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**CLASS ACTIONS AND
PRIVATE
ADMINISTRATION:
The CASE OF BP**

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7 February 2017

Regulatory Authority



Justifications for State's Regulatory Authority

- Expertise
- Political Accountability
- Constitutional Constraints
- Process Values
- Regulatory Pluralism

Regulatory Pluralism



- **Federalism**
- **Separation of Powers**
- **Private enforcement**
 - **Private Attorney General**
 - **Ex post rather than ex ante regulation**
 - **Limitation on capture**

American Class Action



- Privately organized for the claim
- Attorney initiative
- Commonality of Interests/ Diligence of representation
- Collective Prosecution

Role of the Class Action



- Three possible relations to public regulatory authority
 - **Challenge to public authority;**
 - **Complement to public authority;**
 - **Rival to public authority**

Challenge to Governmental Conduct



- **Brown v. Board of Education**
 - Classic case: Desegregation of Public Education
- **Brown v. Plata**
 - Challenge of overcrowding in California prisons

Challenge to Governmental Conduct



- **Challenge to regulatory indifference.**
- **Challenge to failure of political resolve for disfavored, minority group in society.**
- **Political market failure**

Supplement to State Regulation



- **Competition Law: separation of enforcement from compensation**
 - Greater latitude for private lawsuits when follow on to governmental enforcement
- **Securities Fraud**
 - 2x recoveries in private versus public lawsuits brought by SEC
 - Harvey Goldschmidt, former Commissioner of SEC: “Private Enforcement is a necessary supplement to the work that the SEC does. It is also a safety valve against the potential capture of the agency by industry.”

Supplement to State Regulation



- ✦ **Whistleblower actions under qui tam.**
 - **Single private party "relates" action to the government**
 - **Government can pursue (typically paying relator 15% of the recovery), or the government can choose not to pursue the matter.**
 - **Government as filter**
 - **Similar proposals to have State Department authorize claims against foreign entities, or the Securities and Exchange Commission screen fraud on the market class actions.**
 - **True bounty hunter style, a return to the real Wild West.**

Deepwater Horizon

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Supplement to State Regulation



- **BP Oil Spill**
 - Complex Regulatory Scheme
 - Federal/State Actions
 - Compensatory model insufficient
 - **Need to enable private attorneys to achieve**
 - Transparency
 - Closure
 - Horizontal Equity
 - Court Supervision

