No. 19-739

In the
Supreme Court of the United States

JULIUS BARBOUR, ET AL.,
Petitioners,

v.

HALLIBURTON COMPANY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Respondents' assertion that petitioners had no right of appeal from the denial of their claims is incorrect and, in any event, is not material to the question of granting review.

Respondents argue that this Court should deny review based on their contention that petitioners had no right to appeal to the court of appeals in the first place. Respondents rely on provisions in the Settlement Agreements foreclosing an appeal to the court of appeals of the district court's ruling on appeals from claims determinations by the claims administrator in cases where the claims appeal involved "the amount of any payment" to a claimant. However, respondents made this argument to the court of appeals seeking to have the appeals dismissed on that basis, but the court of appeals did not so hold and dismiss the appeal but proceeded to decide the appeal on the merits. Therefore, that contention is not properly before the court and should not be considered as a basis for denying review. In essence, respondents are asking this Court to deny review of the important due process issues presented by deciding an issue contested below that is unrelated to due process and which the court of appeals declined to resolve. That is manifestly unwarranted.

In any event, respondents reach the conclusion that the petitioners' claims determinations involved "the amount of any payment" only by torturing the English language and ignoring the plain meaning of words. If "payment" is given its literal, commonly understood

meaning, then the phrase plainly does not preclude appeal. "Payment" is defined as "the act of paying or giving compensation" or "something that is paid."[1] As a result of the Claims Administrator's departure from the terms the Settlement Agreement regarding the requirements for entitlement to compensation, he did not "give compensation;" he denied compensation, and nothing was paid. Since the Claims Administrator denied any payment to the petitioners, then these appeals are not from a determination as to "the amount of any payment to any individual claimant." Respondents offer no cogent explanation of how the absence of a payment can logically or linguistically be deemed to be a payment. A "zero payment" is not a payment. A determination that a claimant is not entitled to any payment is the antithesis of a payment. The dispute is not over an allocated amount of compensation, but over the total exclusion of the petitioners from any participation in the settlements.

It is apparent that this provision was intended to speed up the claims determination process by foreclosing appellate review of strictly factual and computational decisions that would affect the size of a claimant's recovery (for example, an issue of whether a commercial fisherman claimant was a boat captain or merely a boat pilot or actually possessed the license required to qualify under a particular claim type). The claims administrator's decisions on petitioners' claims were not based on any comparable consideration. Rather, the basis for the decisions involved legal issues

[1] Webster's Third New International Dictionary (Merriam-Webster 1986).

and went to the very heart of whether the petitioners were eligible to participate in the settlement.

The claims administrator determined that the petitioners were not entitled to compensation under the settlements because their lack of a pending individual lawsuit pursuant to PTO 60 left them without standing under maritime law to recover punitive damages. The appeals of those decisions did not "involv[e] the amount of any payment to any individual claimant." Rather, petitioners were contesting a decision that they were "not entitled to any payment," so the appeal provision does not preclude appellate review, but expressly preserves it.

Respondents suggest that decisions that a claimant is "not entitled to any payment" are appealable only if based on a determination that a claimant is not in the settlement class. This argument disregards the fact that non-membership in the settlement class was, in substance if not in form, the basis for the petitioners' exclusion from compensation. Since standing to recover punitive damages was inherent in the class definition (because the definition is expressly intended to capture all affected persons having any arguable basis to claim standing), then the exclusion from receiving compensation based on not having a pending lawsuit and thus purportedly lacking standing was, in effect, based on a failure to meet the class definition.

Respondents argue that petitioners were not excluded "due to a failure to meet the class definition" because "Petitioners do not dispute that they meet the class definition." That argument is disingenuous, because although the petitioners certainly contend that

they meet the class definition—and thus, under the plain terms of the Settlement Agreements, are entitled to receive compensation—compensation was denied based on the claims administrator's ultimate decision that petitioners were not in the settlement class. The claims administrator's reasoning effectively removed petitioners from the class by essentially adding to the class definition a requirement of a current pending lawsuit for compensatory damages at the time a claim application was submitted, which does not appear in the Settlement Agreements, and then denying compensation because petitioners did not meet that revised definition.

Respondents' argument also disregards the fact that under the Settlement Agreements the right to compensation was based solely on meeting the definition for membership in the settlement class, and there was no additional requirement that a claimant present proof of actual loss (which is a requirement for receiving punitive damages under maritime law). Instead, the claims administrator would determine probable losses from statistics and assign compensation under the Settlement Agreements on a 1:1 compensatory-to-punitive ratio. Thus, at the time the Settlement Agreements were entered into—long before the Distribution Model was promulgated—the only way a claimant could be "not entitled to any recovery" was if the claimant was not a member of the settlement class.

