

## As Exxon Valdez case heads to high court, law firm hopes \$2.5 billion judgment doesn't run aground



REUTERS The Exxon Valdez, now named the S/R Mediterranean, is banned from U.S. waters.

By Judith Yates Borger

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For almost two decades the Twin Cities legal community has been captivated by the story of the hard-charging Minneapolis lawyers who fought through the courts to win justice — and a lot of money — for the Alaskan fishermen whose livelihoods were destroyed in 1989 when the Exxon Valdez ran aground, dumping 11 million gallons of crude oil in the pristine Prince William Sound.

On Feb. 27 that story will reach its climax when lawyers for the fishermen try to convince the U.S. Supreme Court that the lower courts were right when they assessed Exxon Mobil \$2.5 billion — that's \$2,500,000,000 — as punishment for assigning a drunk to captain the supertanker.

On its face the case seems like an easy catch for the fishermen and their Minneapolis-based Faegre & Benson attorneys. (Full disclosure: My husband is one of 525 F & B lawyers. He did not work on this case.) Faegre and the fishermen convinced a jury, and then an appellate court, that Exxon knew Valdez Capt. Joseph Hazelwood was a relapsed alcoholic when it assigned him full responsibility for the ship. The jury and appellate courts also agreed that Exxon deserved to be punished for the oil spread across 10,000 square miles and the cleanup that the fishermen said was more a public relations stunt than an attempt to save the ecosystem.



If any company could handle a stiff penalty, surely Exxon can, Faegre and the fishermen say. Exxon, the largest oil company in the world not owned by a state, reported the highest profits ever recorded by any company for 2007, with net income rising 3 percent to \$40.6 billion. Exxon's sales of more than \$404 billion exceeded the gross domestic product of 120 countries. All of this as the rising price of gas has eaten away at the budgets of every household, business and municipality in the country. A fifth of the Alaska fishermen have died without seeing a cent of punitive damages from Exxon since the night their waters were fouled while they slept.

Meanwhile, Exxon says it has already spent \$3.4 billion in payments, settlements, cleanup costs and fines, which is plenty punishment. An added penalty of \$2.5 billion is way over the top, its attorneys say. Further, it's arguing that maritime law going back 200 years says ship owners are not responsible for the action of their captains. And finally, according to their argument, the U.S. Clean Water Act says punitive damages are to benefit the public, not fishermen.

#### **Oral arguments**

Brian O'Neill, a 41-year-old Faegre environmental lawyer in 1989, quickly hopped a plane for Alaska at the first news of the spill to sign up fishermen-clients. Then he persuaded his partners at Faegre — which usually defends big corporations, not sues them — to pay for him and a team to prepare the case in Alaska.

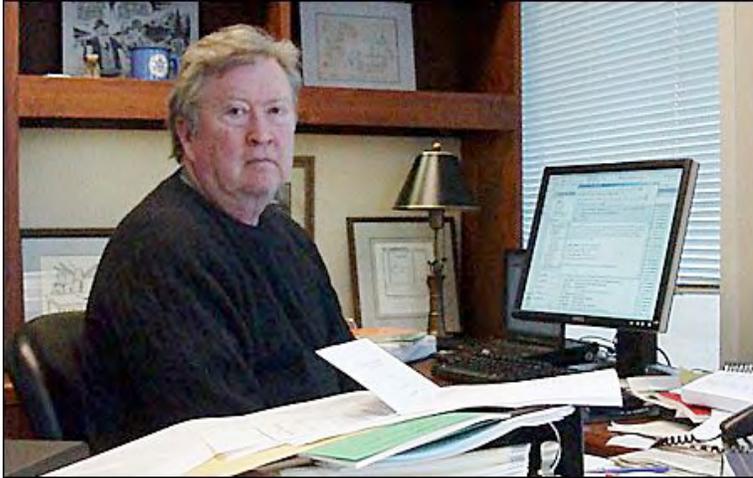
He was 47 when he argued an 83-day jury trial that won the original verdict of \$5 billion. Over the course of the next 12 years, Exxon appealed six times. The fishermen countered each appeal, with O'Neill arguing at every turn, until the punitive damages had been whittled down to \$2.5 billion.

