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JAN 28 2004

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA  
By PD Deputy

in re  
the EXXON VALDEZ

Case Number A89-0095CV (HRH)

THIS DOCUMENT RELATED TO ALL CASES

AMENDED PARTIAL JUDGMENT IN A CIVIL CASE

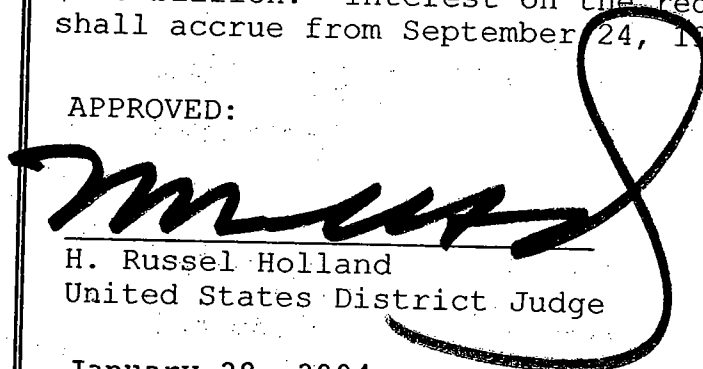
       **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT punitive damages are awarded for the plaintiffs and against the defendants Exxon Mobil Corporation (D-1) and Exxon Shipping Company (D-2), jointly and severally, in the amount of \$4.5 billion. Interest on the reduced award of punitive damages shall accrue from September 24, 1996, in accordance with 28:1961.

APPROVED:



H. Russel Holland  
United States District Judge

January 28, 2004

Date

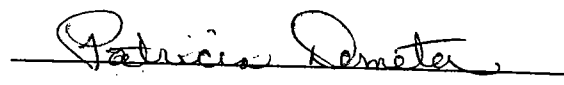
Michael D. Hall

Clerk

A89-0095--CV (HRH)

- D. RUSKIN
- D. SERDAHELY
- L. MILLER

O&J 11463



(By) Deputy Clerk

MAILED ON 1/28/04

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BY PD

FILED

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UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA  
By PD Deputy

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

In re )  
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the EXXON VALDEZ )  
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\_\_\_\_\_ )  
This Order Relates to )  
ALL CASES )  
\_\_\_\_\_ )

No. A89-0095-CV (HRH)

ORDER No. 364

Second Renewed Motion for Reduction  
of Punitive Damages Award

Preface

On December 6, 2002, the court granted Exxon Mobil Corporation's (D-1) and Exxon Shipping Company's (D-2), hereinafter referred to as "Exxon", renewed motion for reduction or remittitur and reduced a jury verdict awarding plaintiffs \$5 billion in punitive damages to \$4 billion.<sup>1</sup> The court concluded that application of the BMW guideposts supported the \$5 billion award but, based on plaintiffs' alternative suggestion, reduced the award to \$4 billion because the Ninth Circuit in earlier proceedings

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<sup>1</sup> Order No. 358, Clerk's Docket No. 7564. Order No. 358 was published as In re Exxon Valdez, 236 F. Supp. 2d 1043 (D. Alaska 2002).

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hereinafter described in detail had mandated that the award be reduced on remand. After final judgment was entered on the \$4 billion award,<sup>2</sup> both Exxon and plaintiffs timely appealed.<sup>3</sup>

On April 7, 2003, before any briefing on the appeals in this case, the Supreme Court decided State Farm Mutual Automobile Ins. Co. v. Campbell, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1513 (2003).<sup>4</sup> In State Farm, the United States Supreme Court revisited the due process issue as to punitive damages in the context of an insurance bad faith case. On August 18, 2003, the Ninth Circuit Court of Appeals vacated the \$4 billion punitive damages judgment and remanded the case to this court to reconsider the punitive damages award in light of State Farm.<sup>5</sup> Upon remand, this court called for supplemental briefing from the parties to aid in its reconsideration.<sup>6</sup> Exxon submitted its supplemental briefing in the form of a second renewed motion for reduction or remittitur of punitive damages.<sup>7</sup> This motion is opposed by plaintiffs.<sup>8</sup> Oral argument on the second renewed motion for reduction or remittitur of punitive damages was heard on December 3, 2003.

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<sup>2</sup> Order No. 359 (granting Motion for Rule 54(b) Determination) (Jan. 27, 2003), Clerk's Docket No. 7589; Judgment, Clerk's Docket No. 7566.

<sup>3</sup> Clerk's Docket Nos. 7605 and 7609A.