In any event, respondents acknowledge that the petitioners raised the same due process arguments in a Rule 60 motion for relief and that the District Court's

order denying that motion was appealed and consolidated with the cases challenging the magistrate judge's claims-appeal decisions. Appeal from that order on the Rule 60 motion could not be foreclosed by an order disallowing an appeal to the Article III judge from a magistrate judge's ruling on claims appeals that challenge the amount of money awarded to a claimant by the claims administrator.

Respondents' argument also ignores the established rule that, for a waiver of appeal rights in a class-action settlement to be valid, the waiver must clearly and unambiguously apply to the issue as to which appeal is sought. *United States v. International Brotherhood of Teamsters*, 905 F.2d 610, 615 (2d Cir. 1990); *Lake Eugenie Land Development, Inc. v. BP Exploration & Production*, 785 F.3d 986, 997 (5th Cir. 2015); *Montez v. Hickenlooper*, 640 F.3d 1126, 1132 (10th Cir. 2011). As noted above, the respondents' interpretation depends on ignoring the plain meaning of words and is based on a premise—that one could be "not entitled to any payment" in some other way than by being excluded from the settlement class—whose factual predicate did not arise until after the Distribution Model was promulgated, months after the Settlement Agreements were executed. Thus, at best for respondents, the provision in question is ambiguous regarding whether it precludes these appeals and, therefore, does not preclude them.

For these reasons, the magistrate judge's decisions on the claims appeals of these petitioners were appealable, and, as noted, the court of appeals did not hold otherwise. As respondents' conceded below, the

question of the applicability of the appeal waiver to these appeals had no bearing on the jurisdiction of the court of appeals. *See United States v. Story*, 439 F.3d 226, 230-31 (5th Cir. 2006) (appeal waivers do not deprive the court of jurisdiction to consider an appeal). Therefore, respondents' contention that the appeal-waiver issue they unsuccessfully raised below is a reason for this Court to deny review is without merit.

II. Petitioners' possession of a property interest subject to due process protections was not contested below and is not negated by respondents' arguments.

Respondents concede that the facts of this case give rise to legitimate questions of whether the notice given to petitioners comported with due process requirements. However, they nevertheless urge this Court to ignore these serious issues as essentially moot based on their contention that the petitioners did not have a property interest in the settlement and thus had no right to due process. However, respondents did not make that argument below, and the court of appeals did not so hold. Therefore, respondents' contention is not properly before the court and should not be considered as a basis for denying review. In any event, the respondents cite no authority negating the petitioners' assertion of a property interest arising from settlement agreements in which they were part of the described settlement class, and their argument is contrary to authority cited below without controversion and in the Petition.

Furthermore, the respondents effectively refute their own argument by stating that "Petitioners did not

have a property interest in the settlement proceeds until demonstrating their underlying compensatory damages claim." In tying a property interest to the possession of an underlying compensatory damages claim, respondents effectively concede that petitioners had a property interest when the Settlement Agreements were entered into, because it was undisputed below that at that time petitioners had viable causes of action for compensatory damages against respondents, and those claims were being asserted through pending class action lawsuits in which petitioners were in the plaintiff class. Petitioners were deprived of that property by the claims administrator's later use of PTO 60 to deny compensation, without giving constitutionally adequate notice to petitioners that they needed to comply with PTO 60 and that they would be divested of the right to receive compensation under the Settlement Agreements if they did not do so.

Respondents point to the Settlement Agreements' provision that the settlement class definition was intended to sweep in all "potential claimants" who "may have valid maritime law standing" as purportedly showing that a person could be within the settlement class definition and yet not have a property interest. They contend that the words "potential" and "may have" indicate that class members only had a potential for recovery and could be determined not to have standing despite meeting the class definition. However, the phrase "potential claimants" simply recognizes the truism that one could not recover under the settlements without submitting a claim to the Claims Administrator and that some members of the

settlement class might not, for whatever reason, submit a claim.[2] Thus, all class members were only "potential claimants" at the outset. The reference to capturing all those who "may have" standing is merely an acknowledgement that not all persons within the New Class definition had clear and well-established maritime law standing under existing Fifth Circuit precedent; although the standing of some class members was well established (for example, those who sustained actual physical damage to real property caused by the oil spill), the standing of others was less clear and not established under Fifth Circuit law (commercial fishermen) while that of others was questionable at best (charter boat operators and subsistence fishermen). The clear intent was to include in the class and subclass definitions those who *might* be held to have standing if the matter were litigated but whose standing was not settled or not highly likely to be established in that event. In other words, the use of "may have" was a consequence of the fact that the parties had crafted the class and subclass definitions to include in the settlement all potential claimants who had any arguable claim to standing under existing maritime law or a foreseeable extension thereof. There is simply no textual or logical support for the notion that the "may have standing" language means that a person making a claim could be within the class definition but still be excluded from compensation. Thus, all members of the settlement class had a property interest in the settlements from the time they were entered into.

