

There's no right to punitives

Evan Tager / Special to The National Law Journal
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In late February, the U.S. Supreme Court heard oral arguments in *Exxon Shipping Co. v. Baker*, No. 04-35183, a case raising questions about the propriety of a \$2.5 billion punitive damages award against Exxon arising out of the grounding of the Exxon Valdez and the ensuing spill of millions of gallons of oil into Prince William Sound, Alaska. There have been scores of editorials, opinion pieces and blog entries written about the case in the days leading up to the argument. Virtually all of the pieces that favor upholding this record-setting punitive exaction rest on fundamentally fallacious premises.

The most common recurring theme involves lamenting the fact that the plaintiffs — commercial fishermen whose ability to harvest fish in Prince William Sound was interrupted for one season — have had to wait 19 years while the case has wended its way through the judicial system. Exxon is blamed for exercising its constitutional right to test the validity of the jury's award, while sympathy is sought for the plaintiffs, many of whom have died or retired since the grounding of the Exxon Valdez. What is persistently overlooked, however, is that this case is about punitive, not compensatory damages. Exxon voluntarily paid 96% of the commercial fishermen's economic losses before trial. The small percentage of fishermen whom Exxon did not pay before trial were made whole through an award of compensatory damages that Exxon paid seven years ago.

The delay is immaterial

The law has long recognized that plaintiffs have no right to receive punitive damages. They are merely the means by which civil punishment is imposed. Recognizing that, several states have enacted statutes that require a substantial part of any punitive award to be turned over to the state. A state could, in fact, require that 100% be turned over. Thus, the recurring complaint about how long the Exxon Valdez plaintiffs have been waiting is a hollow one. A delay in receiving a windfall is not the kind of equitable consideration that should affect public opinion, much less a Supreme Court decision on broadly applicable principles of law.

A second popular theme is that the ecosystem of Prince William Sound remains badly damaged. Many of the amicus briefs written in support of the plaintiffs sounded this theme, and unsurprisingly it has been repeated by the media. Exxon disputes this assertion, and points to a report by an independent consultant hired by Alaska. I am in no position to take sides in this factual fight. But as a legal matter, it is completely irrelevant. This is a case about economic injury to commercial fishermen; the United States and the state of Alaska pursued separate criminal and civil actions against Exxon to redress the harm to the environment. As a result, Exxon expended \$2.1 billion to remediate the environment and paid \$900 million to the two governments for damage to the environment, plus \$125 million in fines and penalties. Exxon entered into a consent decree with both governments, which exposes it to liability for up to another \$100 million if the governments prove additional environmental harms that could not have been anticipated at the time of the original agreement. In short, even if the harm to the environment persists to this day, that is no reason for upholding a punitive award imposed to punish Exxon for injuring the economic interests of commercial fishermen.

A final oft-repeated refrain is that the fishermen were short-changed: The compensatory damages didn't account for future unanticipated lost income, and they were precluded from recovering for emotional distress entirely. But the jury was authorized to award whatever future economic damages it believed that the plaintiffs would suffer; it rejected some of the very allegations of injury that the plaintiffs still make today. Even if the jury did underestimate the plaintiffs' damages, it is not a valid purpose of punitive damages to retroactively cure the error. In many cases, juries award *more* compensatory damages than the plaintiff winds up incurring. Our legal system has no means to fix that problem retroactively either.

For similar reasons, the punitive damages cannot be justified on the ground that the plaintiffs suffered uncompensated emotional distress. Maritime law seeks to draw a balance between competing interests by permitting some forms of damages and not others. Using punitive damages to compensate for damages that are nonrecoverable will disturb this balance. Moreover, it would make little sense: Why should the availability of compensation for emotional distress turn on whether the defendant was willful, wanton or reckless, the sine qua non for punitive damages? However sympathetic the plaintiffs may be, it would be unfair and counterproductive to distort punitive damages law in order to extend their right to compensation beyond what maritime law authorizes.

The real issue is not how long the proceedings have taken, whether there is persistent environmental harm or whether the plaintiffs were undercompensated, but whether a \$2.5 billion exaction is reasonably necessary to punish and deter. Given that Exxon never intended to hurt anyone — and, indeed, was itself a victim of the reckless conduct of the ship's captain — yet already has paid more than \$3.4 billion in damages, settlements, remediation costs and fines, the answer to that question is clearly "no."

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