

The BP Gulf Oil Spill Class Settlement: Redistributive “Justice”?

By John S. Baker, Jr., Ph.D.



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- The Truth About the BP Settlement, HERMAN HERMAN & KATZ, LLC: <http://hhklawfirm.com/bp-oil-spill/truth-bp-oil-spill-rig-explosion/>
- Understanding the New BP Settlement, CLAIMSCOMP, INC. (2013): http://cdn2.hubspot.net/hub/218458/file-24566139-pdf/docs/e-book_bp_settlement_for_business_owners.pdf%3Ft%3D1363794569000
- *WSJ Opposes The Legal Settlement That Separates BP From Its Money*, MEDIA MATTERS (Oct. 2014): <http://mediamatters.org/mobile/blog/2014/10/28/wsj-opposes-the-legal-settlement-that-separates/201349>

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The BP Gulf Oil Spill Class Settlement: Redistributive “Justice”?

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“Sympathy for the Devil” is the title of a recent op-ed in the *New York Times*.¹ Four years after the 2010 Deepwater Horizon oil spill, the author interviews BP’s chief executive regarding the company’s trials and tribulations in the massive federal court litigation in New Orleans. The article, generally favorable to BP, portrays the company as the victim of fraudulent claims paid out over objections it made in the federal courts. According to the article, BP has been forced to pay “hundreds . . . of bogus claims” for damages, like those to “[t]he wireless phone retailer who was awarded more than \$135,000, even though its building had burned down before the spill [and an] attorney who was awarded more than \$172,000, even though his license had been revoked in 2009.”² As of this writing, BP is hoping that the Supreme Court will agree to accept its petition to review two decisions by the U.S. Fifth Circuit Court of Appeals.

One of the lead plaintiffs’ lawyers thought that following the spill “BP did something remarkable [by] voluntarily . . . set[ting] up an administrative program . . . that aimed to fully compensate all the victims of the spill . . . [a]nd it backed all this up by setting aside \$20 billion in a trust fund, with an open-ended commitment should that amount prove insufficient.”³

Still, finding sympathy for BP in the general public will be difficult. Continuous coverage in 2010 of the Gulf oil spill gave people around the nation and the world a terribly negative view of BP.⁴ The media reports caused great fear about the extent of the environmental damage, which at the time seemed potentially catastrophic for the Gulf. Businesses and employees located near the Gulf Coast faced uncertain economic fallout from the spill. Even if not directly affected, most of us living along the Gulf Coast knew people who suffered in one way or another from the spill.

As an opinion piece on *Forbes.com* observed, however, “it really doesn’t matter” what the general public thinks about BP. “As long as BP sells oil

in colossal quantities, it will continue to attract investment.”⁵ BP “remains an economic behemoth and a major player in a commodity the world hopelessly depends on.”⁶ Accordingly, four years after the spill, the Environmental Protection Agency has finally lifted its ban and allowed BP to bid for new leases in the Gulf of Mexico.⁷

So if BP neither needs nor receives much sympathy, how important is it that it is being defrauded of a few million dollars? A few million dollars seems like only a rounding error in terms of the many billions BP has already paid and will pay before all the spill-related matters are resolved. BP will survive and prosper, regardless of whether the Supreme Court reviews and reverses the decisions of the Fifth Circuit.

Of course, the scenarios of fraud cannot be measured against the defendant’s size, total net worth, or prospects for profitability. The more important question is what the fraud will do to the federal courts. The unhappy answer to this question is found in the forceful dissenting opinion of Fifth Circuit Judge Edith Clement. She “indicts” a majority of her Fifth Circuit colleagues’ refusal to review the fraud, saying that “Left intact, our holdings funnel BP’s cash into the pockets of undeserving non-victims. These are certainly absurd results. And despite our colleagues’ continued efforts to shift the blame for these absurdities to BP’s lawyers, it remains the fact that *we are party to this fraud*. . . .”⁸

How is that possible? As part of the Settlement Agreement the parties negotiated an elaborately crafted, 17-page explanation of the proof required to support claims that economic damages suffered by potential plaintiffs were actually caused by the spill.⁹ For many businesses in the areas most directly affected by the spill, the agreement provided a presumption of causation. In other words, businesses in the identified categories were not required to provide any evidence of causation. Thereafter, however, the court-appointed claims administrator issued an interpretation of the Settlement Agreement which BP said effectively eliminated causation. The district judge and a majority of the panel judges in the Fifth Circuit sided with the claims administrator. Thus, according to Judge Clement’s dissent, the federal courts became a “party to this fraud”

[b]y (1) adopting an unreasonable interpretation of the Settlement Agreement to remove any requirement of causation, and (2) certifying a class by ignoring the fact that although causation and traceability were initially written into the Settlement Agreement, the Claim Administrator’s interpretation governing what would *actually happen* meant that Article III’s requirements would be ignored in the class settlement’s execution.¹⁰

I. BP: THE OCCASION FOR A CLOSER LOOK AT CLASS ACTION SETTLEMENTS

The strange developments in the BP Class Settlement offer an appropriate occasion to consider the fundamental constitutional question raised by the creation of class settlements—as a distinct form of class action. Such settlements presume that neither the plaintiffs’ attorneys nor the defense attorneys have any intention of litigating. Objectors may well appeal a settlement. Having negotiated and agreed to the settlement, however, BP has taken a rare appeal.

