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Final Claims Subrogation Could Leave BP Big Winner

By **Nick Malinowski**

Law360, New York (November 19, 2010, 7:11 PM ET) -- New rules for final payments under the \$20 billion BP PLC spill fund will likely include a subrogation clause, and while this will surely change the dynamic among the energy company, the claimants and other parties potentially responsible for the Deepwater Horizon oil spill, it may not represent the watershed event it appears to be at first blush, attorneys say.

On Nov. 23 the Gulf Coast Claims Facility, administered by mediation czar Kenneth Feinberg, will move from accepting emergency no-strings-attached claims into a final and interim payment phase, but the fund has kept the actual protocols of the new distributions under wraps.

That claimants will be required to assign their rights to sue non-BP parties in exchange for a final payment under the fund has bubbled up in informed scuttlebutt surrounding the claims process for some time, and a draft copy of the new rules acquired by Reuters this week in part confirmed what had been a loosely guarded secret.

A spokeswoman for the fund refused Thursday to confirm or deny that the final rules will contain the subrogation clause. BP did not respond to requests for comment on the protocols.

The possibility that BP would demand subrogation in exchange for settlements has been around since the weeks immediately following the spill, and it is not surprising that BP wants this as part of the fund administration because of the significant resources the company has put into both the cleanup and the payment of claims, Kenneth Ehrlich of Jeffer Mangels Butler & Mitchell LLP said Thursday.

If there are a number of entities that share responsibility for the spill and the resulting damage, but only one of those parties, in this case BP, stepped up to fund the response — \$100 million in cleanup plus the \$20 billion fund — it makes sense to streamline BP's ability to recover the shares of the other parties, according to Jeff Porter of Mintz Levin Cohn Ferris Glovsky & Popeo PC.

It also makes sense from a settlement perspective, said Vincent Foley of Holland & Knight LLP's Maritime Practice Group. If BP is going to pay claimants, it will want the assignment of those rights to extinguish the claim; the company does not want to fight with other potentially responsible parties over additional claims down the road, he said.

To the extent that claimants are being compensated fully, they should not need to go after the third parties, according to John Hahn, practice leader of Mayer Brown LLP's environmental group.

"I think it's reasonable for them to have to make an election. They should either accept or

not accept the settlement from the fund but should not take from the fund and think they can go back and top up against other defendants," he said.

BP could use the transferred claims to go after other defendants in suits related to the spill, like Halliburton Energy Services Inc., Cameron International Corp. or Transocean Ltd., to gain reimbursements for what it has dispensed under the fund.

But Hahn suggested the company likely would be able to assert claims against those companies even without the new assignments. The overriding benefit for and likely interest of BP in the deal is extinguishing the claims, he said, adding that the last thing BP wants is to pay claimants fully for their losses and then have the claimants pursue additional claims against third parties and be drawn into that litigation.

Fishermen and property owners do have claims that are unique to what BP would have, in and of itself, been able to bring against third parties, and there is a possibility that those claimants would be assigning the rights to pursue punitive damages, which are not covered under the fund, to BP, David Buente Jr. of Sidley Austin LLP's environmental group said.

In theory, BP would then be able to pursue claims against third parties who might otherwise be contractually indemnified.

But it is likely that the common principles of tort law would still apply, precluding BP from turning its liability into any type of gain, Porter noted. Ultimately BP would not be able to recover from others more than the loss it suffered itself, he said.

There is no doubt that transfer of claims does give BP more leverage for that final day of reckoning when liability is doled out among all the parties who played a part in the disaster.

"BP is in a stronger position because they can say, 'Look, we have paid not just our share, but the shares of everyone else, and in the eyes of a jury that will look pretty good,'" Nancy Rich of Katten Muchin Rosenman LLP said.

BP and its contractors have been hit in the spill's aftermath with as many as 400 lawsuits from environmental groups, fishermen, property owners, insurers, shareholders, states along the Gulf of Mexico and the federal government. Multidistrict litigation has been consolidated in the U.S. District Court for the Eastern District of Louisiana and the U.S. District Court for the Southern District of Texas. Separate individual suits are pending throughout the Fifth Circuit.

Thus far, the potentially responsible parties have publicly minimized their own blame but ultimately resorted more to finger-pointing than litigation regarding what percentage of the liability, if any, each party owns.

Investigations by the National Research Council, the National Academy of Engineers and the National Oil Spill Commission, the presidential task force created to figure out what went wrong during the accident and its aftermath, have suggested that no single party is solely responsible for the disaster and that shoddy government oversight also played a role in the disaster.

Commission Co-Chair William K. Reilly recently said BP, Halliburton and Transocean were all in need of "top-to-bottom reform."

While the claims subrogation may have been expected, it is not clear why Feinberg, the administrator of the GCCF, would consider this part of his duties to fairly dispense the fund through reasonable claims.

"I don't think this streamlines the process for him. I think it does perhaps make more efficient the ultimate allocation among everyone involved, but he wouldn't have been involved in that," Porter said, adding that the obvious winner of a potential subrogation clause is BP. "Is this altruism? Is there some pressure by BP? I see this as entirely outside [Feinberg's] original mandate."

Hahn disagrees. Feinberg has been charged with compensating claimants, but in a way that will not give rise to prolonged litigation, he said.

"I think it's certainly in the interest of everyone that claims not be settled under conditions that will create endless litigation anyway," Hahn said.

There is a chance that the assignment of rights will chill claims brought against the fund, because it further limits the ability of the claimants to pursue compensation, and many have expressed frustration that they are not, in fact, being made whole through the current process.

"It's a double-edged sword," Rich said. "The good part is, this will get them the money more quickly, but will it be as much as they would get if they went ahead and litigated? Obviously there are going to be some disappointed trial lawyers out there who want to represent these people against Transocean and Halliburton."

The addition of proximity claims as recoverable under the fund increases the likelihood that the \$20 billion will be eventually wiped out, forcing claimants to pursue litigation anyway.

The principal concern for the claimants is that they will not be fully compensated through the claims process and will be trading away an opportunity at punitive damages for a short-term payment, Buente said. But the fishermen have to consider the Exxon Valdez punitive damage payments, which have still not been fully paid out 20 years later, he noted.

If plaintiffs' lawyers believe that the non-BP parties hold the majority of the blame for their clients' losses, the subrogation of those claims might persuade them to advise against settling through the GCCF, Buente said.

"My sense is from the administrators view and BP's view the claimants would be made whole through the fund, and [the subrogation] would be for a final allocation among the potentially responsible parties," Ehrlich said. "I don't view this as a tactic to screw the claimants, but as making the claims process more efficient."

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