<sup>4</sup> State Farm will also be published as 538 U.S. 408.

<sup>5</sup> See Order, Clerk's Docket No. 7737.

<sup>6</sup> Order re Further Proceedings on Punitive Damages Award (Aug. 26, 2003), Clerk's Docket No. 7714.

<sup>7</sup> Clerk's Docket No. 7753.

<sup>8</sup> Clerk's Docket No. 7767.

After considering the parties' briefing and hearing oral argument, the court has determined it most practical, for purposes of reevaluating the punitive damages award, to vacate Order No. 358 in its entirety.<sup>9</sup> State Farm adds no new, free-standing factor to the constitutional analysis of punitive damages that the court might "tie onto" its previous order. It is the court's view that State Farm, while bringing the BMW guideposts into sharper focus, does not change the analysis.<sup>10</sup> In fact, there are aspects of the due process evaluation of punitive damages awards which have not changed at all as a result of State Farm. As a consequence, although the court is vacating Order No. 358, where the court perceives no need or necessity of further exposition of the facts or its view of the law, the court will simply replicate what it has previously said in Order No. 358.

#### Facts

Terrible things have happened in Alaska on Good Friday. On Good Friday, March 27, 1964, the strongest earthquake ever recorded in North America literally relocated the seabed of most of Prince William Sound and the Kenai Peninsula. On Good Friday,

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<sup>9</sup> Vacating Order No. 358 impliedly leaves Exxon's Renewed Motion for Reduction of Punitive Damages Award, Clerk's Docket No. 7487, unresolved. In light of Exxon's Second Renewed Motion for the Reduction of Punitive Damages, the motion at Clerk's Docket No. 7487 is denied as moot.

<sup>10</sup> By so stating, the court does not mean that it has adopted plaintiffs' suggestion that State Farm breaks no new ground and is limited to the facts of that case. There is new guidance from the Supreme Court; however, there is still no "bright-line" rule as to what is or is not unconstitutional as regards punitive damages. State Farm, 123 S. Ct. at 1524. The three BMW guideposts still apply.

March 24, 1989, the oil tanker Exxon Valdez was run aground on Bligh Reef in Prince William Sound, Alaska.

On March 24, 1989, Exxon's co-defendant, Joseph Hazelwood, was in command of the Exxon Valdez. He was assisted by a third mate and a helmsman. Captain Hazelwood was a skilled mariner, but he was an alcoholic. Worse yet, he was a relapsed alcoholic; and, before departing Valdez, Alaska, on March 23, 1989, he had, more probably than not, consumed sufficient alcohol to incapacitate a non-alcoholic. As the Exxon Valdez exited Valdez Arm, Captain Hazelwood assumed command of the vessel from a harbor pilot and made arrangements to divert the vessel from the normal shipping lanes in order to avoid considerable ice which had calved off Columbia Glacier. That diversion from the standard shipping lanes took the vessel directly toward Bligh Reef. The captain gave the third mate explicit, accurate orders which, if carried out by the third mate, would have returned the vessel to the shipping lanes without danger of grounding on Bligh Reef. The third mate, who had completed the requirements for a captain's license, was, more probably than not, overworked and excessively tired at the time in question. He neglected to commence a turn of the vessel at the point where, and the time when, he had been directed to do so. At that critical time, Captain Hazelwood had left the bridge to attend to paperwork. When the third mate realized that he had proceeded too far in the direction of Bligh Reef, he commenced a turn, but it was too late.

Like so many great tragedies, this one occurred when three or more unfortunate acts and/or omissions took place in close

proximity to one another, and but for any one of them, the grounding would likely not have occurred. Joe Hazelwood was under the influence of alcohol. Instead of staying on the bridge to verify that his orders were carried out, he tended to paperwork below. The third mate, being overworked and tired, neglected to carry out the orders which he had been given. The grounding might still have been avoided but for several other converging circumstances: the captain had put the vessel on an automated system for increasing its speed prior to completing the maneuver around the ice in the shipping lane; and the third mate, upon realizing his oversight, did not turn the vessel as sharply as he might have.

It has never been established that there was any design, mechanical, or other fault in the Exxon Valdez. It responded to its human masters as intended and expected. Thus it is entirely clear why the Exxon Valdez grounded on Bligh Reef: the cause was pure and simple human frailty.