As related below, BP bases its appeal on class action Rule 23 and Article III standing grounds stemming from the fraud alleged in the administration of the settlement. Regardless of any fraud, however, the constitutionality of the settlement class can be examined from a more generalized viewpoint of Rule 23 and Article III.

The fundamental Article III issue worthy of consideration is whether unconstitutionality is embedded in every settlement class action. Professor Martin Redish simply says “[t]he settlement class action, in short, is inherently unconstitutional.”¹¹

Redish’s *Wholesale Justice* provides a thorough and discriminating treatment of the constitutional issues related to class actions.¹² He raises a number of constitutional issues regarding class actions, but he thinks most of them can be remedied.¹³ It is the settlement class, however, that he contends is always necessarily unconstitutional. Why?

Because by its nature it does not involve any live dispute between the parties that

a federal court is being asked to resolve through litigation, and because from the outset of the proceeding the parties are in full accord as to how the claims should be disposed of, there is missing the adverseness between the parties that is a central element of Article III case-or-controversy requirement.¹⁴

BP argues that the claims administrator’s inclusion in the class of claimants who have not sustained injuries caused by the spill violates Rule 23 and the standing requirements necessary to satisfy the “case or controversy” requirement of Article III. But what about the claimants in the settlement class whose injuries were caused by the spill—can even they satisfy Article III? The parties to litigation cannot create or consent to federal court jurisdiction.¹⁵ Let’s look at what happened when the parties attempted to do so in this litigation.

A. *A Class that Settled, then Litigated*

The first of three Fifth Circuit opinions describes the BP oil spill litigation as “one of the largest and most novel class actions in American history.”¹⁶ While no doubt exists about the unprecedented size and novelty of the BP litigation, it is misleading to label it a “class action.” Actually, hundreds of cases, involving thousands of individual claimants, were filed in various federal courts and later consolidated in the Eastern District of Louisiana (New Orleans) by the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407.¹⁷

During the centralized discovery phase of this multi-district litigation, the separate lawsuits continued. But along the way a court-appointed “Plaintiffs’ Steering Committee” (PSC) was negotiating with BP. When a basic agreement was reached, plaintiff attorneys filed a class action. After only two days, the parties completed, signed, and filed in the court record the Settlement Agreement which had been reached prior to the filing.¹⁸

The Settlement class action¹⁹ was designed to begin and end almost simultaneously. The new class action was filed on the assumption it would involve no litigation. Inverting normal processes, however, litigation between the parties commenced only after the settlement.²⁰ The litigation has been so convoluted that

it is extremely difficult to summarize in an adequate, brief statement of the facts.²¹

The convoluted course of the appeals occurred because BP and objectors to the class settlement pursued different appeals. In panel decisions labeled *Deepwater Horizon I*,²² and *Deepwater Horizon III*²³ BP twice appealed the interpretation of the Settlement Agreement, but not the Agreement itself. In *Deepwater Horizon II*²⁴ several objectors appealed certification of the settlement class itself. BP petitioned the Supreme Court on decisions in numbers II and III, even though it had not challenged the Agreement which was upheld in decision number II. After losing their appeal in the Fifth Circuit, the objectors apparently did not petition the Supreme Court on their case, number II. Instead, they filed as Respondents to the BP petition, but nevertheless urged the Court to grant review, without specifying whether they were referring only to decision number II.

In order to provide a readable and relatively concise summary, the following statement includes lengthy quotes from a journalistic piece by self-described “class action geek,” Alison Frankel, explaining much of the litigation.²⁵

Considering that BP’s resolution of claims stemming from the Deepwater Horizon oil spill in 2010 is the biggest single-defendant private settlement in U.S. history, it’s only fitting that the case has generated a spectacular – and procedurally peculiar – appellate record on the constitutionality of class actions.

...

The abbreviated appellate backstory dates back to December 2012, when U.S. District Judge Carl Barbier of New Orleans granted final approval to a class action settlement between BP and a steering committee of plaintiffs lawyers, negotiated over the course of more than a year. The settlement, which replaced a claims facility BP established right after the spill [administered by Ken Feinberg], was designed to compensate several different sorts of victims, from

the shellfishing and tourism industries directly impacted by the spill to businesses whose losses were indirect fallout. As the settlement defined it, the class included everyone whose losses resulted from the Deepwater Horizon disaster.

