

Commentary

The Impact Of The Exxon Valdez Decision On Future Oil Spill Cases

By

Joan M. Bondareff

John Kimball

and

Duncan C. Smith III

[Editor's Note: Joan Bondareff is Of Counsel at Blank Rome, concentrating her practice on marine transportation, environmental and legislative issues. She represents clients in a variety of industries in matters related to maritime regulations and public policy, environmental law, government relations, international law, federal grants and port security. John Kimball is a Partner at Blank Rome, concentrating his practice in the areas of maritime law and commercial litigation. He has more than 30 years of experience counseling clients both domestically and internationally on maritime matters, including maritime casualties, bankruptcy and insolvency, and maritime environmental law. Duncan Smith is a Partner at Blank Rome, concentrating his practice primarily on legislative and administrative matters. He advises and represents clients on a variety of issues in the areas of maritime, transportation and public facilities, environment, energy, defense, federal appropriations and budgetary matters, economic and natural resources development, government entities and business, and public finance. The authors were assisted by Sabrina Jawed, American University Washington College of Law 2009. Copyright 2008 by Joan M. Bondareff, John Kimball, Duncan C. Smith III. Replies to this commentary are welcome.]

The maritime bar was eagerly awaiting the Supreme Court's decision in *Exxon Shipping Co. et al. v. Baker et al.*, 554 U.S. ___ 128 S.Ct. 2605 (2008). Now that the Court has issued its decision, we can stand back and take a look at the holding to see what effect the case will have on future oil spill cases. Is it

as significant a holding as the maritime bar could have expected? If not, what issues still remain to be addressed?

Supreme Court Decision

At the end of its 2007-2008 term, the Supreme Court let stand the 9th Circuit's ruling that Exxon was liable for punitive damages as a result of the 1989 oil spill of the *Exxon Valdez* tanker in Prince William Sound, Alaska.

Writing for the Court, Justice David H. Souter noted at the outset that the Court was divided four to four on the initial matter before it, whether Exxon was liable derivatively for punitive damages resulting from a major oil spill of 11 million gallons caused as a result of its employee, Captain Hazelwood, leaving the bridge at a critical time in the tanker's voyage. (Justice Samuel A. Alito Jr. recused himself from the matter so the Court was left with only eight Justices to decide the case.) The U.S. Court of Appeals for the Ninth Circuit had found Exxon liable for the actions of its captain. *In re Exxon Valdez*, 270 F.3d 1215, 1236 (9th Cir. 2001). Since the Court was equally divided, the opinion of the Ninth Circuit was left standing.

Justice Souter then addressed the question, raised initially by Exxon only on appeal, of whether the Clean Water Act (33 U.S.C. § 1251 *et seq.* [2000 ed. & Supp. V]) preempted the jury's award of punitive damages. The Court rejected Exxon's argument and held there was no such preemption under the Clean Water Act.

The final matter before the Court was how much to award in punitive damages. Initially the jury awarded \$5 billion and after several decisions back and forth between the district court and the Ninth Circuit, the latter reduced the award to \$2.5 billion. Justice Souter further noted that the assessment of punitive damages was for the Court to rule on *ab initio* because the spill was a matter of common maritime law over which the Court has original jurisdiction. Justice Souter went on to state that the appropriate standard was that expressed by Justice Oliver Wendell Holmes Jr.: Would a “bad man” be deterred by the award? From this standard, he found that the appropriate deterrent would be a ratio of 1:1 between compensatory and punitive damages. This resulted in the punitive damage award of the lower court being reduced to \$507.5 million by operation of this admiralty law standard, and it also triggered dissents from Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen G. Breyer who questioned whether the Court should make this decision instead of Congress.

A key issue left unresolved is whether the Court’s ruling that punitive damages may not exceed the amount of compensatory damages will have any effect outside maritime law. Justice Souter’s opinion clearly was based on the Court’s role as an admiralty court, in which it has supreme authority to establish maritime law. But the opinion plainly left open the question of whether a 1:1 ratio between compensatory and punitive damages is mandated by the due process clause of the U.S. Constitution. Justice Souter’s inclusion of detailed research and thorough analysis of the subject of punitive damages suggests that the limits allowed by due process should be no different from those permitted under maritime law, but his opinion clearly does not go so far. Instead, the 1:1 ratio applied by the Court is grounded in maritime law.

