Response To

U.S. Chamber of Commerce Position its 5th Circuit Brief in the BP Oil Spill Settlement Appeal

April 2, 2014

[April 21, 2014]

- The U.S. Chamber's position on the BP oil spill settlement fund is straightforward: All legitimate claims caused by the spill should be paid, and those who have not been harmed by the spill should not be allowed to game the system and receive payment.

  Not only are the claims identified by BP fairly traceable to the Spill, but they are supported by affirmative evidence that BP stipulated and agreed would be sufficient to objectively establish that such damages were caused by the *Deepwater Horizon* tragedy. Hence, all businesses that present such evidence are, by definition, legitimate claims.

- We believe this means any person, business or organization that is part of the mutually agreed-to settlement class that can trace its economic injury to the spill should receive settlement funds.

  Again, all businesses that present the causation evidence that BP agreed would be required under the settlement have, by definition, traced their economic injury to the Spill.

- However, it is unjust for those who have suffered no harm due to the spill to nonetheless take money intended for those who actually suffered harm.

  BP voluntarily agreed that the Settlement would be uncapped. Therefore, no business' recovery under the Settlement has any effect on any other business' ability to recover. No one is "taking" anything away from anybody else.

- To this end, the U.S. Chamber has filed a brief with the U.S. Court of Appeals for the Fifth Circuit that makes this case.

  The Chamber's Brief represents that: "As frequent class-action defendants, *amici*'s members are deeply interested in the continuing viability of class settlements…. Litigating class actions can be expensive and time consuming, and amicable settlements benefit defendants, class

members, and the legal system itself…. It is an unfortunate fact that litigation takes time and money. While litigating to a final judgment may nevertheless be the best way of resolving some disputes, others can be redressed more quickly and more efficiently through settlement. Such settlements, courts have long recognized, should be actively encouraged…. This is all the more true for class actions. As the number of parties to a dispute increases, so too do the complexities and costs of litigation…. Settlement gives parties an alternative to decades of complicated litigation, permitting large-scale disputes to be resolved quickly and efficiently."[1]

However, BP and the Chamber are arguing that the final settlement BP agreed to in 2012 should be unraveled. What BP and the Chamber now want is years and years of expensive and protracted litigation, to try to determine whether thousands of individual businesses can satisfy an unspecified and subjective causation standard that, in over two years and scores of briefs, BP has yet to define. (Of course, what makes this all the more crazy is that BP spent almost a year negotiating for the objective causation standard that's in the settlement agreement.)

- Our interest in this case goes beyond BP. Failure to interpret the settlement agreement consistent with its plain terms means future defendants in similar cases may be less inclined to agree to efficient and quick settlements as BP did, meaning future cases will not end with relatively quick negotiated mega settlements, but with litigation that leaves legitimate claimants without payment for many, many years.

  There is no argument that the Court has failed to interpret the settlement agreement according to its terms. BP has stated for the record on numerous occasions that it agreed with the Claims Administrator's and the Court's interpretation.[2] What BP, supported by the Chamber, now argues is that the Agreement should be substantively modified, or set aside entirely.

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[1] BRIEF OF THE U.S. CHAMBER AS *AMICUS CURIAE*, No. 13-30315 (March 24, 2014), pp.2-4 [U.S. 5th Cir. Doc. 00512571093, at 14-16].

[2] *See, e.g.*, ORDER AND REASONS (Dec. 24, 2013) [Doc. 12055], pp.6-18, 39-43. *See also, e.g.*, THE TRUTH ABOUT THE BP SETTLEMENT (July 9, 2013) (available at: http://www.hhklawfirm.com/ongoing-results/bp-oil-spill/).

- The U.S. Chamber's position is limited to the current controversy before the court: whether it is necessary to prove that injury was caused by the spill.

  That is not a question before the Court. No one disputes that litigants must generally prove that their injuries were caused by the defendant in order to prevail at trial. The issue before the Court is whether BP is bound by a voluntary contractual agreement – which, incidentally, requires the settling businesses to prove that their injuries were caused by the Spill.

- The U.S. Chamber's current position does not address aspects of the settlement that the parties have already agreed to, or have been resolved by the courts. These include the time period covered by the settlement, the proper accounting methods for calculating losses, or how the class is defined.

  This makes no sense, in light of the current record.

Why did the Chamber refuse to disclose to the Court that some of its members and local chamber affiliates were actively pursuing claims in the Settlement Program?

Why is the U.S. Chamber favoring a Foreign Oil Company over the interests of thousands of small businesses here in the United States?

Doesn't the Chamber believe that parties should be held to the terms of their contracts?

Doesn't the Chamber believe that a company should stand by its word?

Number of U.S. Businesses that have submitted Economic Loss Claims in the *Deepwater Horizon* Court-Supervised Settlement Program as of April 18, 2014:

84,555