

BP fund-seekers might have to waive right to sue

Settlements from BP's \$20 billion oil spill fund could shield defendants

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WASHINGTON — People and businesses seeking a lump-sum settlement from BP's \$20 billion oil spill compensation fund will most likely have to waive their right to sue not only BP, but also all the other major defendants involved with the spill, according to internal documents from the lawyers handling the fund.

The documents — which include e-mails, draft and final versions of the protocols, claims forms and legal notes about the administration of the fund — provide the first definitive picture of who will be paid by the \$20 billion fund, and how and when.

They also shed new light on the components of the payment plan that are likely to stir controversy, including the fund's emphasis on geographic proximity as a determining factor for eligibility.

The fund is being administered by a prominent Washington lawyer, Kenneth R. Feinberg, who declined to be interviewed about the documents but verified their authenticity.

The eligibility requirements for compensation from the fund are similar to those of the 9/11 victims compensation fund, which Mr. Feinberg also handled. People affected by the spill seeking final settlements face a choice similar to that faced by the 9/11 victims: If they decide to sue instead of accepting a settlement, they could face years of litigation; and if they decide to accept the settlement, it could come before the full damage from the spill is known.

A key difference between the spill fund and the Sept. 11 victim compensation fund is the matter of geographic proximity. The 9/11 fund took that issue into account, but it was less controversial because that fund focused on compensating people injured in the terrorist attacks and families of those killed rather than adversely affected businesses.

Fishermen, shrimpers and seafood processors as well as hotel and restaurant owners with beachfront property in areas where oil washed ashore will have the easiest time getting reimbursed. An ice cream parlor or a golf course miles from the affected shore but along the main highway headed to the beach will probably not be eligible, the documents indicate.

Some businesses could be excluded

Legal experts said that the eligibility criteria in the protocol, including the emphasis on proximity, make intuitive sense, but they will cut out large sectors of businesses and people that were indirectly but nonetheless deeply affected by the spill.

Examples of the kinds of businesses that may be excluded include a bait and tackle supply store in Raleigh, N.C., that equips much of the gulf's fishermen; a gas station in Flomaton, Ala., alongside Highway 29, which heads to the Gulf Coast; and a beer distributor in Atlanta whose biggest contracts were with restaurant chains on the affected coast.

The documents say that people or businesses "in a community or municipality adjacent to a beach shoreline, marsh, bay or tributary of the gulf where oil or oil residues came ashore or appeared in the waters" will be given top priority.

Eligibility "will take into account, among other things, geographic proximity, nature of industry, and dependence upon injured natural resources," the documents say.

The possible provision in the final oil spill settlement protocol requiring people to waive their right to sue companies other than BP that were working on the rig is also expected to face protest, legal experts said.

Transocean, Halliburton immune from lawsuits?



Wade Bonvillain, who owns a seafood company, questions Ken Feinberg, administrator of the Gulf Coast claims processes related to the BP oil spill in the Gulf of Mexico in Houma, La. The Gulf Coast Claims billion escrow account, from BP on Aug. 23.

Those other companies related to the spill include Transocean, the operator of the Deepwater Horizon rig that exploded and sank in April; Halliburton, the company responsible for cementing the well; and Cameron International, the maker of the failed blowout preventer, a device designed to shut off a well.

Mr. Feinberg plans to publicly release the protocol for emergency payments on Friday and the protocol for the final settlement in the fall. The eligibility terms for both protocols will be nearly identical, though the burden of proof to qualify for a final settlement payment will be higher, the documents say.

Even though BP is the fund's sole contributor so far, it may still be in its interest that the other companies linked to the spill be protected from claims because they could in turn try to sue BP for payment, said Richard Nagareda, a mass torts expert and law professor at Vanderbilt University.

While the protocol says that all workers injured or killed as a result of the explosion on the Deepwater Horizon or the spill are eligible to file claims, a letter sent by BP's lawyers to Steve Gordon, a lawyer representing some of those workers, states otherwise.

