

No. 14-123

IN THE
Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC., *et al.*,

Petitioners,

v.

LAKE EUGENIE LAND
& DEVELOPMENT, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE FOR THE COBB RESPONDENTS

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QUESTIONS PRESENTED

1. May a court certify for settlement purposes a class that includes numerous members who have not suffered any injury caused by the defendant?
2. May a court approve a class action settlement that provides the same or more compensation to class members who cannot state valid claims against the defendant as it does to class members who can state valid claims?

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Respondents Cobb Real Estate, Inc.; G&A Cobb Family LP; L&M Investments, Ltd.; Mad, Ltd.; Mex-Co Ltd.; and Missroe LLC are not publicly traded, have no parent corporations, and no publicly held corporation owns 10% or more of their stock. Respondent Robert C. Mistrot is an individual.

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OPINIONS BELOW

The opinion of the *en banc* United States Court of Appeals for the Fifth Circuit denying rehearing *en banc* is not reported, but is included in the Petitioner's Appendix at p.394a. The opinion of the Fifth Circuit in the Respondents' appeal No. 13-30095 is reported at 739 F.3d 370. The district court's opinion that was appealed by Respondents is reported at 910 F. Supp. 2d 891.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on January 10, 2014. The court denied timely petitions for rehearing on May 19, 2014.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Fed. R. Civ. P. 23 and Article III of the Constitution (reproduced in Petitioner's Appendix).

STATEMENT OF THE CASE

BP has adequately stated the background of the case in its Petition, and Respondents will not repeat it here.

Respondents Cobb Real Estate, Inc.; G&A Cobb Family LP; L&M Investments, Ltd.; Mad, Ltd.; Mex-Co Ltd.; Robert C. Mistrot; and Missroe LLC are absent class members included in the settlement class certified by the district court. Each of the Respondents is located in the State of Texas, which is treated less favorably than

certain other gulf states in the settlement's allocation. The Respondents objected to the settlement class certification and settlement by the relevant deadline, and filed a timely appeal to the United States Court of Appeals for the Fifth Circuit.

After the Fifth Circuit affirmed the district court's settlement approval, Respondents moved for rehearing *en banc*, which was denied on May 19, 2014.

The Respondents indisputably have standing to challenge the class certification and settlement approved by the district court. They never agreed to the settlement or the overbroad settlement class, and never waived their right to challenge either the settlement class or the settlement.

The Respondents are inherently harmed by the inclusion of uninjured persons in the class, for the reasons laid out by the Third Circuit in *Rodriguez v. Nat'l City Bk.*, 726 F.3d 372 (3rd Cir. 2013):

When a class of plaintiffs does not share a common question of law or fact, it may well include individuals who did not actually experience the harm allegedly caused by the defendants. If that class is certified, those individuals will nonetheless partake in the recovery, ***which diminishes the relief for class members who were actually harmed.*** The Supreme Court stated in *Amchem* that the *Rule 23(a)* requirements are of "vital importance" in the settlement context precisely because they are "designed to protect absentees *by blocking*

unwarranted or overbroad class definitions.”
Thus, denial of certification to a class that lacks commonality falls squarely within the district court’s prescribed role in considering the propriety of a settlement class.

Id. at 381 (internal citation omitted)(emphasis added).

BP notes at page 32 of its Petition that the rights of legitimate class members such as Respondents are imperiled by the certification of unwarranted or overbroad classes. To the extent that a defendant is willing to pay a certain amount of money to resolve legitimate, colorable claims against it, diversion of a portion of those monies to uninjured, illegitimate claimants necessarily reduces the amount available to compensate genuinely injured class members, whose claims constitute the consideration for the settlement benefits.

For all of the reasons stated in BP’s Petition, Respondents support and agree with BP’s Petition for a Writ of Certiorari, and join in BP’s request for Certiorari in this case.

REASONS FOR GRANTING THE PETITION

In addition to Petitioners’ statement of Reasons For Granting The Petition, Respondents further state the following.

In addition to the conflict among the circuits, and the conflict with this Court’s precedents on Article III and class certification, the Fifth Circuit’s decisions are contrary to this Court’s precedent in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

The unfairness of the settlement's distribution is perhaps the most objectionable aspect of the settlement, and illustrates why overbroad class certifications inevitably lead to unfairness to one or more portions of the class.

