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Fits And Starts: Victims Of Deepwater Horizon Oil Spill Look To Feinberg And New \$20 Billion Fund To Improve Claims Handling

By Richard Shore

Individuals and businesses impacted by the Deepwater Horizon oil spill have expressed widespread dissatisfaction with BP's handling of economic damages claims thus far. At the urging of the Obama Administration, BP is setting up what ultimately will be a \$20 billion fund overseen by an "independent" trustee to evaluate and pay claims arising from the spill. Lawyer Ken Feinberg has been designated as the trustee to oversee the fund.

Feinberg was selected on the strength of his experience handling mass disaster and mass tort claims ranging from military veterans exposed to the defoliant agent orange during the Vietnam War, to victims of the 9/11 World Trade Center terrorist attack, to students gunned down at Virginia Tech in 2007.

Our law firm, Gilbert LLP, has extensive experience working with Mr. Feinberg. He is certainly up to this task, and he has made a number of statements straight out of the box intended to reassure the public that he will ramp up operations quickly and handle claims expeditiously. Some more recent statements have been less encouraging. In any event, Feinberg must demonstrate by deeds, not just words, that the new fund will be a dramatic improvement over the prior BP effort.

As Feinberg moves forward, it is important that the process be transparent, expeditious, and fair. That cannot be the sole judgment of one person, or of BP. Feinberg should meet with affected parties at the outset to ensure that their needs, concerns, and perspectives are taken into account in creating and operating what will be one of the largest claims processing facilities in history -- maybe *the* largest. And Feinberg should take concrete steps to demonstrate that the claims process he sets up promptly and fairly compensates individuals, businesses, and others that have suffered economic damage as a result of this incident. Affected parties will be keenly focused on the process for submitting and

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reviewing claims, the criteria by which claims will be evaluated, and the timeline for processing and payment. The time to get it right is now.

Under the Oil Pollution Act, the responsible party, here BP, has 90 days after a claim is submitted to settle and pay it. If the claim is still outstanding at the end of the 90-day period, the claimant can file a lawsuit against BP and litigate the claim, or the claimant can submit a claim to the Oil Spill Liability Trust Fund ("OSLTF"), administered by the Department of Homeland Security.

Unlike BP, which had to set up a claims processing capability from scratch when the oil spill occurred, the OSLTF has an existing claims process in place. But the OSLTF has never faced a spill of this magnitude, or claims in the numbers likely here. Because of the 90-day rule, the OSLTF has a bit of time to ramp up its claims processing capacity -- but not much. Nor should the size of the new BP fund lead the OSLTF to assume that it will not face significant claims in the near term.

Given the scope of this spill, the widespread damage that has already occurred and the even more serious consequences that are anticipated, and the human toll the Gulf coast is facing, the OSLTF must be fully prepared for the worst-case scenario. And just like the new \$20 billion BP fund, the OSLTF must ensure that it handles claims in a transparent, expeditious, and fair manner.

Individuals and businesses that have been impacted by the spill should submit claims to BP as soon as possible. BP will fund the \$20 billion over time, so there is a chance that later filers will have to wait to be paid. In addition, the OSLTF is legally obligated to pay claims on a first-in-first-out basis. Given that the OSLTF is limited to paying \$1 billion per incident, it could well run out of funds before all claimants have been paid. In that event, unless Congress and the Administration act to increase the per-incident cap as has been proposed, late filers could be turned away.