GCCF Payments

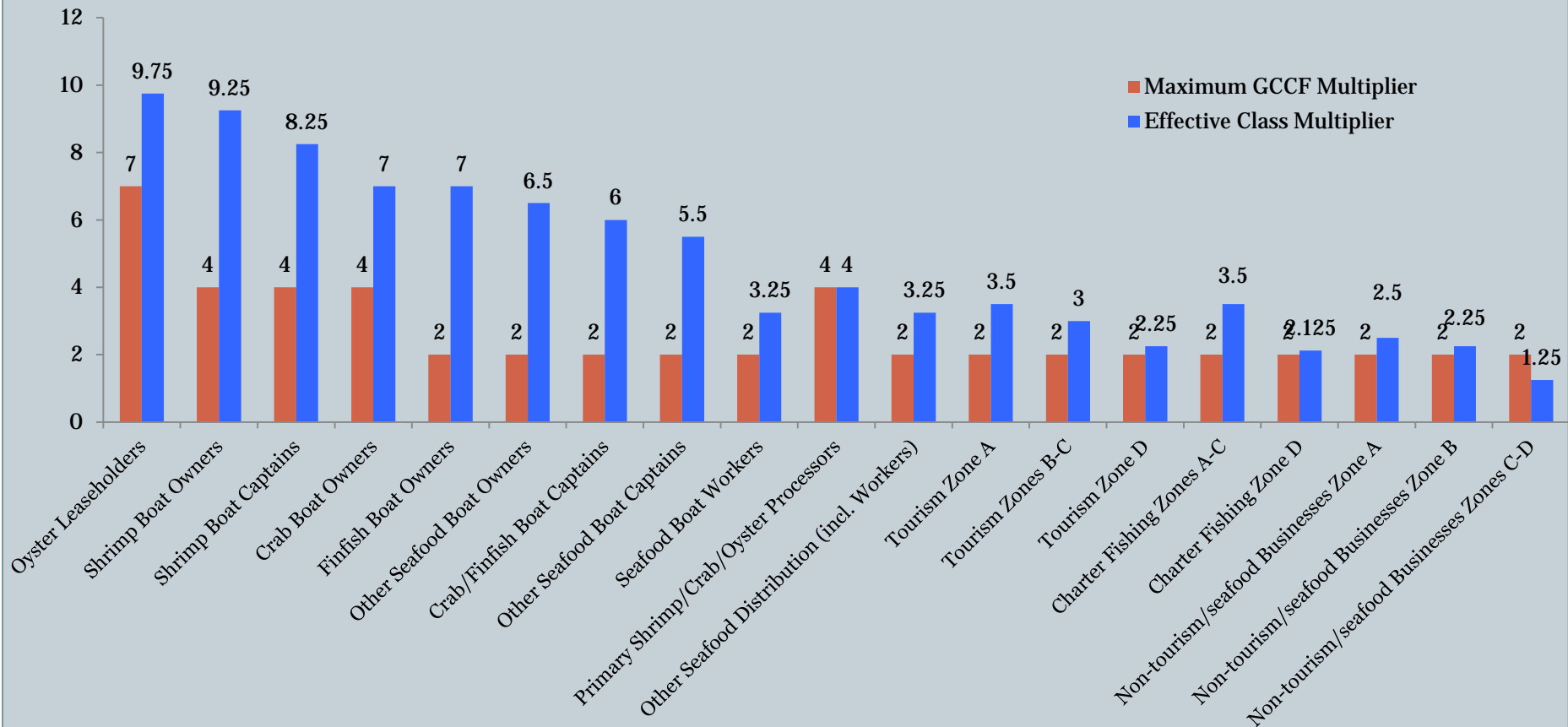
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Total Payments
\$6.2 Billion+
220,000+ Claimants
In 18 Months

GCCF v. Class Settlement: *Risk Transfer Premiums*

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Loss Compensation Multiplier Under GCCF and Class Settlement (Multiplier for class settlement includes total compensation of (1 + RTP times economic loss))

