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Admiralty Law
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It has been nearly 20 years since the ill-fated oil supertanker, Exxon Valdez, ran aground on Bligh Reef in Prince William Sound, Alaska, on March 24, 1989. The ship's hull was split open spilling millions of gallons of crude oil into the pristine waters of the Sound, resulting in an environmental and economic disaster.

The environment was cleaned up, but the litigation against Exxon stalled in the courts for two decades. The jury's punitive damage award against Exxon and its captain was decided 14 years ago on Sept. 16, 1994, yet the issue was not laid to rest until the U.S. Supreme Court ruled on June 25, 2008, in Exxon Shipping Co. v. Baker, 128 S.Ct. 2605 (2008).

The Supreme Court's decision is a must-read for an admiralty practitioner, or anyone with an interest, historically or otherwise, in punitive damages. Justice David Souter provides a cogent historical prospective on the development of admiralty damages law noting that a great portion of admiralty law is federal judge made "common law." Indeed, that is precisely what the Supreme Court did. Rather than wait for Congress to determine an appropriate test for punitive damages in admiralty, the Court decided it was high time to make some law. In doing so, the Court modified the $2.5 billion award approved by the U.S. Court of Appeals for the Ninth Circuit and developed a 1:1 "ratio" of compensatory to punitive damages to guide lower courts in calculating punitives in cases with similar conduct at issue. What the Supreme Court did not mention is that Exxon, yes, Exxon, will actually share in the punitive damages award pursuant to a secret deal with claimants it made years ago.

In a rarely expressed nod of approval, the federal district court in Alaska was commended in the U.S. Supreme Court's decision for the excellent way it managed this gargantuan litigation. What the district judge did to manage the case was design a three-phase approach: Phase I was the trial to determine Exxon and the captain's recklessness and thus their potential exposure to punitive liability; Phase II was the compensatory damage trial for commercial fishermen and native Alaskans; and Phase III, the main event, was the trial to fix the amount of punitive damages for which Exxon and Captain Joseph Hazelwood were each liable.

At the end of Phase I, the jury determined that a corporation (Exxon) is responsible for the reckless acts of an employee who is employed in a managerial capacity (i.e., a ship captain) while acting in the scope of their employment. In Phase II, the compensatory damages were calculated at $507.5 million. In Phase III, the jury found Exxon's conduct to be reprehensible and also considered Exxon's financial condition, the magnitude of the harm, and any mitigating facts. The jury awarded $5.0 billion in punitive damages against Exxon (at the time the largest award of its kind in history), which was subsequently reduced to $2.5 billion on appeal.[1] The award against Captain Hazelwood (who, by the way, despite recent newspaper accounts of his "whereabouts unknown," is still living on Long Island and working for the past 15 years as a maritime consultant and marine investigator with a New York admiralty law firm) was just $5,000.

The U.S. Supreme Court addressed three important questions: (i) whether a corporate shipowner may be vicariously liable for punitive damages for the actions of a ship captain, a "managerial employee" that contributes to the loss, ii) whether punitive damages have been barred by federal statutory law (Clean Water Act)[2] governing oil spill liability having made no provision for them, and (iii) whether the punitive award of $2.5 billion in this case was excessive under maritime law.

Derivative Liability

• And Statutory Preemption. On the issue as to whether maritime law allows corporate liability for punitives for acts or omissions of managerial agents (i.e., a ship captain), the court was deadlocked (4 to 4) and "if the judges are divided, the reversal cannot be had, for no order can be made."[3] Justice Samuel A. Alito Jr. recused himself because he owned Exxon stock. Thus, the Ninth Circuit's opinion remained undisturbed in this regard though Justice Souter mentioned that the "disposition here is not precedential on the derivative liability question."[4]

On the issue of statutory preemption, the Supreme Court upheld the Ninth Circuit's ruling that the Clean Water Act did not preempt an award of punitive damages under maritime "common law." Exxon Shipping Co. v. Baker, at 2618. Exxon had pleaded guilty to violations of the Clean Water Act, the Refuse Act of 1899, and the Migratory Bird Treaty Act.[5] Exxon argued that the Clean Water Act does not provide for punitive damages. The court found it "too hard to conclude that a statute expressly geared to protecting 'water, shorelines, and natural resources' was intended to eliminate sub silentio oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals." Id. at 2619.

