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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2015-2016

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Regions Bank

v.

BP P.L.C. et al.

**Appeal from Baldwin Circuit Court
(CV-10-901491)**

MAIN, Justice.

Regions Bank ("Regions") appeals from a final judgment dismissing its action against BP P.L.C., BP Corporation North America, Inc., and BP America Inc. (hereinafter referred to collectively as "BP"). We reverse and remand.

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I. Facts and procedural history

On April 20, 2010, an explosion and fire occurred aboard the Deepwater Horizon, an offshore-drilling rig, located off the coast of Louisiana. The incident led to a massive discharge of oil into the Gulf of Mexico, which, in turn, spawned an expansive clean-up and response operation by BP and various governmental agencies.

Regions owns coastal real property located in Baldwin County, Alabama. On August 13, 2010, Regions filed this trespass action against BP in the Baldwin Circuit Court. Regions alleged that BP occupied Regions' property, without authorization, for its spill-response operation; that BP moved equipment and structures onto the property without permission; and that BP erected fences and barriers on the property, again, without permission. Regions further alleged that BP stored hazardous materials and waste on the property and that those hazardous materials and waste damaged the property.

Contemporaneous with Regions' action, on August 10, 2010, the United States Judicial Panel on Multidistrict Litigation entered an order centralizing all federal actions relating to the Deepwater Horizon incident in the United States District

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Court for the Eastern District of Louisiana. Eventually, hundreds of cases with thousands of individual claimants were consolidated into the multidistrict litigation ("the MDL"). In 2011, BP and the plaintiffs' steering committee in the MDL began discussions regarding a class-wide settlement. In early 2012, BP and the plaintiffs' steering committee reached a settlement agreement relating to economic and property damage. On May 2, 2012, the federal district court in the MDL preliminarily approved the economic-and-property-damage settlement and preliminarily conditionally certified a class for the purposes of settlement. On November 8, 2012, following notice to the putative class members, an opt-out period, and a fairness hearing, the federal district court entered its final judgment approving the economic-and-property-damage class settlement.

On April 23, 2015, BP filed a Rule 12(c), Ala. R. Civ. P., "motion to dismiss" Regions' trespass action on the ground that it was subject to the class-action settlement approved in the MDL and, therefore, that dismissal was warranted on the basis of the doctrine of res judicata.¹ Specifically, BP

¹Initially, on February 12, 2013, BP moved to stay the proceedings in Regions' trespass action on the ground that

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argued that, because the property damage suffered by Regions was within the geographic area designated by the class settlement and arising from the Deepwater Horizon oil spill, Regions was a class member in the economic-and-property-damage-settlement class. BP contended that, because Regions had not opted out of the class, its trespass claim had been released under the terms of the settlement. On May 12, 2015, the circuit court entered a one-sentence order granting BP's motion to dismiss. Regions timely appealed.

II. Standard of Review

BP's motion was styled as a Rule 12(c) "motion to dismiss" for failure to state a claim upon which relief can be granted. In support of its motion, BP attached several exhibits that evidenced the class-wide settlement approved in the MDL. Ordinarily, consolidation by the court of materials outside the pleadings converts a motion to dismiss -- or a

Regions' claims were included within the claims settled by the economic-and-property-damage class-action settlement approved in the MDL. BP contended that the case was due to be stayed while the order approving the class settlement was on appeal. The Baldwin Circuit Court stayed the trespass action. The class settlement became effective on December 8, 2014, following the exhaustion of all further grounds for appellate review. The Baldwin Circuit Court lifted the stay on January 12, 2015.

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Rule 12(c) motion for judgment on the pleadings -- into a motion for a summary judgment. Barry v. The D.M. Drennen & Emma Houston Drennen & Drennen Mem'l Trust of Saint Mary's Church, 982 So.2d 478, 482-83 (Ala. 2007); Rule 12(c), Ala. R. Civ. P. ("If ... matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"). Moreover, the doctrine of res judicata was the basis of the motion to dismiss. We have noted that a res judicata defense will typically require evidence outside the pleadings and therefore must ordinarily be raised in a motion for a summary judgment. See Ex parte Scannelly, 74 So. 3d 432, 438-89 (Ala. 2011).