Defendant Exxon Shipping owned the Exxon Valdez. Exxon employed Captain Hazelwood, and kept him employed knowing that he had an alcohol problem. The captain had supposedly been rehabilitated, but Exxon knew better before March 24, 1989. Hazelwood had sought treatment for alcohol abuse in 1985 but had "fallen off the wagon" by the spring of 1986. Exxon knew that Hazelwood had relapsed and that he was drinking while on board ship. Exxon officials heard multiple reports of Hazelwood's relapse, and Hazelwood was being watched by other Exxon officers. Yet, Exxon continued to allow Hazelwood to command a supertanker carrying a

hazardous cargo. Because Exxon did nothing despite its knowledge that Hazelwood was once again drinking, Captain Hazelwood was the person in charge of a vessel as long as three football fields and carrying 53 million gallons of crude oil. Exxon officials knew that it was dangerous to have a captain with an alcohol problem commanding a supertanker. Exxon officials also knew that oil and fisheries could not mix with one another. Exxon officials knew that carrying huge volumes of crude oil through Prince William Sound was a dangerous business, yet they knowingly permitted a relapsed alcoholic to direct the operation of the Exxon Valdez through Prince William Sound.

Captain Hazelwood came to the bridge immediately after the grounding. He timely reported to the United States Coast Guard:

Exxon Valdez [calling Valdez Traffic Control].  
We should be on your radar there. We've  
fetched up hard aground north of Goose Island  
off Bligh Reef and evidently leaking some oil  
and we're gonna be here for a while....<sup>[11]</sup>

Despite the fact that he was aware of oil boiling up through the seawater on both sides of the vessel, Captain Hazelwood attempted to extract the vessel from the reef.<sup>12</sup> Had he succeeded in backing the vessel off the reef or driving it across the reef, the Exxon Valdez would probably have foundered, risking the loss of the entire

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<sup>11</sup> Plaintiffs' Exhibit 92A, Excerpts of Record, Vol. II - Trial Exhibits, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

<sup>12</sup> Transcript of Trial Testimony of Joseph J. Hazelwood at 439, Excerpts of Record, Vol. I - Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

cargo and the lives of those aboard. However, the vessel was really hard aground. It could wiggle but not be moved off Bligh Reef.

The best available estimate of the crude oil lost from the Exxon Valdez into Prince William Sound is about 11 million gallons.<sup>13</sup> In the days following the grounding, about 42 million gallons of crude oil were lightered off the Exxon Valdez by other tankers. This process was very dangerous. The lightering process was necessarily taking place in a pool of crude oil. A spark from static electricity or other mechanical or electrical sources might have set fire to the crude oil.

The crude oil lost from the Exxon Valdez spread far and wide around Prince William Sound, mostly in a westerly direction. Counter-currents which pass through the sound in a westerly direction (the primary North Pacific currents flow from west to east) took the crude oil past numerous islands, spreading to the coast of the Kenai Peninsula, Cook Inlet, and Kodiak Island. As the oil spread, it disrupted the lives and livelihoods of those in its path, including the 32,677 punitive damages class members. Commercial fisheries throughout this area were totally disrupted, with entire fisheries being closed for the 1989 season. As a

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<sup>13</sup> Throughout these proceedings, plaintiff W. Findlay Abbott has contended that far more than 11 million gallons of crude oil were actually spilled from the Exxon Valdez into Prince William Sound. The court has repeatedly rejected these contentions for lack of any substantial evidence to support Mr. Abbott's contentions. For example, his qui tam action, United States ex rel. Abbott v. Exxon Corp., No. A96-0041-CV, was dismissed by this court and that dismissal was affirmed by the Ninth Circuit Court of Appeals, 182 F.3d 930 (Table) (1999 WL 313320) (9th Cir. 1999). There is no reliable evidence in the record that a larger spill was covered up by Exxon.



result, commercial fishermen not only suffered economic losses but also the emotional distress that comes from having one's means of making a living destroyed. A high percentage of commercial fishermen suffered from severe depression, post-traumatic stress disorder, generalized anxiety disorder, or a combination of all three.<sup>14</sup> Subsistence fishing by residents of Prince William Sound and Lower Cook Inlet villages was also disrupted. The disruption to subsistence fishing deeply affected Native Alaskans, for whom subsistence fishing is not merely a way to feed their families but an important part of their culture. Research indicated that Native Alaskans also experienced great emotional distress following the spill.<sup>15</sup> Shore-based businesses dependent upon the fishing industry were also disrupted as were the resources of cities such as Cordova.