Exxon next argued, without precedent, that maritime common law should not allow punitive damages. The Court did not buy the argument but found worthy of analysis the contention that the award of $2.5 billion exceeded the bounds justified by the punitive damage goal of deterring reckless (or worse) behavior. The Court was concerned about the "stark unpredictability" of punitive awards and gave many examples of this in the decision.

Historical Perspective

The Court observed that the modern Anglo-American doctrine of punitive damages dates back to at least 1763 but that even legal codes from ancient times through the Middle Ages called for multiple damages for certain especially harmful acts. See, e.g., Code of Hammurabi §8 (tenfold penalty for stealing the goat of a freed man).[6] The Court noted the "twin goals" of punitive awards - retribution and deterring harmful conduct. The New York Pattern Jury Instructions contain similar language.[7] The prevailing rule in American courts limits punitive damages to cases where a defendant's conduct is "outrageous" owing to "gross negligence," "willful, wanton, and reckless indifference for the rights of others, or behavior even more deplorable."[8]

For example, claimants in the fatal Staten Island Ferry crash in New York Harbor recently filed a motion, opposed by the city of New York, seeking punitive damages. The motion was denied from the bench by U.S. District Judge Jack B. Weinstein of the Eastern District of New York. Judge Weinstein felt that the conduct involved there "was not a sufficient departure from ordinary negligence under the circumstances" to warrant a jury issue on punitive damages.[9]

The Supreme Court noted that many states impose statutory limits on punitive damages in the form of monetary caps, a maximum ratio of punitive to compensatory damages, or some combination of the two, noting that the states that rely on a multiplier have adopted a variety of ratios, ranging from 5:1 to 1:1.[10] Interestingly, it was noted by the Supreme Court that the punitive damage inquiry under maritime law differs from a state constitutional "due process" review. The Exxon Valdez case arose under federal maritime jurisdiction and therefore the Court had to review the jury award for conformity with maritime law, rather than the outer limits of punitives allowed by state due process concerns.

Thus, the punitive damage verdict was being examined by the Supreme Court in the exercise of its federal maritime common law authority, which the Court noted should obviate any application of the state constitutional standard.[11]

In maritime law, punitive damage issues come up most frequently in cases involving a ship employer who wilfully fails to pay "maintenance" and "cure" expenses to a sick or injured crew member. Up to now, most federal appellate courts have denied punitive damages even for proven wilful failure to pay maintenance and cure. Only the Eleventh Circuit presently allows punitive damages for this, while the First, Second, Third, Fifth, Sixth and Ninth circuits have denied punitive damages as did a Virginia district court. Typically, only attorney's fees for having to pursue maintenance and cure have been allowed. The Eleventh Circuit case is *Atlantic Sounding Co. v. Townsend,* 496 F.3d 1282 (2007). On appeal en banc, the court affirmed and the ship company at present is hoping to obtain certiorari for a decision by the Supreme Court. With the Exxon Valdez opinion in mind, the reprehensibility of the conduct may determine the issue. Unless the federal courts begin to uniformly allow, or reject, punitive damages in seaman's maintenance and cure cases, under Exxon Shipping Co. v. Baker, this issue may also wind up in the Supreme Court.

Miles v. Apex Marine, 498 U.S.19, decided in 1990, involved the death of a crew member whose nondependent mother sued under the Jones Act negligence and unseaworthiness of a vessel. While the decision had nothing to do with punitive damages, some courts have cited it in restricting punitive damage (and other) recoveries for crew members and others.

Following Miles, some courts, including the Second Circuit, implied that punitive damages are not recoverable in maritime cases.[12] Others denied it for willful failure to provide maintenance and cure, for unseaworthiness, for Jones Act seamen suing third parties, in products liability cases, collision cases and under the Death on the High Seas Act. However, even after Miles there have been punitive damages recoveries in property damage cases (besides the Exxon Valdez), marine pollution cases, cruise ship cases, long-shore deaths in state waters and even automobile victims suing riverboat casinos.

The cases extending Miles beyond its facts may perhaps now be challenged as out of sync with the Exxon Valdez decision.[13]

The Ratio Rule

After reviewing the difficulty state and federal judges and juries have in producing some consistency in punitive awards, Justice Souter doubted that anything but a "quantified approach" would work. Thus, after reviewing alternatives, the Court found that the most "promising alternative" is to peg punitive to compensatory damages using a ratio or maximum multipliers. Id. at 2629.