[2] For example, members of the settlement class might opt out of the settlements.

III. The "broad notice" touted by respondents was plainly inadequate.

Respondents preface their arguments with the incorrect statement that petitioners have acknowledged that they received notice of the PTO 60 compliance requirement as of the filing of the proposed Distribution Model some two weeks before the deadline for responding to the District Court's show-cause order. However, this was not asserted below by either the respondents or the claims administrator appearing before the court of appeals as amicus curiae, but was an unwarranted assumption by the court of appeals that factored critically in its decision. To the contrary, the petitioners argued that they did not even receive notice of the PTO 60 compliance requirement through the short-form notices (which were mailed after the Distribution Model was filed) or the long-form notice posted on the settlement website. The mere filing of the Distribution Model for approval did not give constructive notice of the PTO 60 compliance requirement to the petitioners, and in any event the Distribution Model contained no hint of any purported opportunity for "mercy" supposedly afforded by the show-cause order. The petitioners attempted to correct the faulty assumption in their motion for panel rehearing, which the court of appeals summarily denied without opinion or analysis. This Court should disregard that false premise perpetuated here by respondents in considering whether to grant the petition.

Respondents' defense of the means of notice with respect to the PTO-60 compliance requirement is that

it was consistent with the requirements of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), because, they say, under *Eisen* "broad notice" such as that given here is constitutionally sufficient if class members' names and addresses are not easily available. That argument, of course, begs the question of whether it would have been feasible to give petitioners direct notice and ignores the fact that, as noted in the Petition, the claims administrator did not represent to the court of appeals that a determination had been made that direct notice to menhaden fishermen was impracticable or that any effort had even been made to explore the feasibility of direct notice and, in fact, disclosed to the court that a potential ready source of contact information for menhaden fishermen was known to the claims administrator.

Moreover, respondents' defense of the *means* of notice disregards the patent deficiencies in the *content* of the notice with respect to the PTO 60 compliance requirement. As explained in the Petition, the "broad notice" touted by respondents was silent or misleading as to the effect of PTO 60 on the settlements (which were entered into long before PTO 60 was entered), the need for certain settlement class members to file individual lawsuits in order to remain a member of the class even though their claims for punitive damages had already been settled, or any potential opportunity for retroactive compliance with a deadline that had already passed.

In short, petitioners have presented a compelling case that the notice requirements of *Eisen* and other

cases were disregarded. That disregard warrants correction by this Court to vindicate its precedents.

IV. Respondents' "limited interest" in the outcome of the appeal is not a reason to deny review.

Respondents argue that this Court should deny review because of their professed lack of a personal stake in the outcome and the consequent purported lack of an adversarial relationship between the parties. That argument is ironic, since generally the lack of opposition to a party's position results in that party prevailing by default. In any event, it should not be held against the petitioners that the court of appeals deemed the respondents to be the proper appellees and that no person deemed by the court of appeals to have the interest necessary to give them standing appeared before the court to seek leave to intervene as an appellee to contest the petitioners' due process arguments and argue in support of denying them compensation under the Settlement Agreements. The argument also overlooks the fact that the claims administrator's amicus brief below, while professing agnosticism regarding the merits of the appeal and purporting to give the court "just the facts," was actually quite adversarial and had a distinctly argumentative tone, perhaps carried over from the claims administrator's unsuccessful attempt to intervene as an appellee, which was denied by the court of appeals based on the claims administrator's lack of a legally cognizable interest in the outcome. Furthermore, as noted in the Petition, the court of appeals compensated for any supposed lack of

adversativeness by reaching to decide the case and deny relief based on positions that neither the appellees nor amicus argued or even identified. In any event, if respondents' "limited interest" were a legitimate concern, this Court could invite the claims administrator to submit a brief on the merits supporting the respondents, since it is quite apparent that the claims administrator has from the outset had a clear and strong preference regarding the outcome of this case.

CONCLUSION

For the foregoing reasons, respondents have presented no cogent arguments for denying review of the decision of the court of appeals. Accordingly, for the reasons stated in the Petition, the Court should issue the requested writ of certiorari.

Respectfully submitted,

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