In keeping with its legal obligations, Exxon undertook a massive cleanup effort.<sup>16</sup> Approximately \$2.1 billion was ultimately spent in efforts to remove the spilled crude oil from the waters and beaches of Prince William Sound, Lower Cook Inlet, and Kodiak Island. Also in accordance with its legal obligations attendant to

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<sup>14</sup> J. Steven Picou and Duane A. Gill, "The Exxon Valdez Disaster as Localized Environmental Catastrophe: Dissimilarities to Risk Society Theory" in Risk in the Modern Age: Social Theory, Science and Environmental Decisionmaking, Maurie J. Cohen, ed. (2000) at 160-62, pertinent part attached as Exhibit 6 to Declaration of David W. Oesting, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

<sup>15</sup> Id. at 160-61.

<sup>16</sup> See 33 U.S.C. § 1321, which imposes a duty upon an owner or operator of a vessel that spills oil to clean up its discharge.

spilling crude oil,<sup>17</sup> Exxon undertook a voluntary claims program, ultimately paying out \$303 million, principally to fishermen whose livelihood was disrupted for the year 1989 and ensuing years up to 1994.

#### Proceedings

Litigation over the grounding was soon commenced. The civil suits came first, but developed slowly because of their number and complexity. Both the United States Government and the State of Alaska sued Exxon for environmental damage. That litigation was expeditiously settled by means of consent decrees under which Exxon agreed to pay to the governments, for environmental damage, \$900 million over a period of ten years.<sup>18</sup> The decrees contain an "opener" provision, allowing the governments to make additional claims of up to \$100 million for environmental damage not known when the settlements were reached.<sup>19</sup>

Captain Hazelwood was prosecuted by the State of Alaska for operating a watercraft while intoxicated, reckless endangerment, negligent discharge of oil, and three felony counts of criminal mischief. That litigation became involved in legal complexities which led to multiple appeals. Some nine years after the grounding,

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<sup>17</sup> AS 46.03.822.

<sup>18</sup> United States v. Exxon Corp., No. A91-0082-CV (Clerk's Docket No. 46 at 7-8), and Alaska v. Exxon Corp., No. A91-0083-CV (Clerk's Docket No. 26 at 7-8).

<sup>19</sup> See Consent Decree and Agreement at 18-19, Clerk's Docket No. 46 in United States v. Exxon Corp., No. A91-0082-CV, and Clerk's Docket No. 26 in Alaska v. Exxon Corp., No. A91-0083-CV.

a single misdemeanor conviction for negligent discharge of oil was affirmed on appeal.<sup>20</sup>

Exxon was prosecuted by the federal government for various environmental crimes: violating the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); violating the Refuse Act, 33 U.S.C. §§ 407 and 411; violating the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); violating the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and violating the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon Corporation pled guilty to one count of violating the Migratory Bird Treaty Act. Exxon Shipping pled guilty to one count each of violating the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. They were jointly fined \$25 million and were ordered to pay restitution in the amount of \$100 million.<sup>21</sup>

The civil cases (involving thousands of plaintiffs) were ultimately (but with a few exceptions) consolidated into this case. Municipal claims and some Native corporation claims were tried in state court.<sup>22</sup> In the consolidated cases, there was never any

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<sup>20</sup> State v. Hazelwood, 946 P.2d 875 (Alaska 1997); State v. Hazelwood, 866 P.2d 827 (Alaska 1993); and Hazelwood v. State, 962 P.2d 196 (Alaska Ct. App. 1998).

<sup>21</sup> See Judgments at Clerk's Docket Nos. 235 and 236 in United States v. Exxon Corp., No. A90-0015-CR.

<sup>22</sup> More or less simultaneously with the trial in this case, a state court civil trial involving several Native corporations was conducted. The jury awarded the corporations almost \$6 million in damages. Chenega Corp. v. Exxon Corp., 991 P.2d 769, 774 (Alaska 1999). The trial court offset pretrial settlements and payments against the jury award. Id. at 775. Because the pretrial payments exceeded the jury award, final judgments were entered by which the

(continued...)

dispute as to Exxon's liability for compensatory damages. Only the amount of the plaintiffs' economic losses was controverted. As a consequence of procedural orders in this case and the excellent, cooperative approach taken by counsel for all parties, an effective and efficient trial protocol for the plaintiffs' claims was developed. As the time for trial grew near, this court became convinced of the necessity of creating a single, punitive damages claims class. On April 14, 1994, the court granted conditional final approval of a mandatory punitive damages class, consisting

of all persons or entities who possess or have asserted claims for punitive damages against Exxon and/or Exxon Shipping which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill.<sup>[23]</sup>

By agreement with the parties, trial as regards Exxon's and Captain Hazelwood's liability for punitive damages was commenced on May 2, 1994. In this Phase I of the trial, the jury found Exxon and Captain Hazelwood to be liable for punitive damages.