BP supported class certification and approval of the settlement. But the company developed qualms after Judge Barbier approved policy decisions by claims administrator Patrick Juneau that, in the company’s view, enabled businesses unharmed by the oil spill to recover money from BP through creative accounting tactics. As business loss claims mushroomed, BP’s lawyers from Kirkland & Ellis (which had negotiated the settlement) and Gibson, Dunn & Crutcher (which came in for the company after the deal was approved) appealed Barbier’s order to the 5th Circuit. That appeal led to Judge Clement’s opinion last October. Despite arguments by class counsel, represented on appeal by New York University law professor Samuel Issacharoff, that BP agreed to settlement terms that were open to the interpretation Barbier approved, Judges Clement and Leslie Southwick instructed Judge Barbier to reconsider his interpretation of deal terms. On her own, Clement went quite a bit further. If the BP settlement permitted claims by class members who had suffered no losses attributable to the oil spill, she said, then it was illegal. Uninjured plaintiffs don’t have standing under Article III of the Constitution, Clement wrote, and judges can’t create a cause of action that doesn’t otherwise exist – even if the defendant wants to buy global peace through a settlement.

Judge Southwick declined to join Clement’s conclusions about constitutional standing, though he said it was logical, because he found it unnecessary. The third judge on the panel, Judge James Dennis, dissented vigorously, arguing that Clement’s Article III analysis would erase the benefits of class action settlements by imposing expensive and unwieldy requirements at the class certification stage.

While BP’s appeal of Barbier’s order was under way, class members who objected to the approval of the deal proceeded with a separate appeal at the 5th Circuit. In September, BP filed an extraordinary brief in that case. Even though the company had backed approval of the settlement at the trial court and had pledged to defend the agreement against objections, BP said that it was prepared to argue alongside objectors for decertification of the class unless Barbier’s interpretation of the settlement agreement was reversed.

BP maintained that position after the Clement panel’s ruling in its appeal of Barbier’s order. In fact, the company filed a supplemental brief citing Judge Clement’s analysis to back its assertion that a class encompassing uninjured claimants does not pass constitutional muster.

This second appeal came before a panel consisting of two different judges, Judges Davis and Garza, along with Judge Dennis, the dissenting judge on the first panel. This decision, one of the two covered in the petition for certiorari, upheld the Certification of the Class Action which had been criticized on constitutional grounds in the earlier opinion by Judge Clement. As Ms. Frankel writes,

[the] majority opinion writer Judge Davis was joined by Judge Dennis—yes, the same Judge Dennis who dissented from Clement’s opinion in the other appeal – in upholding the settlement. Federal circuit courts, the majority wrote, have developed two different standards to guide trial judges in the evaluation of class action settlements that may sweep in uninjured claimants. The so-called Kohen test, followed by the 3rd, 7th and 9th Circuits, holds that settlement approval hinges on the constitutional standing only of named plaintiffs; as long as they have a viable federal-court claim, courts need not consider the standing of absent class members. The 2nd and 8th Circuits follow the Denney test, which requires that classes be defined to include only claimants with constitutional standing but does not insist that every absent class member submit evidence of personal standing. (Interestingly, according to the 5th Circuit, the 7th and 9th Circuits have used both the Kohen and Denney tests in reviewing class certification decisions.)

According to the 5th Circuit majority, Judge Barbier’s approval of the BP settlement was justified under either test. Even BP has not challenged the standing of named plaintiffs in the case, which would satisfy the Kohen test. And the settlement agreement defined the class as those whose injuries were the result of the oil spill, which satisfies Denney. Judge Davis’s opinion conceded that in the previous appeal, Judge Clement said the BP settlement would fail the Denney test if it permitted claims by uninjured plaintiffs. “In Judge Clement’s view, if absent class members include persons who ‘concede’ that they

have no ‘causally related injury,’ then a district court lacks jurisdiction to certify the class,” the opinion said. But Clement misread Denney, according to Davis’s opinion. By the agreement’s definition, the BP settlement class includes people injured by the spill, he said. “Accordingly, using Judge Clement’s formulation of the standard, the class in this case does not include any members who ‘concede’ that they lack any ‘causally related injury,’” the majority wrote. “This ends the Article III inquiry under the Denney test, which does ‘not require that each member of a class submit evidence of personal standing’ so long as every class member contemplated by the class definition ‘can allege standing.’”

BP’s arguments that Barbier’s post-approval interpretation of the deal rendered class certification unconstitutional were beside the point, according to the majority. The 5th Circuit’s review, the opinion said, was based on the evidence before Judge Barbier in December 2012. If BP had wanted a deeper review of individual claims, according to the opinion, then it should not have settled through a class action. The company might have obtained rulings on the evidentiary standards for economic loss claims through summary judgment or at trial, the 5th Circuit majority said, but it’s simply not part of the class certification inquiry to consider individualized claims.

Indeed, the majority said, BP knew (or should have known) that it was asking for something impossible. “In particular, BP’s arguments fail to explain how this court or the district court should identify or even discern

the existence of ‘claimants that have suffered no cognizable injury’ for purposes of the standing inquiry during class certification and settlement approval,” the opinion said. “It would make no practical sense for a court to require evidence of a party’s claims when the parties themselves seek settlement. . . . Logically, requiring absent class members to prove their claims prior to settlement . . . would eliminate class settlement because there would be no need to settle a claim that was already proven.”