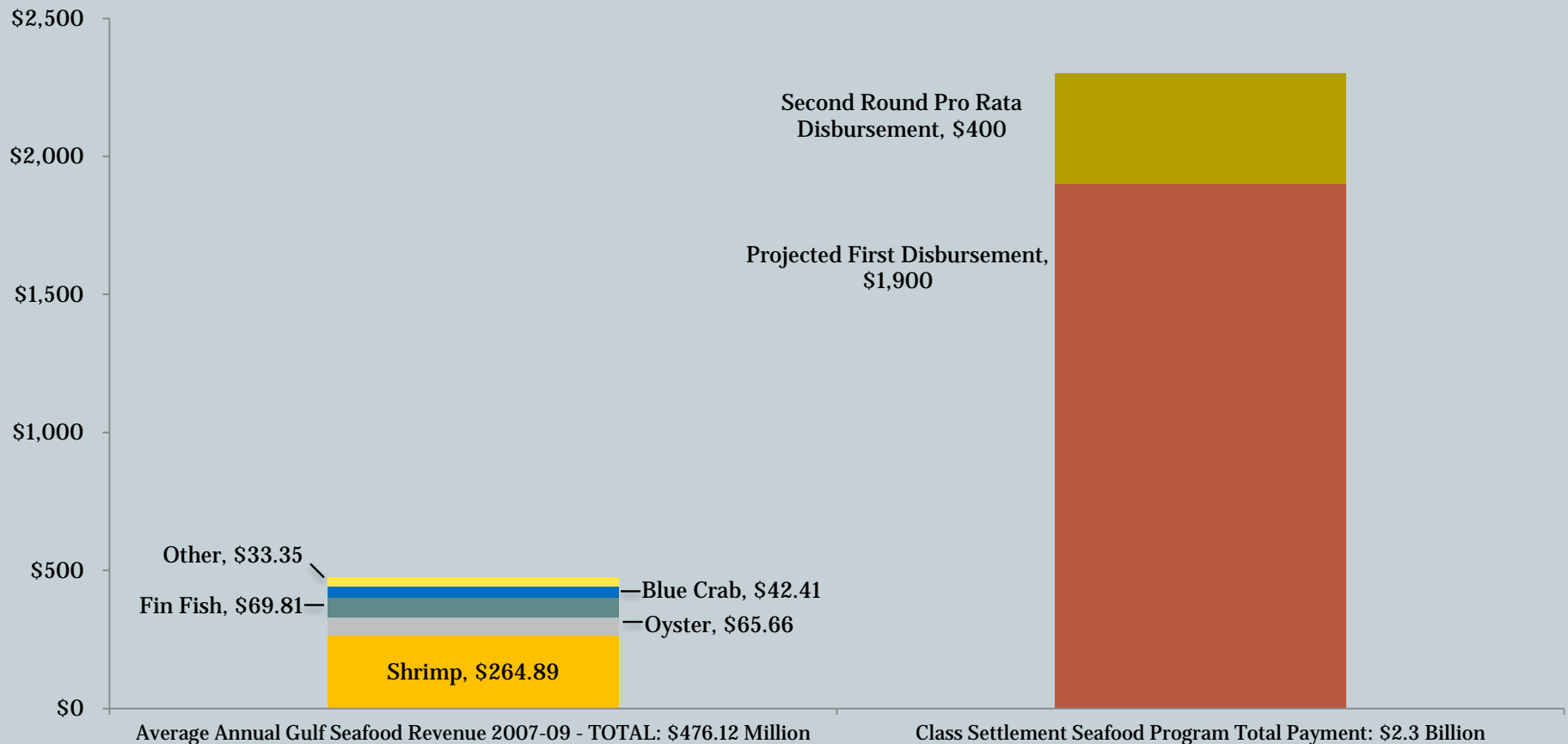


Sources: DOJ Audit of GCCF; Class Settlement Agreement as Amended, Ex. 15

GCCF v. Class Settlement: *Seafood Compensation Program*

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Class Settlement Seafood Program Payments versus Total Annual Gulf Seafood Revenue (in millions)



Average Annual Gulf Seafood Revenue 2007-09 - TOTAL: \$476.12 Million

Class Settlement Seafood Program Total Payment: \$2.3 Billion

GCCF v. Class Settlement:

Types of Claims Paid

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Class settlement paid categories of claims that the GCCF did not:

- Loss of use and enjoyment of coastal real property
- Physical damage to property due to cleanup operations
- Loss on the sale of residential property

Peace Premium

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- “From a practical standpoint . . . achieving global peace is a valid, and valuable, incentive to class action settlements. . . . [A defendant] may be motivated to pay class members a premium and achieve a global settlement in order to avoid additional lawsuits. . . .”

⌘ *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 339 (3d Cir. 2011) (Scirica, J., concurring)