Phase II of the trial dealt with compensatory damages for plaintiffs' economic losses. In Phase IIA, the jury returned a verdict in favor of the fishermen in the amount of \$287 million. Phase IIB, a separate aspect of the compensatory claims having to

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<sup>22</sup> (...continued)  
corporations "took nothing" from Exxon. Id. Recently, a stragglng case involving six Alaska communities was tried in state court to a defense verdict. The cities were unsuccessful in their efforts to recover from Exxon for alleged additional expenses incurred by them as a consequence of the oil spill.

<sup>23</sup> Order No. 204 (granting conditional final approval and certifying mandatory punitive damages class) at 2, Clerk's Docket No. 4856.

do with the Native economic claims, was settled without trial for \$22.6 million.

Phase III of the trial focused upon the amount of punitive damages which should be imposed upon the defendants. As a predicate or base for the punitive damages trial, the parties entered into a stipulation regarding impacts from the oil spill which was read to the jury at the beginning of Phase III.<sup>24</sup> The stipulation outlined the actual damages that had been resolved in Phase IIB of the trial and the actual damages that were to be resolved in Phase IV of the trial and in Alaska state court proceedings. The damage estimates outlined in the stipulation exceeded \$350 million. The jury was, of course, also aware that it had awarded \$287 million in damages in Phase IIA of the trial. The evidence presented during Phase III focused on Exxon's and Hazelwood's conduct as it related to the oil spill. While evidence of extra-territorial conduct was admitted,<sup>25</sup> it had a nexus to the grounding of the Exxon Valdez and the resulting oil spill.

In consultation with counsel, unusually detailed punitive damages instructions were developed for purposes of this case. The jury was instructed that punitive damages are awarded for the purposes of punishment and deterrence,<sup>26</sup> and that the fact that it

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<sup>24</sup> See Clerk's Docket No. 5634.

<sup>25</sup> For example, evidence of Hazelwood drinking in parts of the country other than Valdez, Alaska, was admitted.

<sup>26</sup> See Jury Instruction No. 22:

(continued...)

had found the defendants' conduct reckless did not require it to award punitive damages.<sup>27</sup> The jury was specifically instructed to use reason in setting the amount of punitive damages and that any award of punitive damages should bear a reasonable relationship to the harm caused the members of the plaintiff class by the defendants' misconduct.<sup>28</sup> The jury was instructed that punitive damages are not intended to provide compensation for plaintiffs' losses and that they should assume that the plaintiffs had been fully compen-

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<sup>26</sup>(...continued)

The purposes for which punitive damages are awarded are:

(1) to punish a wrongdoer for extraordinary misconduct; and

(2) to warn defendants and others and deter them from doing the same.

Clerk's Docket No. 5890.

<sup>27</sup> See Jury Instruction No. 20, which in pertinent part, reads: "The fact that you have determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them." Clerk's Docket No. 5890.

<sup>28</sup> See Jury Instruction No. 25, which in pertinent part reads:

the amount of punitive damages may not be determined arbitrarily. You must use reason in setting the amount. ... [A]ny punitive damages award must have a rational basis in the evidence in the case. A punitive damages award may not be larger than an amount that bears a reasonable relationship to the harm caused to members of the plaintiff class by a defendant's misconduct.... Also, the award may not be larger than what is reasonably necessary to achieve society's goals of punishment and deterrence.

Clerk's Docket No. 5890.

sated for the damages that they had suffered as a result of the oil spill.<sup>29</sup> Factors that the jury was told it could consider in setting an amount of punitive damages included the reprehensibility of the defendants' conduct,<sup>30</sup> the amount of actual and potential harm suffered by the members of the plaintiff class as a result of the defendants' conduct, and the financial condition of the defendants.<sup>31</sup> As to the reprehensibility factor, the jury was

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<sup>29</sup> See Jury Instruction No. 26, which reads:

An award of punitive damages is not intended to provide compensation for any loss suffered by any plaintiff. In determining whether to make an award of punitive damages you should assume that all plaintiffs have been or will be fully compensated for all damages they may have suffered as a result of the oil spill. You may not make an award of punitive damages for the purpose of compensating any plaintiff.

Clerk's Docket No. 5890.