Here, the circuit court accepted evidentiary material outside the pleadings from BP in support of its motion to dismiss. Regions was provided the opportunity to respond, and it submitted its own evidence in opposition to the motion. In granting BP's motion on the ground of res judicata, the circuit court necessarily considered materials outside the pleadings concerning the class-action settlement. Thus, BP's motion was converted to a motion for a summary judgment. Boles v. Blackstock, 484 So. 2d 1077, 1079 (Ala. 1986)

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("[W]here matters outside the pleadings are considered on a motion to dismiss, the motion is converted into a motion for summary judgment as provided in Rule 12(c), [Ala.] R. Civ. P., regardless of its denomination and treatment by the trial court."); see also Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 792 (Ala. 2007). Accordingly, our standard of review is as follows:

"We review the trial court's grant or denial of a summary-judgment motion de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact. Bockman v. WCH, L.L.C., 943 So. 2d 789 (Ala. 2006). Once the summary-judgment movant shows there is no genuine issue of material fact, the nonmovant must then present substantial evidence creating a genuine issue of material fact. Id. "We review the evidence in a light most favorable to the nonmovant." 943 So. 2d at 795. We review questions of law de novo. Davis v. Hanson Aggregates Southeast, Inc., 952 So. 2d 330 (Ala. 2006)."

Lloyd Noland, 979 So. 2d at 793 (quoting Smith v. State Farm Mut. Auto. Ins. Co., 952 So. 2d 342, 346 (Ala. 2006)).

III. Analysis

In this case the circuit court concluded that Regions' claim was due to be dismissed based on the doctrine of res

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judicata.² That doctrine bars a party from asserting a claim when there is: "(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions." Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998). A class-action settlement may serve as a judgment on the merits for res judicata purposes. See Alabama Dep't of Transp. v. Price, 854 So. 2d 59, 63 (Ala. 2003). In this case, Regions concedes that if it is bound by the class settlement, the settlement agreement would encompass its trespass claim asserted against BP. Regions, however, contends that it is not bound by the settlement agreement because, Regions argues, it was expressly excluded from the class definition. Thus, only the third element -- identity of the parties -- is in dispute. Accordingly, the only question before this Court is whether Regions was a member of the economic-and-property-damage-settlement class.

²The circuit court did not provide its rationale for granting BP's motion, but res judicata was the only ground asserted in the motion.

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The federal district court's judgment approving the class-action settlement defined membership in the economic-and-property-damage-settlement class. That definition provides that a person or entity is a member of the class if it incurred certain types of damage within a specified geographical area and did not otherwise fall within certain excluded categories. The definition provides, in pertinent part:

"(a) Class Definition

"Economic and Property Damages Settlement Class shall mean the NATURAL PERSONS and ENTITIES defined in this Section 1, subject to the EXCLUSIONS in Section 2 below. If a person or entity is included within the geographical descriptions in Section 1.1 or Section 1.2, and their claims meet the descriptions of one or more of the Damage Categories described in Section 1.3, that person or entity is a member of the Economic and Property Damages Settlement Class, unless the person or entity is excluded under Section 2:

"....

"1.2. Entities. All Entities doing business or operating in the Gulf Coast Areas or Specified Gulf Waters that:

"....

"1.2.4. owned or leased REAL PROPERTY in the Gulf Coast Areas at any time from April 20, 2010 to April 16, 2012.

"1.3 Individuals and Entities who meet the geographical descriptions of Section 1.1 or 1.2 above are included in the Economic Class only if their Claims meet the descriptions of one or more of the Damage Categories described below.

"1.3.1. The following are summaries of the Damage Categories, which are fully described in the attached Exhibits 1A-15:

". . . .