In dissent, Judge Emilio Garza followed Judge Clement on the issues of Article III standing and class certification. Meanwhile,

. . . after Clement’s panel ordered Judge Barbier to reconsider his interpretation of the settlement agreement, the trial judge basically stuck with his old holding on causation for business loss claimants (though he did modify his previous interpretation of accounting terms). BP raced back to Judge Clement’s panel at the 5th Circuit to ask the appeals court to make permanent a temporary injunction against payments to uninjured claimants. The 5th Circuit ordered expedited briefing on BP’s motion.

Ms. Frankel concluded, saying “this record is as interesting as it is weird.”

But matters got more “weird” after Ms. Frankel’s report. Following the expedited appeal, the original panel, for which Judge Clement wrote the lead opinion, refused BP’s requested injunction and upheld the district court’s interpretation of the Settlement Agreement. This time, Judge Southwick wrote the lead opinion, with Judge Dennis concurring in part and concurring in the judgment. Judge Clement, of course, dissented.

Judge Clement contended the issues presented to two different panels would have been better handled

by the same panel.²⁶ Quite remarkably, the Fifth Circuit declined to sort out the three conflicting panel decisions.²⁷

II. ARTICLE III: A PROBLEM WITH INTERPRETING THE SETTLEMENT OR WITH THE SETTLEMENT ITSELF?

Given that BP agreed to the Settlement Class and that it relies on Judge Clement's opinions, it is understandable that it is not attacking the settlement itself. Nevertheless, the more fundamental issue is whether this and other settlement classes can satisfy Article III.

A. The Statements by the Parties as to the Question Presented

Tracking Judge Clement, BP presents the question to the Supreme Court in terms of a circuit split on Federal Rule 23 class actions and Article III standing of claimants who do not satisfy the causation requirement. The Respondent class, on the other hand, reframes the question as follows:

May a party to a class action settlement who advocated settlement approval before the District Court, filed no notice of appeal, and appeared as an appellee urging affirmance, now seek to switch sides in order to overturn that same settlement through a petition for certiorari?²⁸

The lawyers for the class hope to make the issue one of simple contract, but they cannot ignore the Rule 23 and Article III standing arguments. Of course, just as BP tracks Judge Clement and those who joined her,²⁹ the class tracks the position of the other judges on the claim about a circuit conflict on Rule 23 and Article III standing.³⁰

For the moment, however, let's ignore that the Article III "case or controversy" issue is necessarily present throughout all phases of the litigation³¹ and that courts have the duty to raise the subject-matter jurisdictional issues even if both sides fail to do so.³²

If we do so, the first and the third of the arguments made by the class counsel might seem fairly reasonable. First, they argue that Supreme Court review of the constitutional issues would have had to have occurred

after the ruling on the first appeal in which Judge Clement initially raised the constitutional issues, that those issues are not presented in either of the two cases in which BP is seeking review, and that BP is judicially estopped from switching sides on the settlement. Then, the third argument would follow and reduce the dispute to one which is "fundamentally a matter of contract interpretation between parties to a complicated settlement."³³

The big problem with the "this is just a contract dispute" argument is that no contract would have been signed, but for the approval of the federal district court. In a law review article, one of the attorneys for the class, Professor Samuel Issacharoff, explains that the advantage of the BP and other settlement classes lies in the district court's approval, administration, and enforcement.³⁴ He rightly says that "[o]nly a court's imprimatur—and a deal that comports with the formalities and safeguards of the class action system—can bind absentees without their affirmative consent."³⁵

B. Rule 23 and Article III

Rule 23, derived from the Supreme Court's authority under the Rules Enabling Act,³⁶ is not supposed to alter substantive rights.³⁷ As Professor Redish writes, however,

Under the guise of procedure, class actions often effect dramatic alterations in the DNA of the underlying substantive law. The result – whether intended or not – is a form of confusion or even deception of the electorate, which is likely unaware that the essence of the governing substantive law has been altered because the alteration has occurred under the guise of procedural modification. Substantive law is altered, not through resort to traditionally recognized democratic procedures but rather by what is effectively a procedural shell game.³⁸

Different views on the Fifth Circuit regarding whether Rule 23 has been satisfied in the BP case and whether a conflict exists with other circuits may well be rooted in unarticulated views about the malleability of

the class action and the importance of protecting the substantive rights at stake. It is certainly possible that some judges, regardless of the circuit, are more inclined to shape class actions for the convenience of the courts, even while convincing themselves that such flexibility serves justice. But as Redish writes, “The class action collectivizes adjudication of those substantive rights, often revoking—either legally or practically—the individual right holder’s ability to control the protection or vindication of his rights through resort to the legal process.”³⁹

Standing is one of the four components of Article III’s “case or controversy” requirement.⁴⁰ The jurisprudence on the four components—standing, ripeness, mootness, and political question—enforce the adverseness between the parties required by Article III. The adverseness requirement can be met in a class action lawsuit; but in what is solely a class action settlement, adverseness is necessarily absent.