<sup>30</sup> The jury was instructed, however, that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible...." See Jury Instruction No. 30, Clerk's Docket No. 5890.

<sup>31</sup> See Jury Instruction No. 27, which reads in pertinent part:

In determining the amount of punitive damages to award, if any, you may consider, among other factors:

(a) the degree of reprehensibility of the defendants' conduct,

(b) the magnitude of the harm likely to result from the defendants' conduct, as well as the magnitude of the harm that has actually occurred, and

(c) the financial condition of the defendants.

Clerk's Docket No. 5890.

instructed that in determining the reprehensibility of the defendants' conduct it could consider "the nature of the conduct, the duration of the conduct, and defendant's awareness that the conduct was occurring."<sup>32</sup> As to the defendants' wealth, the jury was instructed to consider the defendants' financial condition only in terms of what level of award would be necessary to achieve punishment and deterrence.<sup>33</sup>

The jury was instructed that it should not count any damage to natural resources or the environment in general when assessing the harm suffered by members of the plaintiff class.<sup>34</sup> The jury was also instructed that it could consider as mitigating factors the existence of criminal fines or civil awards against the defendants for the same conduct and the extent to which the

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<sup>32</sup> Jury Instruction No. 30, Clerk's Docket No. 5890.

<sup>33</sup> See Jury Instruction No. 32, which reads:

In considering whether an award of punitive damages is appropriate in this case and, if so, in what amount, you may consider the financial condition of a defendant. This does not necessarily mean that you should punish one defendant more than another defendant simply because of their relative financial conditions. If you find that a defendant's financial condition affects the level of award necessary to punish the defendant and to deter future wrongful conduct by that defendant and others, you may take the defendant's financial condition into account for that purpose.

Clerk's Docket No. 5890.

<sup>34</sup> See Jury Instruction No. 29, which reads in pertinent part: "In determining the harm caused by the oil spill, you should not consider any damage to natural resources or to the environment generally[.]" Clerk's Docket No. 5890.



defendants had taken steps to remedy the consequences of the oil spill<sup>35</sup> and to prevent another oil spill.<sup>36</sup>

The Phase III trial was relatively short, lasting only five days, but the jury deliberated for approximately twenty-two days before returning a verdict. The jury awarded a breath-taking \$5 billion in punitive damages against the Exxon defendants, and \$5,000 against Captain Hazelwood.

There was to be a Phase IV of the civil litigation. The Phase IV claims embodied all of the compensatory damage claims remaining in federal court and not included in Phase II. As to these claims, a settlement was reached in the amount of \$13.4 million.

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<sup>35</sup> See Jury Instruction No. 36, which reads in pertinent part:

In considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you may consider whether a defendant has paid other criminal fines or civil penalties. You may also consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures. You may also consider the extent to which a defendant has been subjected to condemnation or reproof by society as a result of other means, such as loss of standing in the community, public vilification, loss of reputation, and similar matters.

Clerk's Docket No. 5890.

<sup>36</sup> See Jury Instruction No. 35, which reads in pertinent part, that "[i]n considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you should consider steps taken by a defendant to prevent recurrence of the conduct in question--in this case, another oil spill." Clerk's Docket No. 5890.

Exxon moved for a reduction or remittitur of punitive damages.<sup>37</sup> That motion was denied.<sup>38</sup> The court applied the Hammond factors to reach its conclusion that the \$5 billion punitive damages award was not so grossly excessive as to violate Exxon's due process rights.<sup>39</sup> After lengthy other proceedings not relevant now, final judgment was entered including the award of \$5 billion in punitive damages.<sup>40</sup>

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<sup>37</sup> Clerk's Docket No. 5970.

<sup>38</sup> Clerk's Docket No. 6234.

<sup>39</sup> The Supreme Court, in Pacific Mutual Life Ins. Co v. Haslip, 499 U.S. 1 (1991), indicated that the Hammond factors were useful in assessing the reasonableness of a punitive damages award. The Hammond factors are as follows:

- (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
- (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
- (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss;
- (d) the "financial position" of the defendant;
- (e) all the costs of litigation;
- (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation;
- and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 499 U.S. at 21-22.

<sup>40</sup> Judgment as to Phases I and III was entered September 16, 1994. Clerk's Docket No. 5891. That judgment was vacated. Clerk's Docket No. 6055. A final judgment was entered September 24, 1996, Clerk's Docket No. 6911, and an amended judgment was entered January 30, 1997, Clerk's Docket No. 6966.