"1.3.1.6. Coastal Real Property Damage Category. Damages alleged by a Coastal Real Property Claimant that meet the requirements set forth in the Coastal Real Property Claim Framework.

". . . .

"1.3.1.11. Businesses/Employers in Otherwise Excluded Gaming, Banking, Insurance, Funds, Defense Contractors and Developers Industries: As more fully described in Exhibit 16 and Section 5.10 below, businesses and employers in these otherwise excluded industries described in Section 2 may submit Claims only for Coastal Real Property Damage and Wetlands Real Property Damage, but are not entitled to recover under any other aspect of the Settlement.

". . . .

"(b) Exclusions from the Economic and Property Damages Settlement Class Definition

"2.1. Notwithstanding the above, the following individuals and Entities, including any and all of their past and present predecessors,

successors, personal representatives, agents, trustees, insurers, reinsurers, indemnitors, subrogees, assigns, and any other Natural Person, legal or juridical person or Entity entitled to assert any Claim on behalf of or in respect of any such individual or Entity in their respective capacities as such are excluded from the Economic Class.

"2.2. Excluded Individuals or Entities:

". . . .

"2.2.4. The following exclusions are based on the substantive nature of the business, not the legal or juridical form of that business. Any of the following types of Entity, or any Natural Person to the extent he or she alleges Economic Damage based on their employment by such an Entity, during the Class Period are excluded:

"2.2.4.1. F i n a n c i a l Institutions as identified in the NAICS codes listed on Exhibit 18, which include, by way of example, commercial banks; savings institutions; credit card issuers; credit insurers; factors or other sales finance entities; financial or investment banking entities; lending institutions; real estate mortgage or lending entities; brokers or dealers of securities, commodities, commodity contracts or loans; securities or commodities exchanges; entities serving as custodians, fiduciaries or trustees of securities or other financial assets; or entities

engaged in other financial transaction intermediation, processing, reserve or clearinghouse activities, provided, that the following shall not be excluded solely pursuant to this Section 2.2.4.1 unless they are subject to a different exclusion: stand-alone ATMs, credit unions, pawn shops, businesses engaged predominantly in making payday loans or paycheck advances and businesses that sell goods and services and offer financing on these purchases to their customers."

(Capitalization in original.)

Regions does not dispute that it falls within the relevant geographical description and that its claim is encompassed within one or more of the damage categories of the class definition. Rather, it argues that, as a financial institution, it was expressly excluded from the economic-and-property-damage-settlement class. Regions emphasizes the following language of the opening paragraph of the class definition:

"Economic and Property Damages Settlement Class shall mean the NATURAL PERSONS and ENTITIES defined in this Section 1, subject to the EXCLUSIONS in Section 2 below. If a person or entity is included within the geographical descriptions in Section 1.1 or Section 1.2, and their claims meet the descriptions of one or more of the Damage Categories

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described in Section 1.3, that person or entity is a member of the Economic and Property Damages Settlement Class, unless the person or entity is excluded under Section 2"

(Capitalization in original; emphasis added.) Regions then points to the following exclusionary provision of Section 2:

"2.1. Notwithstanding the above, the following individuals and Entities ... are excluded from the Economic Class.

"2.2. Excluded Individuals or Entities:

"....

"2.2.4. The following exclusions are based on the substantive nature of the business, not the legal or juridical form of that business. Any of the following types of Entity ... are excluded:

"2.2.4.1. Financial Institutions as identified in the NAICS codes listed on Exhibit 18, which include, by way of example, commercial banks; savings institutions; ... provided, that the following shall not be excluded solely pursuant to this Section 2.2.4.1 unless they are subject to a different exclusion: stand-alone ATMs, credit unions, pawn shops, businesses engaged predominantly in making payday loans or paycheck advances and businesses that sell goods and services and offer financing on these purchases to their customers."

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(Emphasis added.) There is no dispute that Regions is the type of financial institution identified in Section 2.2.4.1 of the class definition. Thus, Regions argues that it was expressly and unequivocally excluded from the economic-and-property-damage-settlement class and, that, therefore, the circuit court erred in dismissing its trespass action.

