

BP entered into a settlement in a massive class action arising out of the BP oil spill. Now it's trying to get out of part of the settlement while keeping the rest of the deal in place. BP's argument involves three areas of confusion in standing doctrine: how does it apply to class actions, how does it apply to settlements, and should it apply in torts cases? The class action issue is difficult, but I would argue that standing requirements should not apply to settlements and in fact shouldn't apply to torts cases in the first place.

The class action involved an enormous number of claims for economic loss due to the spill. As to some subsets of those claims, the settlement provides that claimants in some particular industries and areas need only prove that they suffered an economic loss and certify (under pain of perjury) that the losses were caused by BP. BP now claims rather unconvincingly that this wasn't the actual meaning of the settlement, but this claim is inconsistent with the actions of their own lawyers earlier in the case. Now BP argues that the settlement (as implemented) requires payment even in cases where the claim form itself raises questions about causation. It complains loudly that it might have to make payments in cases where a business would have closed for some obvious reason apart from the spill. One element of standing is that an injury be "fairly traceable" to the defendant's actions. Hence, according to BP, those class members lack standing, and since standing is jurisdictional, even BP's agreement to pay them can't make them part of the case.

**The class certification issue.** The first question involves the relationship between class actions and standing. BP argues that class certification can only include individuals with standing under Article III. In effect, according to BP, the implementation of the settlement expanded the class, in violation of Article III, to include some individuals who would not have had standing on their own. The lower courts seem to be divided. According to some decisions, Article III requires only that the class representatives have standing. Others say that every member of the class must independently have standing. This is really an interesting question, but doesn't seem to be at issue in this particular case. Even the judges who ruled against BP now agree that in this particular case the class was defined so as to require injury. They say that BP has simply agreed in certain situations that the claimant's allegation of causation under penalty of perjury is sufficient proof. So the interesting question about class action certification isn't really presented here.

**The settlement issue.** This brings us to the second question: what happens to the causation requirement when a case is settled? Can the defendant contest the presence of causation despite the settlement? And suppose that the defendant stipulates causation or forfeits the issue under procedural rules, or suffers a default judgment? In theory, issues relating to Article III jurisdiction can't be waived. The Supreme Court has held that the kind of showing to be made regarding standing depends on the procedural stage of the case.

Without such a mini-trial, it's always possible that some plaintiff who wasn't actually harmed by the defendant is recovering. At the settlement stage, the bar has to be pretty low. Otherwise, it would be impossible to settle a mass tort case since the court would have to conduct a hearing about injury, causation and the existence of at least some legally compensable damage for every member of the class to ensure that it had jurisdiction. So the only question in this particular case is whether the bar is quite as low as simply stating causation under penalty of perjury (even when other portions of the form raise questions about causation). It's not clear to me why the Constitution should require some particular hearing procedure or quantum of proof if the parties agree otherwise in their settlement.

In a way, the entire inquiry may be misplaced. It's worth noting that even if the claimants in question didn't have standing before the settlement, they now do seem to have a legal claim as third party beneficiaries of the agreement between the class representative and the defendant. Thus, assuming the settlement stands, those claimants do have an injury-in-fact: BP owes them money under the settlement contract that it hasn't paid them. It may well be appropriate for a consent decree to confer rights on individuals who haven't had injury in fact — for example, the parties might both agree to pay an independent expert to monitor implementation, although the expert clearly never suffered injury at the hands of the defendant. The expert should have a legitimate claim for compensation if the defendant later balks, and so should claimants under the settlement.

**The misapplication of standing doctrine to mass tort litigation.** What makes the BP case intriguing is that it involves tension between two things beloved of the majority of Justices: standing restrictions and settlement. It also highlights a problem with applying standing law to common law causes of action, which is that the standard elements of standing overlap with the elements of the cause of action. Any tort plaintiff has to prove harm, causation, and legally compensable damages, paralleling the requirements for standing. If a tort plaintiff loses because the jury doesn't find causation, it seems weird to contend that the court never had the power to hear the case in the first place. That's a signal that there's something wrong with applying standard standing doctrine here.

Standing doctrine was developed to deal with litigation over the legality of government action, and the way the doctrine is formulated doesn't work well for private disputes. There's an especially strong argument that standing doctrine should not apply to private disputes over money. If the plaintiff's case is valid on the merits, the defendant owes him money that he is trying to collect, and this seems like a classic basis for a lawsuit.

At various times, the Court has articulated three reasons for standing doctrine, None of those reasons apply to monetary disputes between private parties:

1. *Ensuring that both parties have a concrete stake so as to ensure vigorous advocacy.* Money is a very concrete, highly motivating stake.
2. *Preventing courts from undertaking executive branch functions.* Resolving monetary disputes between private parties is not an executive branch function; in fact, Article III severely limits the extent to which such disputes can be decided by anyone *except* Article III judges.
3. *Limiting courts to their traditional function.* Deciding disputes between private parties over money is a function that goes back centuries before the Constitution.

Thus, I would argue that disputes between private parties over money are necessarily “cases and controversies” under Article III, making recourse to the three-part standing test redundant.