### Appeal and Remands

Exxon appealed as to liability for and the amount of punitive damages. Exxon sought and obtained a stay of execution on the judgment for punitive damages by posting a supersedeas bond in the amount of \$6,750,000,000.<sup>41</sup> On appeal, Exxon contended first that punitive damages should have been barred as a matter of law. For reasons given, the court of appeals rejected this contention, concluding that:

the Clean Water Act does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights. ... [W]hat saves plaintiff's case from preemption is that the \$5 billion award vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment.

In re Exxon Valdez, 270 F.3d at 1231.

Exxon's second contention was that the plaintiffs' burden of proof should be to produce clear and convincing evidence of liability for punitive damages. The court of appeals held that this court did not abuse its discretion by employing the preponderance of evidence standard. Id. at 1232-33. Similarly, this court was affirmed as regards its instructions to the jury concerning Exxon's vicarious liability for the conduct of its employees. Id. at 1235. Exxon did not challenge the substance of the court's instructions as to the determination of punitive damages; for, with prescient skill, counsel for plaintiffs and Exxon had proposed instructions which appropriately informed the jury as to what have become the

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<sup>41</sup> Clerk's Docket No. 6914.

"guideposts" for fixing punitive damages: the reprehensibility of defendant's conduct, the relationship of punitive damages to actual and potential harm, and comparison to other penalties.

Captain Hazelwood and Exxon both challenged the sufficiency of the evidence to support an award of punitive damages against them. The Ninth Circuit Court concluded that there was substantial evidence to support a jury verdict of liability for punitive damages as to both Captain Hazelwood and Exxon. Id. at 1237-38.

Finally, with liability concluded, the court of appeals turned to Exxon's challenge to the amount of the punitive damages award against it. In addition to passing muster under the sufficiency of the evidence test, punitive damages awards must be subjected to a due process analysis which flows from the decision of the United States Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). In BMW, the Supreme Court held that a \$2 million punitive damages award<sup>42</sup> based upon \$4,000 in compensatory damages for pure economic loss was unconstitutional because the defendant lacked fair notice of so severe a punitive award. Id. at 574-75. The importance of the BMW guideposts in determining the outer constitutional limits of punitive damages was reinforced in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

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<sup>42</sup> The jury awarded Dr. Gore \$4 million in punitive damages, which the Alabama Supreme Court reduced to \$2 million.

Based upon BMW, the Ninth Circuit Court of Appeals in this case reiterated the three guideposts established by the Supreme Court for use in determining whether punitive damages are so grossly excessive as to constitute a violation of due process. The guideposts are:

(1) the reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm inflicted on the plaintiff; and (3) the difference between the award and the civil or criminal penalties in comparable cases.

In re Exxon Valdez, 270 F.3d at 1240. The court of appeals recognized that this court did not have the benefit of BMW and Cooper Industries when it decided Exxon's original motion to reduce the punitive damages award and remanded the case "for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in BMW." Id. at 1241. However, the court of appeals also provided its analysis of the BMW factors to aid the court in its consideration of the constitutional question. Id. In the end, the court of appeals unequivocally told this court that "[t]he \$5 billion punitive damages award is too high to withstand the review we are required to give it under BMW and Cooper Industries" and "[i]t must be reduced." Id. at 1246 (citations omitted).

On remand, Exxon filed a renewed motion for reduction or remittitur of the punitive damages award,<sup>43</sup> which plaintiffs opposed.<sup>44</sup> After consideration of the briefing and hearing oral

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<sup>43</sup> Clerk's Docket No. 7487.

<sup>44</sup> Clerk's Docket No. 7501.

argument on the renewed motion, the court, on December 6, 2002, issued Order No. 358, which granted Exxon's renewed motion and reduced the punitive damages award to \$4 billion.<sup>45</sup> In applying the BMW guideposts, the court found Exxon's conduct highly reprehensible, a ratio of 9.85-to-1 based on actual and potential harm of over \$507 million, and comparable civil and criminal penalties of which Exxon was on notice in excess of \$5 billion. The court concluded that application of the BMW guideposts supported the \$5 billion punitive damages award but reduced the award to \$4 billion because the Ninth Circuit had mandated that the award be reduced.