Professor Redish does not argue that actual class action *litigation* is necessarily unconstitutional. It is the settlement class, however, that he contends is always unconstitutional because it involves no litigation.

A typical class action is legitimate because the interests of the plaintiffs and defendant are adverse. In that scenario, the monetary interests of class counsel, which are contingent on class recovery, are aligned with the absent class members’ interest in maximum redress, incentivizing a presentation of the issues that benefits both equally. These incentives break down in the context of the non-adversarial settlement class. Because class counsel seeks the same outcome as the defendant, she has no reason to formulate her clients’ arguments or destroy her opponent’s case. Particularly, she lacks incentive to present to the court evidence that may shed unfavorable light upon the non-adversarial agreement, even though that evidence may reveal critical details about the effect of the settlement on absent class members.⁴¹

C. *The Individuals: “Skunks at the Tea Party”*

Several parties objected to the settlement and appealed to the Fifth Circuit, where they lost in *Deepwater Horizon II*. Their simple, straightforward argument was that they were “inherently harmed by the inclusion of uninjured persons in the class” because the inclusion “diminishes the relief for class members who are actually harmed.”⁴²

None of the major players in the litigation ever seemed to have questioned the constitutionality of a settlement class. Judge Barbier wrote that “Settlement classes are a typical feature of modern class litigation, and courts routinely certify them, under the guidance of *Amchem Products, Inc. v. Windsor*, to facilitate the voluntary resolution of legal disputes.”⁴³ The experts tendered by both parties apparently indicated nothing to the contrary.⁴⁴

As Professor Redish recognizes, in *Amchem* “the Court implicitly approved the concept of the settlement class as an alternative form of dispute resolution.”⁴⁵ So, therefore, on what basis would practicing lawyers attack the constitutionality of settlement classes? Although *Amchem* “implicitly” approves settlement classes, it did so in dictum and it did not consider the constitutional issues.⁴⁶ Rather, “the Court reserved for a later date the question of whether the settlement class presents a justiciable case or controversy.”⁴⁷

How is it then that so many very bright lawyers and judges have failed to question the constitutionality of the settlement class? One answer may be that the constitutional point is so very simple that many sophisticated minds cannot see it. As Professor Redish writes,

On the most basic analytical level, the unconstitutionality of the settlement class action should be obvious, purely as a matter of textual construction. There is simply no rational means of defining the terms “case” or “controversy” to include a proceeding in which, from the outset, nothing is disputed and the parties are in complete agreement. Moreover, from both historical and doctrinal perspectives, Supreme Court

decisions could not be more certain that Article III is satisfied only when the parties are truly “adverse” to one another, which, at the time the relevant proceeding is undertaken, they are not in the case of the settlement class action.⁴⁸

Another answer may be that both the plaintiffs and defendants like the settlement class. In reality, defense attorneys and corporations have many reasons to favor “aggregate settlements,” as explained both by Professor Issacharoff⁴⁹ and Professor Redish.⁵⁰ Corporations may not be able to avoid defending a class action. But corporations are not legally required to enter into a separate settlement class. So when corporations and their attorneys enter such agreements, they believe on utilitarian grounds that that option, however expensive, is preferable to the alternatives. Precisely because the parties cannot always be relied upon to raise subject-matter jurisdiction, it is the duty of federal judges—no matter how much they prefer mass settlements solutions—to do so.

III. COLLECTIVE AND REDISTRIBUTIVE LITIGATION VERSUS LITIGATION BY AND FOR THE INDIVIDUAL

“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”⁵¹ Through common-law reasoning, however, the exception often becomes the rule.⁵² How might that be occurring?

By collectivizing—often forcibly—the litigation process, the class action procedure threatens core notions of the process-based autonomy that is central to liberal democratic thought. The class action, then, gives rise to at least a *prima facie* tension between legally imposed collectivization and democratic meta decision making autonomy on the part of the individual.⁵³

As evident from this quote, Professor Redish’s consideration of class actions includes the perspective

of political theory.⁵⁴ He has “described four normative models of political theory: liberalism, utilitarianism, democratic communitarianism, and civic republicanism.”⁵⁵ His “thesis is that (1) the various normative approaches to the class action that have been advocated by prominent legal scholars are best understood largely as manifestations of one or another of these broader political theories, and (2) when viewed from this theoretical perspective, each should be found wanting because of its improper departure from the fundamental norms of liberal theory, which value the process-based autonomy of the individual.”⁵⁶

Professor Redish then “identif[ies] three class action models that illustrate the breadth and depth of legal scholarship on the normative rationale and proposed structure of the modern class action . . . [:] the “utilitarian justice” model, . . . the “communitarian process” model, . . . and the “public action” model.”⁵⁷ Professor Issacharoff, Counsel of Record in the Supreme Court for the BP Settlement Class, is one of two prominent scholars who have developed the “communitarian process model.”⁵⁸

The communitarian process model “views a class as a stand-alone ‘entity,’ rather than an aggregation of separate individual claims.”⁵⁹ Professor Redish finds that “[t]he constitutional implications of the entity perspective are both striking and troubling. Likening class actions to private voluntary associations permits . . . circumvent[ing] the due process inquiry, because [for] voluntary private organizations it is not the individual plaintiffs but rather the collectivity which seeks redress for the violation of its substantive rights.”⁶⁰

Using the settlement class is certainly an effective way of advancing the “entity theory” and what Redish labels “the communitarian justice model.” Getting a settlement agreement with the defendant pretty well insulates such outcomes from appellate judicial scrutiny, unless some objector raises the Article III issues.