In *Ortiz*, this Court affirmed “the requirement of equity among members of the class” in class action settlements. *Id.* at 854. This requirement is relevant not only in the context of Rule 23(e)(2)'s “fair, reasonable and adequate” analysis, but also to the antecedent question of whether the class may be certified for settlement in the first place. In *Ortiz*, this Court held that settlement certification was deficient based, in part, upon the unfairness of the distribution of the settlement fund among class members. *Id.* at 855.

[A] settlement must seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness among themselves.

....

[T]he class included those exposed to Fibreboard's asbestos products both before and after 1959. The date is significant, for that year saw the expiration of Fibreboard's insurance policy with Continental, the one which provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, the consequence being a

second instance of disparate interests within the certified class....

Id. at 855-857.

In *Ortiz*, the critical difference between the subclasses was the availability of insurance coverage to pay claims. Here, the difference is the claimant's ability to state a claim against BP in court, a difference several magnitudes greater than the one this Court confronted in *Ortiz*. *Ortiz* dictates that class members who can state a claim because they were injured by BP's conduct have stronger and more valuable claims than those who were not injured by the oil spill, and, as a consequence, the settlement distribution must reflect this difference in value.

In upholding a settlement that provides payments to businesses that were not harmed in any way by the oil spill, the Fifth Circuit violated the principle of proportional allocation announced in *Ortiz*. Inclusion of uninjured persons in a settlement class inevitably leads to a violation of the principles of *Ortiz*, since payment of *any* settlement benefits to persons without claims is *per se* inequitable. Indeed, any such payment is properly considered a form of *cy pres*, as Judge Dennis candidly conceded in his partial dissent at 732 F.3d 326, 359. Before any portion of the settlement may be paid to *cy pres*, however, each class member must first be made whole. *Kleier v. Elf Atochem*, 658 F.3d 468, 475 (5th Cir. 2011) (Because the settlement funds are the property of the class, a *cy pres* distribution of settlement funds to a third party is permissible only when each class member has already been made whole).

The Fifth Circuit made clear in *Kleier, supra*, that all funds paid by a defendant in settlement of a class action belong to the class.

Second, a class settlement generates property interests. Each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves. The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.

658 F.3d at 474. Accordingly, all of the payments made to date by BP belong to the Respondents and other class members, and not to either BP or the improper recipients who were not damaged by the oil spill.

The settlement currently provides the same or greater recovery to claimants that were not injured by the oil spill — and thus, as non-class members, are properly viewed as *cy pres* recipients — as it does to legitimate class members such as Respondents. Therefore, in addition to all of the reasons for *certiorari* identified by BP in its Petition, the Fifth Circuit's decisions violate this Court's precedent in *Ortiz* because they let stand a settlement that fails to fairly allocate a settlement's value based on the strength of each class member's claims, and permits payments to *cy pres* before every class member has been made whole. The payments to uninjured claimants also represent a conversion of funds belonging to the class.

Ortiz requires that those class members who were actually harmed by the oil spill receive more than those

claimants whose losses were not caused in any way by the oil spill, because the former have claims against BP that could be asserted in a court of law, while the latter do not. Since all of the settlement's value was created by the claims of those class members who can state a colorable claim against BP related to the oil spill, the payment of any of that value to strangers to the litigation is improper and a violation of *Ortiz*. Some businesses that were uninjured by the oil spill in any way have been awarded hundreds of thousands of dollars by the claims administrator, money that belongs to the legitimate class members, and not to the recipients. This has unwittingly created a new threshold for the settlement for all legitimate class members. Unless all genuinely injured class members recover at least as much as the uninjured businesses, the settlement fails the *Ortiz* test.

This is the fundamental unfairness of the settlement as it has been interpreted by Claims Administrator Patrick Juneau. Principles of equitable distribution require that each legitimate class member receive at least as much as a business whose losses are unconnected to the spill, and that essentially stands in the shoes of a *cy pres* recipient. The payment of \$500,000 to a business that was unaffected by the oil spill requires an equal or greater payment to every other class member whose claims were released in exchange for the settlement payments, in order for the settlement distribution to be found fair and equitable. Regardless of the uncapped nature of the settlement, payment to one illegitimate claimant affects all other claimants, because of the requirement that settlement distributions be equitable in relation to distributions made to all other class members, and because it represents a conversion of funds created by the claims of legitimate class members.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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