Judgment on the \$4 billion punitive damages award was entered on December 10, 2002.<sup>46</sup> Plaintiffs moved for an order directing entry of a final judgment on Order No. 358 or, in the alternative, an order authorizing an interlocutory appeal.<sup>47</sup> On January 27, 2003, the court granted the plaintiffs' motion.<sup>48</sup> Both Exxon and plaintiffs timely noticed appeals to the Ninth Circuit Court of Appeals. Exxon sought and obtained a stay of execution on the judgment by posting a supersedeas bond in the amount of \$4,806,000,000.<sup>49</sup>

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<sup>45</sup> Clerk's Docket No. 7564.

<sup>46</sup> Clerk's Docket No. 7566.

<sup>47</sup> Clerk's Docket No. 7569.

<sup>48</sup> Order No. 359 (granting Motion for Rule 54(b) Determination) (Jan. 27, 2003), Clerk's Docket No. 7589.

<sup>49</sup> Clerk's Docket No. 7622.

On April 7, 2003, the Supreme Court decided State Farm, 123 S. Ct. 1513, which addressed the question of whether a \$145 million punitive damages award, compared to compensatory damages of \$1 million, in an insurance bad faith case was grossly excessive and violated due process. The Court held that the \$145 million punitive damages award did not comport with due process and remanded the case to the Utah Supreme Court with the suggestion that, under the circumstances of the case, a punitive damages award at or near the amount of compensatory damages would comport with due process. Id. at 1526.

On August 18, 2003, prior to briefing on either appeal, the Ninth Circuit Court of Appeals vacated the \$4 billion punitive damages judgment and again remanded the case to this court, this time to reconsider the punitive damages award in light of State Farm.<sup>50</sup> In remanding, the court of appeals simply vacated the court's amended judgment which found plaintiffs entitled to \$4 billion in punitive damages against Exxon. The court of appeals did not comment on the merits of Order No. 358, neither suggesting nor implying that the court should revise Order No. 358, although the court of appeals plainly intended that this court reconsider Order No. 358 in light of State Farm. In remanding, the court of appeals also did not disturb its earlier holding that the \$5 billion punitive damages award was too high to pass constitutional muster.

On remand, this court called for supplemental briefing from the parties to aid in its reconsideration of the punitive

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<sup>50</sup> See Order, Clerk's Docket No. 7737.

damages award in light of State Farm.<sup>51</sup> Exxon submitted its supplemental briefing in the form of a second renewed motion for reduction or remittitur of punitive damages.<sup>52</sup> This motion is opposed by plaintiffs.<sup>53</sup> Oral argument on the second renewed motion for reduction or remittitur of punitive damages was heard on December 3, 2003. Having considered the parties' arguments, both written and oral, the court turns, for a third time, to the question of whether the \$5 billion punitive damages award against Exxon offends the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

### Discussion

#### Legal Background

It has long been understood "that the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 453-54 (1993) (quoting Seaboard Air Line R. Co. v. Seegers, 207 U.S. 73, 78 (1907)). It was not, however, until recent years that the Supreme Court considered applying this general principle of constitutional law to punitive damages awards.

In Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276-77 (1989), the Supreme Court suggested that the Due Process Clause could place substantive limits

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<sup>51</sup> Order re Further Proceedings on Punitive Damages Award (Aug. 26, 2003), Clerk's Docket No. 7714.

<sup>52</sup> Clerk's Docket No. 7753.

<sup>53</sup> Clerk's Docket No. 7767.



on punitive damages awards but left the question of whether it did to another day because the parties had not raised the issue below. Id.

That day came two terms later in Haslip, 499 U.S. 1. Haslip involved the misappropriation of insurance premiums by Pacific Mutual's agent. After their insurance lapsed because of non-payment of premiums, Haslip and others brought a fraud claim against the agent and also sought to hold Pacific Mutual liable on a respondeat superior theory. A jury awarded Haslip \$200,000 in compensatory damages and \$840,000 in punitive damages.<sup>54</sup> Id. at 6-7 and n.2. Pacific Mutual challenged Haslip's punitive damages award arguing that it violated both substantive and procedural due process.

The Supreme Court rejected Pacific Mutual's argument that its substantive due process rights were violated by the imposition of liability based upon the respondeat superior doctrine. The Court also determined that the common-law method of determining punitive damages is not "so inherently unfair as to deny due process and be per se unconstitutional." Id. at 17. However, the Court emphasized that a punitive damages award that was the result of unlimited jury or judicial discretion could violate the Due Process Clause. Id. at 18.

The Court in Haslip refused to "draw a mathematical bright line between the constitutionally acceptable and the constitution-

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<sup>54</sup> The other three plaintiffs were awarded much smaller amounts of damages (\$15,290; \$12,400; and \$10,288).