'Full release of all BP entities'

The letter was handed over to the House Judiciary Committee, which is investigating liability issues and the claims process.

"To be clear, it is BP's position, consistent with this indemnification, that any settlement between Transocean and any of its injured or deceased employees must include a full release of all BP entities from any and all claims or liability in connection with the Deepwater Horizon incident," said the letter, from John T. Hickey, a lawyer for BP. "This full release of all BP entities would indeed bar any subsequent claims against the fund being established by BP and the claims facility that will be administered by Mr. Feinberg."

Other parts of the fund protocol that may upset potential claimants include a provision that property owners will not be reimbursed strictly for loss of property values. Also, there will be no reimbursements for anyone adversely affected by the Obama administration's moratorium on most deepwater drilling in the gulf, people with mental health claims or businesses that were far from spill but lost tourism revenue because of government predictions that the slick was headed their way.

"Economic losses which are more remote, or occurred at a location more distant from the spill, are less likely to be fully compensated," the documents say.

Case-by-case basis

Mr. Feinberg will determine on a case-by-case basis what qualifies as beach-front property and how payments will be adjusted on a sliding scale based in part on geographic proximity to the spill.

In a political deal struck with the governors of Alabama and Mississippi, up to \$60 million from the fund will be set aside in a special pool just for compensating negatively affected real estate brokers and agents in the gulf region who are otherwise ineligible for compensation. That money will not be distributed by Mr. Feinberg but rather by the National Association of Realtors in Washington or local chapters in Alabama, Florida, Louisiana, Mississippi and Texas. The national association will set eligibility requirements for this money, but Mr. Feinberg will review those terms.

The \$20 billion BP fund will be administered in two stages.

People, businesses or other groups that have been adversely affected by the spill can apply to Mr. Feinberg between Aug. 23 and Nov. 23 to see if they are eligible for emergency payments. After Nov. 23, only final settlement claims will be accepted, and the cutoff date for sending those is Aug. 23, 2013, the documents say.

The right to sue is waived only if people or businesses accept Mr. Feinberg's settlement, not if they simply apply for the payment. Accepting the short-term emergency payments comes with no conditions, the documents say.

The time limit placed on applying for emergency payments has been criticized by some gulf officials, including Alabama's attorney general, Troy King. After the emergency payments run out, people still out of work may be forced to apply for a final settlement before there is enough evidence to ascertain the spill's actual long-term financial effects.

'Zones of eligibility'

Gulf residents, their lawyers and local politicians have also harshly criticized the use of proximity in calculating eligibility.

The protocol will "arbitrarily exclude large swaths of claimants from covertly predetermined 'zones of eligibility' based on restrictive state law concepts as opposed to following" the federal Oil Pollution Act, a team of lawyers representing several gulf restaurants wrote in a July 20 filing in federal court in the Eastern District of Louisiana.

In a concession to trial lawyers, Mr. Feinberg removed early draft language from the emergency protocol that said affected restaurant owners were likely to be eligible while their suppliers were not. Mr. Feinberg has also removed from the current draft of the final settlement protocol

language that would have granted BP the right to appeal to a pre-established three-judge panel any claim Mr. Feinberg approved for over \$500,000.

In response to pressure from BP, he decided to include language in the protocols emphasizing proximity rather than language that is closer to federal law that does not geographically limit damage claims. BP also successfully lobbied to include language in the emergency protocol that says that any earnings or profits people receive from another job or other source of income during the period for which they are claiming lost earnings will be deducted from the final settlement.

Instead of the month-by-month checks that BP had been handing out, Mr. Feinberg will begin authorizing emergency payments worth up to six months of lost compensation. Any emergency payments will be deducted from the final settlement disbursed.

*This article, "[BP Settlements Likely to Shield Top Defendants](#)," first appeared in *The New York Times*.*

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