Peace Premium

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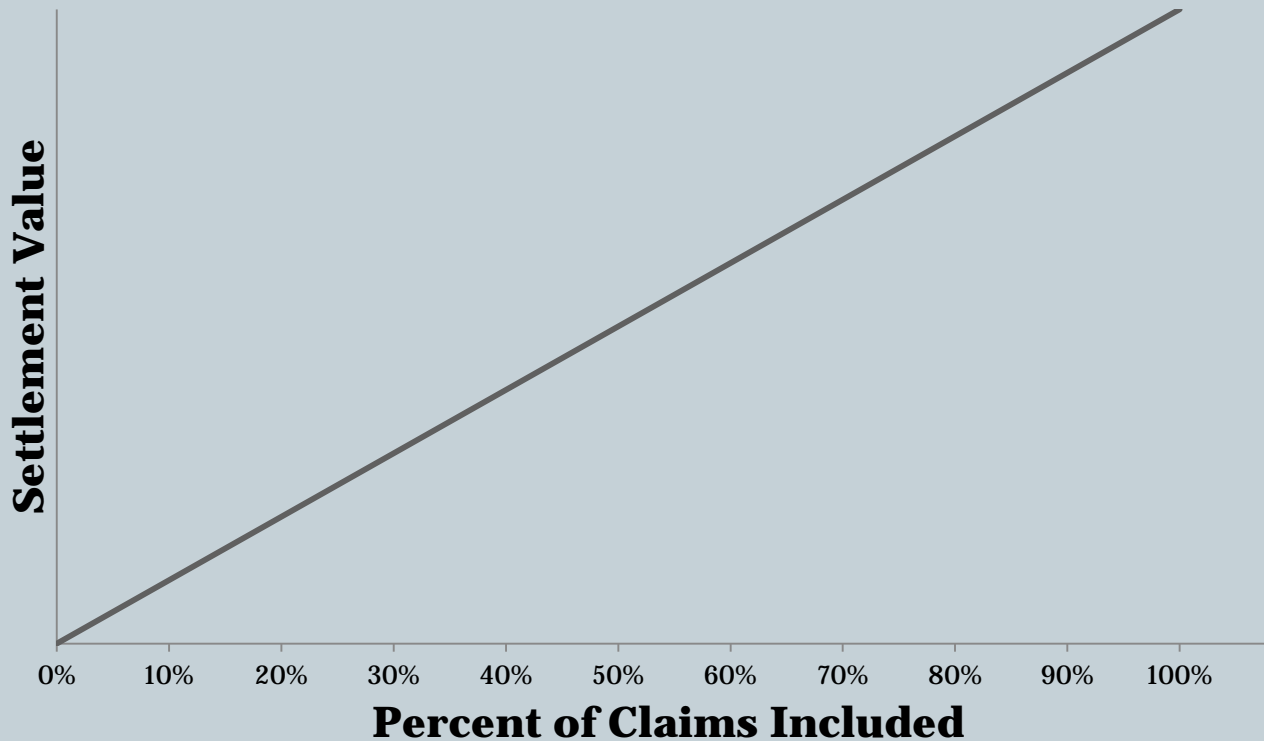
Why might defendants pay a peace premium?

- Economies of scale
- Avoid adverse selection
- Disproportionate costs of litigating handful of claims
 - Negative publicity
 - Regulatory scrutiny
 - Access to capital markets

Peace Premium

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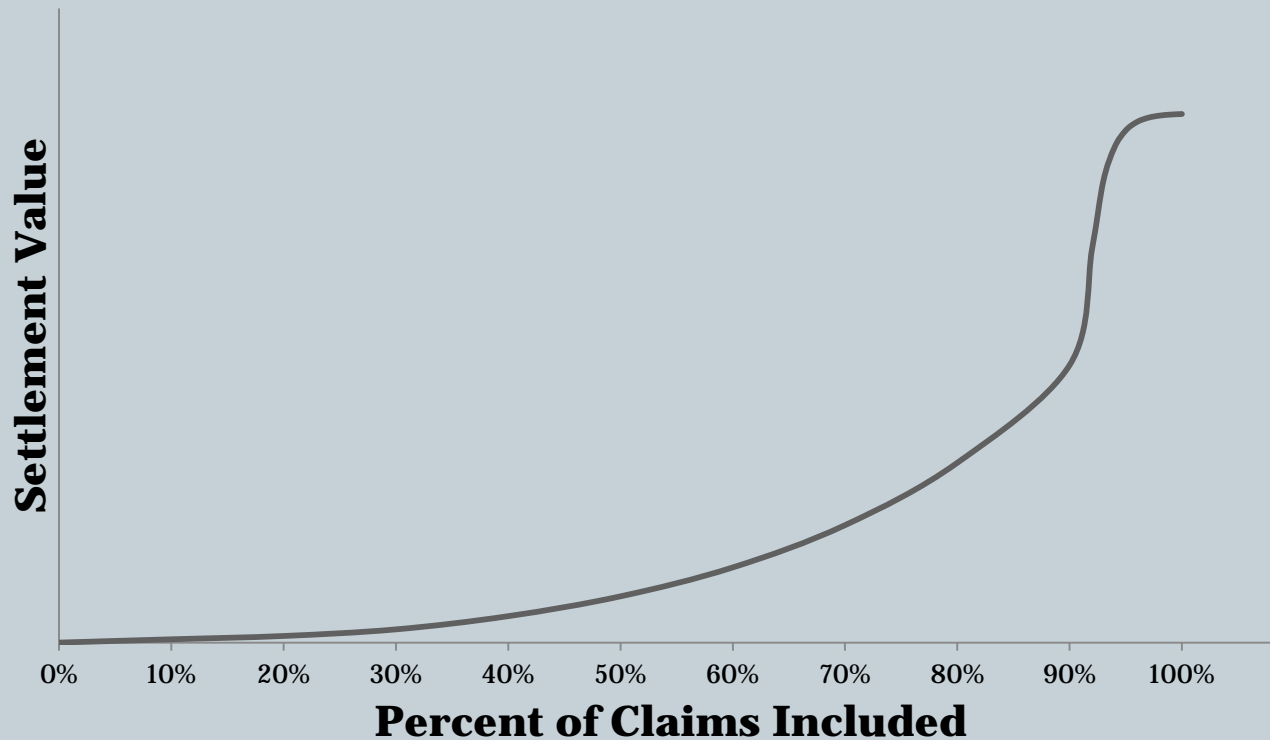
- Value of settlement to defendant as claims are added does not look like this:



