg encouraging claimants to participate in the GCCF process rather than resort to the courts.

The final payment and quick pay waiver, which requires claimants to relinquish all future litigation rights against BP and all other potentially responsible parties involved in the Spill, has prompted a harsh response. On December 9, 2010, Alabama Gov. Bob Riley sent letters to President Barak Obama and to BP's Chief Executive Officer Robert Dudley claiming that the waiver is "over-broad and simply

unconscionable" because the release is required before the full nature of a claimant's injury is clear. Similarly, in a joint statement issued on December 16, 2010, the attorneys general for Alabama, Florida, Louisiana, and Mississippi "strongly urge[d] all claimants to proceed with caution in evaluating whether to accept an offer of final payment or quick final payment from the GCCF or to sign any release." The attorneys general further "advise[d] claimants against accepting any form of final payment or signing any release without first thoroughly reviewing and understanding the GCCF's terms" and "strongly encouraged [claimants] to consult with counsel before signing any final claim paperwork with the GCCF."

Finally, the GCCF and Mr. Feinberg have been criticized for statements discouraging claimants from seeking legal advice or resorting to the courts. In a Motion to Supervise *Ex Parte* Communications between Defendant and Putative Class Members filed in the Eastern District of Louisiana on December 21, 2010, attorneys for certain claimants asked the Court to ensure that Mr. Feinberg's public comments, and the language of the GCCF's settlement release, are "clear, accurate and fair" to the people who might instead pursue their claims in court. The plaintiffs further asked that Mr. Feinberg stop advising spill victims that they should not hire lawyers and that he be required to tell potential litigants of the benefits of going to court, including the potential for punitive damages, attorney fees, and the opportunity to sue others involved in the Spill.

The controversy may stem, in part, from a perception that BP is influencing the independent claims process. Critics have complained that the GCCF and Mr. Feinberg are inherently biased, in part because BP pays Mr. Feinberg's firm roughly \$850,000 per month to oversee the claims process. Despite the growing criticism, the GCCF continues to accept and process final payments. As of December 23, the GCCF had paid roughly \$43 million in "quick pay" claims alone.

BP and its critics approach the claims-handling process from very different perspectives. BP's process provides compensation quickly and efficiently. There is no question, however, that full participation in the GCCF process would also limit BP's ultimate exposure. BP's critics, and those encouraging claimants to pursue their legal rights in court, point to the potential for greater recovery through litigation. While that potential exists, litigation may add considerable time before compensation is obtained. As participation in the OPA claims process is voluntary, individual claimants ultimately need to determine which course to pursue.

## **POSSIBLE LEGISLATIVE ACTION**

The claims process is but one of OPA's provisions subject to congressional scrutiny. While amendments to the Statute in the immediate aftermath of the Spill were limited, the new Congress may pursue a more sweeping reform agenda. The most significant proposals for the next Congress to consider include a significant increase in the per-incident liability cap and an increase or even potential elimination of the cap on certain damages, currently set at \$75 million. Other proposals include an expanded definition of "Responsible Party" to include minority owners of the RP and an expansion on the scope of recoverable OPA damages to include injuries to human health. With respect to the claims process specifically, legislators may take a hard look at the RP's ability to obtain broad releases from claimants and call for greater federal oversight of the claims-handling process generally.<sup>1</sup>

In its deliberations, Congress will be taking into account the final report of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (Commission), issued on January 11, 2011. The report, which is critical of both the energy industry and the federal government, traces the root causes of the Spill and recommends steps to avoid future incidents.

The scale of the BP Spill has resulted in closer scrutiny of routine OPA processes and practices that typically occur outside of the public eye. In particular, critics have called into question a claims-handling process that has imperfectly balanced the often competing objectives of speed and efficiency versus the comprehensive and thorough airing of all potential claims resulting from an oil spill. While these issues are debated in Congress, individual claimants will continue to face difficult decisions as they determine how best to proceed.

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## FOR MORE INFORMATION

Additional information regarding the BP claims process is available at <http://www.gulfcoastclaimsfacility.com/>.

The Commission's final report on the Spill is available at <http://www.oilspillcommission.gov/final-report>.

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<sup>1</sup> In addition to legislative initiatives, on December 15, 2010, the Justice Department filed a lawsuit against BP and other potentially responsible parties for violations of OPA and Clean Water Act. The government is seeking to recover all removal costs and damages caused by the Spill, including damages to natural resources, without limitation under OPA. The lawsuit also seeks civil penalties under the Clean Water Act. The government has not set a monetary amount for the damages it is seeking.

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