The Court considered multiples such as 3:1 and 2:1, but because the Exxon Valdez spill was a case of reckless action (with no malice or intent), no profit motive and resulted in substantial recovery ($5 billion) for substantial injury, the Court decided that a reasonable limit in "this particular type of case" was 1:1. The ruling was that a 1:1 ratio is a "fair upper limit in such maritime cases." Id. at 2632. The Court inferred that varying degrees of fault and financial motive should dictate the ratio of compensatory to punitive damages to be applied.

Justice Souter found a higher ratio may be allowed where the " . . . behavior (is) driven primarily by a desire for gain." Id. at 2631. Plaintiffs will argue that this could apply, for example, where there is a willful and wanton failure to pay maintenance and cure without a plausible excuse for doing so. Future litigation on this issue will no doubt be forthcoming.

Exxon's Secret Deal

The Supreme Court did not mention a surprising turn of events that disturbed the district judge and warranted the Ninth Circuit's intervention. Exxon's secret deal with seafood processors in Alaska that came to be known as the "Seattle Seven." The Seattle Seven settled with Exxon early in the case for $64 million and as a quid pro quo, agreed that they would not execute on any compensatory damages award and would pay or "cede" back to Exxon any punitive damages they might recover. The district court and the plaintiffs knew of the settlement, but neither was aware of the cede-back provision that would allow Exxon to wind up with almost 15 percent of the punitive damage award. Exxon chose not to inform the punitive damages jury of this either.

When it came time to allocate shares of the punitive damage award, the cede-back provision was revealed and it infuriated the district judge because in its closing argument, Exxon had referred to its quick payment of claims without requiring anything in return, not even a release. The district judge criticized Exxon's failure to tell the jury "the whole story" and struck it down. Exxon and the Seattle Seven appealed; the Ninth Circuit vacated and reversed finding that cede-back agreements are lawful and enforceable and generally should not be disclosed to a jury even under these circumstances.[14] As a result, Exxon will share in the punitive damage award against it!

Conclusion

The U.S. Supreme Court has offered a beacon to admiralty practitioners to navigate the murky landscape of punitive damage calculations in a maritime tort case when such awards may be appropriately considered under the specific facts. Future disputes will no doubt center on the scale of egregiousness of a defendant's conduct to determine not only whether to allow punitive damages, but the proper ratio or multiplier to apply using the Supreme Court's "quantified approach."

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Endnotes:

1. In Re Exxon Valdez, 270 F.3d 1215, 1246 (C.A. 9 2001), 472 F.3d 600, 601, 625 (2006) (per curium), and 490 F.3d 1066, 1068 (2007).

2. Clean Water Act 86 Stat. 816, 33 U.S.C. §1251 et seq. (2000 ed. and Supp. IV).

3. Durante v. Essex Co., 7 Wall. 107, 112, 19 Lawyers' Edition 154 (1869).

4. Exxon Shipping Co. v. Baker at 2616.

5. Clean Water Act, 33 U.S.C. §1311(a), 1319(c)(1) [criminal provisions]; Refuse Act, 33 U.S.C. §§407 and 411; Migratory Bird Treaty Act, 16 U.S.C. §§703 and 707(a).

6. Code of Hammurabi §8 (Harper ed. 1904).

7. N.Y. Pattern Jury Instr., Civil, No. 2:278 (2007) ("The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant . . . and thereby discourage the defendant . . . from acting in a similar way in the future").

8. Id. at 2621, citing 4 Restatement §908(2); 1 Schuleter §9.3(A).

9. See In Re City of New York, as Owner and Operator of the M/V Andrew J. Barberi, 03-6049 (July 31, 2008 transcript of proceedings and ruling by Judge Jack B. Weinstein).

10. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2623.

11. Id. at 2626.

12. See, e.g., Wahlstrom v. Kawasaki, 4 F.3d 1084 (2d Cir. 1993).

13. See, e.g., Wartman v. Commodore Cruise Lines, 100 F.3d 943 (2d Cir. 1996) (where a spouse of a cruise line passenger was allowed to pursue nonpecuniary loss of society damages under general maritime law despite a U.S. Supreme Court decision restricting statutory remedies under the Death on the High Seas Act to pecuniary loss.

14. In Re: The Exxon Valdez, 229 F.3d 790, 2001 A.M.C. 49 (9th Cir. 2000).