Peace Premium

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- Value of settlement to defendant as claims are added looks more like this:



Walk-Away Provision

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- **Class settlement allowed BP to back out if too few plaintiffs participated**
 - Second option once nature of settlement is known
 - No fear of overpaying on weak claims only to face hordes of opt outs with strong claims
 - Critical threshold filed in sealed envelope – thwarts strategic behavior
- **GCCF**
 - Paid claims seriatim without knowing how many
 - Had to hold back funds to litigate against opt outs

Firm Cut-Off Date

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- **Claimants had to file opt out request by November 1, 2012, or be bound by class settlement**
 - Decide whether to participate or go it alone in litigation
 - Specific date when BP would know contours of settlement
- **GCCF was open ended**
 - Wait-and-see approach
 - Interim payments allowed claimants to keep going back to well without signing release

Transparent and Consistent Procedures

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- **Class settlement set out payment calculation methodologies in full detail at outset**
 - Precommitment to apply same criteria to *all* claimants
 - Can't change without court approval
 - No special deals for “squeaky wheels”
 - Made holding out more costly
- **GCCF designed to be flexible**
 - Criteria evolved in response to changing circumstances
 - Easier to extract secret payments or prospective changes
 - BP must withhold funds in anticipation of upward spiral

Shift From Opt-In to Opt-Out

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- **Class settlement binds all those who didn't opt out**
 - Shifts default rule
 - Takes advantage of procrastination
 - Forces high value claimants to identify themselves
- **GCCF only bound those who opted in**
 - Had to file claim, accept settlement offer, and sign release
 - High value claimants can wait and see

Supplement to State Regulation



- **Unique hybrid of public and private enforcement**
 - Each has collective character.
 - Public dimension uses the forced collective action of the state
 - Private dimension uses the volunteer mechanism of the class action or similar private aggregation.

Private Enforcement as Substitute



- **Ex Post Regulation**
- **Professor Richard Marcus: [T]he American tendency to litigate about topics that are handled without litigation in other societies is not pathological, but rather a logical consequence of the American method of providing activist government without a centralized bureaucracy.**

Private Enforcement as Substitute



- **Overcomes hurdles of:**
 - Insufficient resources
 - Risk of regulatory capture
 - Rigidity of formal regulation
- **Protects anonymous consumer**
- **Essential to flexibility of common law**

Private Enforcement as Substitute



- Current Battleground of Class Action Law
 - Move toward arbitration waivers imposed by mass sellers of goods and services is currently the most significant challenge to the continued effectiveness of the class action.
 - **Leading cases: Concepcion and CompuCredit.**
 - Area where private enforcement is most critical.

Conclusion...



- **Class actions controversial, contested, and indispensable in American law**
- **Expand enforcement, police and facilitate resolution of disputes**