BP, on the other hand, cites the following section of the class definition:

"1.3.1.11. Businesses/Employers in Otherwise Excluded Gaming, Banking, Insurance, Funds, Defense Contractors and Developers Industries: As more fully described in Exhibit 16 and Section 5.10 below, businesses and employers in these otherwise excluded industries described in Section 2 may submit Claims only for Coastal Real Property Damage and Wetlands Real Property Damage, but are not entitled to recover under any other aspect of the Settlement."

(Emphasis added.) BP contends that this section makes clear that banks like Regions can possess claims for coastal real-property damage and for wetlands real-property damage that are covered under the settlement. BP argues: "[B]y stating 'these otherwise excluded industries,' Section 1.3.1.11 confirms that the exclusion detailed in Section 2 does not impact banks' claims for Coastal Real Property Damage and Wetlands Real

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Property Damage." (BP's brief, at 19; emphasis in original.)
We find this argument unpersuasive.

The language of the class definition clearly and unambiguously excludes Regions, a commercial bank, from the class. The definition provides that to be part of the class a party must (1) meet the geographic requirements, (2) meet one or more of the damage categories, and (3) not be subject to an exclusion within Section 2 of the definition. Regions is included within an exception in Section 2. Hence, Regions is not a member of the class. To the extent that the language of Section 1.3.1.11 causes any confusion as to whether an "otherwise excluded industr[y]" is a part of the economic class, that confusion is cleared up by Section 2.1, which begins: "Notwithstanding the above, the following individuals and Entities ... are excluded from the Economic Class." See Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.").

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BP argues that this interpretation of the class definition renders Section 1.3.1.11 meaningless or that it would create an impermissible "opt-in" class. We disagree. Section 1.3.1.11 provides that "businesses and employers in ... otherwise excluded industries described in Section 2 may submit Claims only for Coastal Real Property Damage and Wetlands Real Property Damage, but are not entitled to recover under any other aspect of the Settlement." (Emphasis added.) This section appears to do no more than give non-class members optional access to the claims-administration framework established as a result of the class settlement. First, the word "may" indicates that claims filed pursuant to Section 1.3.1.11 are merely permissive. See Burgess Mining & Constr. Corp. v. City of Bessemer, 312 So. 2d 24, 26 (Ala. 1975) (noting that the word "may" normally connotes a permissive character). When read in relation to the clear and mandatory exclusionary language of the class definition (i.e., "subject to the exclusions"; "unless ... excluded under Section 2"; "[n]otwithstanding the above, the following ... are excluded"; "[a]ny of the following ... are excluded"), Section 1.3.1.11 cannot reasonably be construed as mandating the inclusion of

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an "otherwise excluded" entity's coastal-property-damage claims within the MDL class-action settlement. Second, there is no indication that submission of a claim under Section 1.3.1.11 requires class membership. As Regions argues, "nothing in Rule 23[,Ala. R. Civ. P.,] or the case law interpreting it suggests that a settlement framework cannot also serve as a basis of rights for non-class members, such as by creating a claim-processing apparatus that is also made available to non-class members." (Regions' reply brief, at 19.) Regions' proffered interpretation is all the more convincing in light of the fact that there is not a limited settlement fund in the MDL class settlement that would be depleted by non-class-member claims. Accordingly, Section 1.3.1.11 may be meaningfully reconciled with the class definition in a way that does not undermine the clear exclusionary language of the definition.

IV. Conclusion

Based on the clear and unequivocal exceptions to the MDL economic-and-property-damage-settlement class, we conclude that Regions was not a member of the settlement class. Therefore, its trespass claim was not adjudicated as part of

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the MDL class-action settlement. Accordingly, the circuit court erred in dismissing Regions' action on the ground of res judicata. We reverse the judgment of the circuit court and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bolin, Parker, Wise, and Bryan, JJ., concur.

Murdock and Shaw, JJ., dissent.