In a law review article about the BP case, Professor Issacharoff noted that “the Supreme Court has made it more difficult to use class action to resolve large-scale disputes arising out of mass injuries.”⁶¹ That has produced “pressure to find alternative means of effectively resolving mass disputes at a wholesale level outside of the courtroom.”⁶² Accordingly, “[m]ass torts

have shifted into MDLs, where parties must rely on non-class aggregate settlements in their quest for global resolution.”⁶³ That has meant that “lawyers constructing these deals must use innovative and controversial contractual strategies to try to achieve full participation by claimants.”⁶⁴

The limits imposed on class actions by the Supreme Court are largely designed to ensure that Rule 23 does not contravene the Rules Enabling Act⁶⁵ or Article III. Accordingly, the creative use of MDLs to reach class settlements as advocated by Professor Issacharoff should be viewed as an unconstitutional “end-run” around Article III. Unless it is possible to avoid the standing and larger “case or controversy requirements” of Article III, the settlement class will not be available to produce the kind of redistributive “justice” sought by plaintiffs’ lawyers in mass tort litigation and consented to by corporations and defense attorneys on utilitarian grounds.

IV. CONCLUSION

Prominent constitutional scholars who also litigate look for opportunities to bring the jurisprudence in line with what they think the law is or should be. Often, however, constitutional scholars are brought into a case only at the appellate level, which can limit their ability to shape the theory of the case. This case demonstrates the wisdom of the plaintiffs’ lawyers representing the class who early on brought Professor Issacharoff into the litigation.⁶⁶ Professor Issacharoff has been able to shape the strategy and the settlement, as he has described in his law review article. He has not needed to lay out his entity theory in any of the appellate briefs.⁶⁷

Defense attorneys might consider the importance of political and constitutional theory in any matter that might raise Article III issues. Very few litigators have time to read and reflect on the constitutional and political-theory foundations of what they do in practice. Moreover, class actions are so complicated that despite the countless articles on the subject not many academics have broadly considered the constitutional foundations.⁶⁸ For these reasons, the Vice President and Chief Counsel for AON, a leading insurance and reinsurance brokerage, has urged defense attorneys and in-house counsel to read and draw arguments from

Wholesale Justice.⁶⁹

The Supreme Court has avoided several opportunities during its last term to address issues raised in mass tort litigation.⁷⁰ Obviously, the plaintiffs’ and BP’s attorneys have opposing views on the importance of the Court reviewing their litigation. The constitutional problem posed by class settlements, however, transcends the narrow interests of both plaintiff and defense attorneys in the BP case. Whether in this case or in another one, the Court needs to consider class settlements in terms of separation of powers because maintaining the limits of Article III’s “case or controversy” requirements is fundamental for protecting the individual liberties of all.⁷¹ As Redish writes,

by authorizing a federal court to redistribute resources as a means of enforcing legislative directives absent an adversary adjudication, the settlement class action effectively transforms the court into an administrative body, which is more appropriately located in the executive branch . . . [and] improperly transfers powers reserved to the executive branch to the federal judiciary, in clear contravention of separation-of-powers dictates.⁷²

Endnotes

1 Joe Nocera, Op-Ed, *Sympathy for the Devil*, N.Y. TIMES, Aug. 2, 2014 at A17, available at http://www.nytimes.com/2014/08/02/opinion/joe-nocera-sympathy-for-the-devil.html?_r=0.

2 *Id.*

3 Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Litigation and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014). (footnotes omitted).

4 Poll: *BP Oil Spill Response Rated Worse than Katrina*, ABCNEWS.COM, June 7, 2010, <http://www.abcnews.go.com/PollingUnit/Media/poll-bp-spill-rated-worse-katrina-criminal-charges/story?id=10846473>.

5 See Steve Olenski, *Nearly Four Years After Deepwater Horizon, Has BP’s Brand Image Recovered?*, FORBES.COM, Jan. 24, 2014, <http://onforb.es/1eYhNNE>.

6 *Id.* But, note that BP has been sued in American and British courts over the spill by investors. See Alison Frankel, *Institutional*

Investors Step off Sidelines to Sue BP for Fraud, REUTERS.COM, April 21, 2014, <http://blogs.reuters.com/alison-frankel/2014/04/21/institutional-investors-step-off-sidelines-to-sue-bp-for-fraud/>; Terry Macalister, *BP faces Deepwater Horizon Lawsuit by Investors Including London Councils*, THEGUARDIAN.COM, (July 4, 2014, 5:46 PM), <http://www.theguardian.com/environment/2014/jul/04/bp-deepwater-horizon-class-action-texas>.