Congress Struggled With Preemption In OPA ‘90

The Exxon Valdez case was brought under common and state maritime laws. Following the spill, Congress enacted new comprehensive legislation addressing the subject of liability for oil spills.

Specifically, the Exxon Valdez oil spill prompted Congress to pass the Oil Pollution Act of 1990 (“OPA ‘90”). 33 U.S.C. § 2701 *et seq.* (West 2008). Oil spill legislation had been languishing before Congress and

the spill crisis served as a catalyst for Congress to pass new legislation. One of the more contentious issues before Congress was whether and how to preempt state law on liability. (Section 1018 of OPA ‘90 contains the preservation of State authorities stating that nothing shall “affect, or be construed or interpreted as preempting” State laws. 33 U.S.C. § 2718 [2000 ed. & Supp. V])

OPA ‘90 sets forth a list of recoverable damages, including: removal costs; damage to natural resources and real or personal property; loss of subsistence use of natural resources; loss of government revenues, lost profits and earning capacity; and costs of increased or additional public services occasioned by the unlawful act. *See* 33 U.S.C. § 2702(b). Since then, the Supreme Court has addressed the issue of preemption for vessel design and construction, but it has yet to rule on preemption of punitive damages. In the case of *United States v. Locke*, 529 U.S. 89 (2000), the Court ruled that Congress did intend to preempt certain vessel and manning requirements such as those enacted by Washington State.

The Circuit Courts have begun to address preemption of punitive damages. For example, the First Circuit has ruled that punitive damages are not available under OPA ‘90, but it seems clear that Congress did not intend to bar the imposition of additional liability by the States. *South Port Marine LLC v. Gulf Oil Ltd. Pshp.*, 234 F.3d 58 (1st Cir. 2000).

State Laws On Punitive Damages May Survive OPA ‘90

Some states have passed legislation allowing, or allowed as a matter of common law, punitive damages for oil spills in state waters. California, Alabama, and Ohio state statutes all contain provisions allowing for punitive damages in cases involving water pollution. California’s Fish and Game Code allows punitive damages to be assessed against criminal or administrative civil violations of its oil and petroleum discharge provisions. Cal. Fish & G. Code § 13011(a) (West 2008). Alabama allows punitive damages to be assessed “in a case where pollution resulted from willful or wanton conduct on the part of the defendant . . .” Ala. Code § 22-22-9(m) (2008). Ohio state law allows punitive damages to be assessed “for injury, death, or loss to person or property, or for relief in the form of the abatement of a nuisance, civil penalties, cleanup costs,

cost recovery, an injunction or temporary restraining order, or restitution, that arises, in whole or in part, from contamination or pollution of the environment or a threat of contamination or pollution of the environment, including contamination or pollution or a threat of contamination or pollution from hazardous or toxic substances.” Ohio Rev. Code Ann. § 2307.72(D) (1) (West 2008). Whether these three state laws constitute a trend or will survive a future OPA '90 preemption challenge remains to be seen.

Derivative Liability Unresolved

The Court was split on the question of attributing liability for punitive damages to Exxon for the negligent acts of its employee Captain Hazelwood. The Ninth Circuit decided that Exxon was liable and, as a result, its decision remains the law in that Circuit.

However, other Circuits have ruled that an employer is not liable for the acts of its employee. *Matter of E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (“We hold simply that punitive damages may not be

imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct”); *United States Steel Corp. v. Furhman*, 407 F.2d 1143, 1148 (6th Cir. 1969) (“We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident”).

Conclusions

As is often the case, the impact of the Court's ruling, while of great import to both Exxon and the Alaskan plaintiffs, is not as consequential as it might have been. One can only speculate what the outcome would have been before a full Court. It remains to be seen how the Court will apply Justice Souter's analysis of punitive damages when the issue returns to the Court as a matter of Constitutional due process or pursuant to a case brought under OPA '90. Until then, the lower courts have been left to predict as best they can how the Court ultimately will resolve the issue. ■