Moore, C.J., recuses himself.

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MURDOCK, Justice (dissenting).

I agree with the argument advanced by BP P.L.C., BP Corporation North America, Inc., and BP America Inc. (hereinafter referred to collectively as "BP") regarding the import of Section 1.3.1.11 of the settlement framework incorporated in the federal district court's judgment in the multidistrict litigation. That is, I agree with BP that claims asserting real-property damage of the nature asserted by Regions Bank were encompassed within the class settlement as an exception to the general exclusion of financial institutions pursuant to Section 2 of the settlement framework.

Regions attempts to counter BP's reasonable reading of the import of Section 1.3.1.11 by putting forth the notion that the purpose of that section is merely to provide to entities who were not parties to the litigation that resulted in the federal court judgment "optional access to the claims administration framework" created in that judgment. I cannot agree that the federal judgment was intended to serve "as a basis of rights for non-class members" who were not parties to the litigation concluded by that judgment.

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Therefore, I respectfully dissent. My position as set out herein is consistent with that of Justice Shaw, with whose special writing I agree in the main.

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SHAW, Justice (dissenting).

I respectfully dissent. The issue in this case is whether Regions Bank is excepted as a member of the "Economic Class" by an exclusion in a settlement agreement ("the agreement") or whether it is a member of the "Economic Class" by operation of an exception to that exclusion.

There is no dispute that Regions and its particular claim for damages are included under the general definition of members of the Economic Class. Regions claims, however, that it is excepted from the class by an exclusion in Section 2 of the agreement. That section states, in pertinent portions:

"2.1. Notwithstanding the above [Section 1, defining the members of the class], the following individuals and Entities ... are excluded from the Economic Class.

"2.2. Excluded Individuals or Entities:

"....

"2.2.4. ... Any of the following types of Entity ... are excluded:

"2.2.4.1. F i n a n c i a l Institutions ... which include, by way of example, commercial banks; savings institutions; credit card issuers; credit insurers; factors or other sales finance entities; financial or investment banking entities;

lending institutions; real estate mortgage or lending entities; brokers or dealers of securities, commodities, commodity contracts or loans; securities or commodities exchanges; entities serving as custodians, fiduciaries or trustees of securities or other financial assets; or entities engaged in other financial transaction intermediation, processing, reserve or clearinghouse activities"

(Emphasis added.)

There is no dispute that Regions is a "Financial Institution" as contemplated by Section 2.2.4.1. It contends that it is therefore excluded as a member of the class.

On the other hand, BP P.L.C., BP Corporation North America, Inc., and BP America Inc. (hereinafter referred to as "BP") contend that, in Section 1 of the agreement, which defines the members of the class, there is an exception to the exclusion found in Section 2.2.4.1. The section BP identifies states:

"1.3.1.11. Businesses/Employers in Otherwise Excluded Gaming, Banking, Insurance, Funds, Defense Contractors and Developers Industries: As more fully described in Exhibit 16 and Section 5.10 below, businesses and employers in these otherwise excluded industries described in Section 2 may submit Claims only for Coastal Real Property Damage and Wetlands

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Real Property Damage, but are not entitled to recover under any other aspect of the Settlement."

(Emphasis added.) BP contends that Regions, although an "otherwise excluded" banking business under Section 2, specifically, Section 2.2.4.1, is nevertheless included, under the exception to the exclusion found in Section 1.3.1.11, as a class member for its claim of real-property damage. I agree.

The main opinion notes that Section 2.1, which follows Section 1.3, begins with the phrase "[n]otwithstanding the above." Generally, such a phrase signals that the language that follows is not impacted by the language that precedes it. I agree that this is generally the case: Section 1 defines the members of the class, and Section 2.1 sets forth that certain persons and entities, despite those definitions, are not considered members of the class even though they would otherwise fit within the definitions of Section 1.