7 Stanley Reed, *Ban Lifted, BP Bids \$42 Million to Win Gulf Oil Leases in U.S. Auction*, N.Y. TIMES, Mar. 20, 2014, at B3, available at <http://www.nytimes.com/2014/03/20/business/energy-environment/ban-lifted-bp-bids-42-million-to-win-gulf-oil-leases-in-us-auction.html>.

8 *In re Deepwater Horizon*, 753 F.3d 516, 519-20 (5th Cir. 2014) *reh'g en banc denied*.

9 Amended Settlement Agreement at 201-17, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012) (No. 6430-2) available at http://www.deepwaterhorizoneconomicsettlement.com/docs/Amended_Settlement_Agreement_5.2.12_optimized.pdf#search (citing Exhibit 4B).

10 *In re Deepwater Horizon*, 753 F.3d at 519.

11 MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 178 (2009).

12 See Douglas Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit*, 104 NW. U. L. REV. 319 (2010), available at <http://www.law.northwestern.edu/lawreview/colloquy/2010/9/> ("In *Wholesale Justice*, Professor Redish provides a thorough analysis of the constitutional implications of the class action mechanism. Unlike prior commentators and courts, which have focused mainly on limited constitutional issues arising in class action cases, Professor Redish's analysis sweeps more broadly. In the process, he brings to bear principles of constitutional law that have long lain dormant in the field of class action practice. His insights demonstrate that more than mere practical or policy concerns arise when class action procedures are used. Rather, they implicate—and often infringe—fundamental principles of constitutional law.").

13 See REDISH, *supra* note 11, at 13-15.

14 *Id.* at 178.

15 Federal courts "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though both parties are prepared to concede it." *Bender v. Williamsport Area School District*, 475 U.S. 534, 547 (1986) (citations omitted); *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537 (1958) ("The federal system is an independent system for administering justice to litigants who properly invoke

its jurisdiction.").

16 *In re Deepwater Horizon (Deepwater Horizon I)*, 732 F.3d 326, 345 (5th Cir. 2013).

17 *In re: Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico*, on April 20, 2010, 910 F. Supp. 2d 891, 900 (E.D. La. 2012).

18 *Id.* at 902.

19 The settlement agreement provided for numerous types of claims, one of which was a claim for economic loss. The class definition limited eligibility for business economic loss claims to those claimants who conducted commercial activities in the Gulf Coast region between April 20, 2010, and April 16, 2012. Additionally, claimants must have experienced loss of income, earnings, or profits as a result of the spill. To demonstrate economic loss, claimants submitted documentation detailing the difference between their expected variable profit during a defined period of time prior to the spill and their actual variable profit during a defined period of time after the spill. If a claimant met all the other requirements of the class, he would be entitled to the difference between the variable profits in the two time periods. See *Deepwater I*, 732 F.3d at 330.

20 The current litigation over the class settlement resulted from two Policy Announcements issued by the Claims Administrator that interpreted the Settlement Agreement and were adopted by the district court. The first of these Policy Announcements concerned whether the variable profit used to determine a claimant's economic loss would be calculated using an accrual or a cash accounting method. *In re Deepwater Horizon (Deepwater II)*, 739 F.3d 790, 797 (5th Circuit 2014). The second Policy Announcement interpreted the Settlement's "Causation Requirements for Economic Loss Claims" and declared that the Administrator would pay claims "without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill" as long as the claimant met the established requisite economic loss using the method provided in the Settlement. *Deepwater I*, 732 F.3d at 331. While these issues are significantly intertwined, they were decided by two separate 5th Circuit panels in three separate appeals.

21 BP's "Statement of the Case" in its petition for certiorari contains twelve and one-half pages devoted to the facts and procedural history of the three appeals, only two of which are the subject of the petition for certiorari. Petition for Writ of Certiorari at 2-14, *BP Exploration & Production Inc., v. Lake Eugenie Land & Development, Inc.*, (No. 14-123) 2014 WL 3834540. Likewise, the Response to the Petition also contains a fourteen and one-half page "Statement of the Case." Brief in Opposition to Petition for Writ of Certiorari at 5-17, *BP Exploration & Production Inc., v. Lake Eugenie Land & Development, Inc.*, (No. 14-123) 2014 WL 5034632.

22 732 F.3d 326 (decided October 2, 2013).

23 *In re Deepwater Horizon (Deepwater Horizon III)*, 744 F.3d 370 (5th Cir. 2014) (decided March 3, 2014).

24 739 F.3d 790 (decided January 10, 2013).

25 Alison Frankel, *With 5th Circuit Split on Class Constitutionality, What's Next for BP?*, REUTERS.COM (Jan. 14, 2014), <http://blogs.reuters.com/alison-frankel/2014/01/14/with-5th-circuit-split-on-class-constitutionality-whats-next-for-bp/>.

26 *In re Deepwater Horizon*, 753 F.3d 516, 521 (5th Cir. 2014) (Clement, J., dissenting) *reh'g en banc denied*; *Deepwater III*, 744 F.3d at 382 n.2 (Clement, J., dissenting).

27 753 F.3d at 516.

28 Brief in Opposition, *supra* note 20, at i.

29 The denial for a rehearing en banc was rejected with five judges voting for a rehearing (Judges Jolly, Jones, Clement, Owen, and Elrod) and eight judges voting against a rehearing (Chief Judge Stewart and Judges Davis, Dennis, Prado, Southwick, Haynes, Graves, and Higginson). 753 F.3d at 320. at 320 (majority opinion). While only Judges Jolly and Jones joined Judge Clement in dissenting from the denial, Judge Clement noted that Judge Garza would have also joined the dissent had he been able to vote as an active member of the en banc panel. *Id.* at 320-21 (Clement, J., dissenting).

30 Brief in Opposition, *supra* note 20, at 21-25.

31 *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (“Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an “actual controversy” persist through all stages of litigation.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 553, 561 (1992) (“Since [standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiffs case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of litigation.”).

32 *United States v. Hays*, 515 U.S. 737, 742 (1995) (“The question of standing is not subject to waiver, however: ‘[W]e are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the [jurisdictional] doctrines.’”) (citations omitted).

33 Brief in Opposition, *supra* note 20, at 4.

34 *See Samuel Issacharoff & D. Theodore Rave, supra* note 3.

35 *Id.* at 426.

36 28 U.S.C.A. § 2072(a) (West 2014) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules for evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”).

37 *Shady Grove Orthopedic Associates, P.A., v. Allstate, Ins. Co.*, 559 U.S. 393, 406-07 (2010).

38 REDISH, *supra* note 11, at 3 (footnote omitted).

39 *Id.*

40 *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968) (“No justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.”).

41 REDISH, *supra* note 11, at 211.

42 Response for the Cobb Respondents on Petition for Writ of Certiorari at 2, *BP Exploration & Production Inc., v. Lake Eugenie Land & Development, Inc.*, (No. 14-123) 2014 WL 5017955.

43 *In re: Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 913-14 (E.D. La. 2012) (internal citations omitted).

44 *See Id.*

45 REDISH, *supra* note 11, at 185.

46 *Id.* and n. 48 (“*Amchem* , 521 U.S. at 612 (although noting that ‘Rule 23’s requirements must be interpreted in keeping with Article III’s constraints.’)”; *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (“We agree that ‘the class certification issues are dispositive,’ because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first.”).

47 REDISH, *supra* note 11, at 185.

48 *Id.* at 178 (footnotes omitted).

49 *See Samuel Issacharoff & D. Theodore Rave, supra* note 3, at 413-18.

50 REDISH, *supra* note 11, 185-86.

51 *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

52 BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 38-40 (1924), *available at* Gale F3752241803.

53 REDISH, *supra* note 11, at 4.

54 *See id.* at 93-106.

55 *Id.* at 106.

56 *Id.*

57 *See id.* at 106-25.

58 *Id.*

59 *Id.* at 115.

60 *Id.* at 150.

61 *See Samuel Issacharoff & D. Theodore Rave, supra* note 33, at 428 (citing Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286 (2013)).

62 *Id.*

63 *Id.* at 428-29.

64 *Id.* at 429.

65 *Shady Grove Orthopedic Associates, P.A., v. Allstate, Ins. Co.*, 559 U.S. 393, 406-08 (2010).

66 Declaration of Samuel Issacharoff at 1, In re: Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012) (No. 7104-4).

67 The three appellate cases shared five overlapping appellate dockets [13-30095; 13-30329; 13-30315; 13-31220; 13-31316] and one district court docket [2:10-md-02179-CJB-SS]. Of the more than 30 briefs, motions, and responses filed by Professor Issacharoff that we were able to locate on the five separate appellate dockets, only one filing, the Plaintiffs-Appellees' Brief on the Merits, *Deepwater Horizon II*, 739 F.3d 790 (2013 WL 8902142), contained a citation to himself.

68 See Douglas Smith, *supra* note 12, at 319; see also REDISH, *supra* note 11, at 20 (“I undertake an examination of the modern class action from an intellectual perspective that no other scholar has, to date, attempted.”).

69 Mark Herrman, *Inside Straight: Torpedoing Class Actions*, ABOVEHELAW.COM (Jan. 12, 2012 at 10:12 AM), <http://abovethelaw.com/2012/01/inside-straight-torpedoing-class-actions/>.

70 See Heather A. Pigman, John M. Kalas, *High Court's Cert Denial Fosters Greater Confusion Over Removal of Mass Actions Under Federal Law* (Washington Legal Foundation, October 23, 2014)

71 See THE FEDERALIST NOS. 47, 48 (James Madison).

72 REDISH, *supra* note 11, at 182 (footnote omitted).



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