Nevertheless, I believe that a section of a document that precedes such a "notwithstanding" clause can specifically indicate that portions of it are not impacted by the following section. In other words, the part of a document that creates a general rule can indicate that a portion of the general rule

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is not impacted by an exception in a following portion that starts with the term "notwithstanding." Here, Section 2.1 indicates that it provides exclusions to Section 1, but Section 1.3.1.11 explicitly provides that it is not impacted by any exclusions contained in "Section 2": "businesses and employers in these otherwise excluded industries described in Section 2 may submit Claims only for Coastal Real Property Damage" (Emphasis added.) Section 1.3.1.11 states that "Section 2" does not apply to the entities listed in Section 1.3.1.11 that have certain damage claims; Section 1.3.1.11 states that it is an exception to Section 2 and thus is also an exception to the phrase contained in Section 2 stating "[n]otwithstanding the above."³

To hold that Section 2.1 trumps Section 1.3.1.11 (despite the fact that Section 1.3.1.11 states that Section 2 does not apply) would render Section 1.3.1.11 meaningless. However,

³Another part of the agreement recognizes that these otherwise "excluded industries" can assert damage claims; Section 5.10.4.1.1 of the agreement states: "Businesses/employers in these categories of excluded industries ['Gaming, Banking, Insurance, Funds, Defense Contractors and Developers'] are barred from recovery in the Settlement for any type of Business Economic Losses, but are permitted to pursue Coastal Real Property Damage and Wetlands Real Property Damage Claims."

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"[t]he law is settled that this Court is bound to construe contracts so as to give meaning to all provisions whenever possible." Board of Water & Sewer Comm'rs of City of Mobile v. Bill Harbert Constr. Co., 870 So. 2d 699, 710 (Ala. 2003). Nevertheless, the main opinion suggests that Section 1.3.1.11 still retains a function: "This section appears to do no more than give non-class members optional access to the claims-administration framework established as a result of the class settlement." ___ So. 3d at ___. I disagree; the language of Section 1.3.1.11 will not allow such optional access for non-members of the class. Specifically, Section 1.3.1.11 states that one "may submit Claims only for Coastal Real Property Damage." (Emphasis added.) The term "Claim" is capitalized, signaling that it is assigned a specific definition by the agreement.⁴ "Claim" is defined in Section 38.19 as "any demand or request for compensation (other than Bodily Injury Claims or Expressly Reserved Claims), together with any properly completed form and accompanying required documentation, submitted by a Claimant to the Settlement

⁴Section 38.1 states: "For purposes of this Agreement, the following terms (designated by capitalization throughout this Agreement) shall have the following meanings."

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Program." (Emphasis added.) A "Claimant," as defined by Section 38.20, is "any Natural Person or Entity that submits a Claim to the Settlement Program seeking compensation as a member of the Economic Class." (Emphasis added.) "Claims" are submitted to the "Settlement Program" by a "member of the Economic Class." (Emphasis added.) Thus, non-members of the Economic Class do not submit a "Claim." The terms of Section 1.3.1.11 thus contemplate only members of the class filing Claims. Therefore, it does not appear that Section 1.3.1.11 can be read to create an alternate process for non-members.

It is true that Section 1.3.1.11 uses permissive language, i.e., one "may submit Claims." (Emphasis added.) The main opinion interprets this to mean that Section 1.3.1.11 allows that one may optionally participate in the "claims-administration framework" as a non-class member. I disagree. The word "may" here does not allow the option to participate in the settlement; instead, it is stating that the "only" type of "Claim" that can ("may") be sought is "for Coastal Real Property Damage and Wetlands Real Property Damage," "but" not for recovery "under any other aspect of the Settlement." "May" refers to what type of Claim "may" be filed (damage to

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real property), and not where a Claim "may" be filed (within the claims-administration framework or somewhere else, such as a circuit court). One may file property-damage Claims (as a class member), "but" may not file for, and recover on, other types of Claims.

I think that Regions was a member of the "Economic Class" under the agreement; thus, it is barred by the doctrine of res judicata from maintaining its action in the Baldwin Circuit Court. I therefore respectfully dissent.