O'Neill and the team of a dozen lawyers, paralegals and assistants spent three years in Alaska working on the case. Living and working together they became a tight band. The experience put an end to some marriages on the team and created others. One attorney, Sarah Armstrong, a 1988 University of Minnesota law grad, met and married the 1984 champion Iditarod musher and stayed in Alaska. After she was killed in a car accident Christmas Eve, O'Neill and two other members of the team flew to Alaska, where O'Neill and Armstrong's husband spent

half a day digging her grave with pick axes.

Today, at 60, O'Neill looks tired. The blond stubble on his chin, the pouches under his eyes etch the toll the case has taken on him. "I was sick of this case 10 years ago," he said. He thought he was done early last fall.

Given its history, no one was surprised when Exxon appealed the case to the U.S. Supreme Court, one of about 8,000 requests it receives yearly. But most who have been tracking the case were amazed when the court included Exxon among the 100 it will hear this year.



MinnPost photo by Judith Yates Borger "I fully intend to retry this case if we have to," says Brian O'Neill, the Faegre & Benson lawyer who has represented the fishermen since 1989.

O'Neill was "shocked," an emotion that has morphed into disappointment because he won't be arguing the case that has consumed him when it goes to the highest court in the land. O'Neill and two other attorneys managing the case decided it was time to hand this phase to someone else, he said. "I don't like it. But Jeff Fisher will do a good job."

Jeffery L. Fisher is a 37-year-old assistant professor at Stanford law school with heavy-duty credentials who answers his phone, "[This is Jeff.](#)" Like Chief Justice John Roberts before him, Fisher is making a career appearing before the Supremes. Since November 2003 he has argued six cases there — won three, lost two, one dismissed — and will argue three more this session.

Before moving to Stanford, Fisher was a partner at Davis, Wright & Tremaine, a large national firm with offices in Anchorage and the West Coast. Ten years ago Fisher clerked for Justice John Paul Stevens, a definite plus for anyone going up before the court.

Fisher sums up the argument succinctly. "The court wants to be sure that Exxon received a fair trial and that the judgment is supported. We think we're right on both counts."

Exxon has its own prizefighter. Walter Dellinger III, 30 years older than Fisher, has argued nine cases before the Supreme Court. The assistant who answered his phone said he was "traveling and cannot be

reached." According to [his online profile](#), he joined Duke University in 1997 as an emeritus professor of law, after serving as acting solicitor general for the 1996-97 term of the Supreme Court. He clerked for Justice Hugo Black.

But Dellinger has already suffered one stroke of bad luck. Supreme Court Justice Sam Alito disqualified himself from the case because he owns stock in Exxon. That means Dellinger will have to win five of eight justices, rather than nine, to get the court to absolve Exxon of the penalties. If the court splits four-four, the lower court decision stands, and the fishermen win.

Other attorneys representing Exxon referred press inquiries to the company's public relations people, who did not respond to my call.

Not quite two weeks before the argument the court granted the fishermen's request to add 15 minutes to the half hour each side will have to make its case.

"That's unusual," said Arthur Miller, a professor at New York University and Harvard law schools who [teaches civil procedure](#). "The court is generally very strict on time."

Is this some indication that the court is leaning toward the fishermen? Or Exxon? Looking for intent in an extra 15 minutes per side is like reading tea leaves, according to Miller.

"This is one of the most protracted cases the court has on its calendar," Miller said. Granting the extra time could be "a matter of courtesy or recognition of the complexity of the case."

### **Who will win?**

Statistics tip the argument in favor of Exxon. In the past three years the U.S. Supreme Court has reversed 75 percent of the cases it has chosen to review. And this one came out of the 9th Circuit Court of Appeals, a West Coast court that tops the Supreme Court's [list of most reversed districts](#). Right wing conservatives have long argued that the 9th Circuit is lefty loony-tunes. Rush Limbaugh has called it a "[circus](#)." Meanwhile under the Bush administration, the Supreme Court has issued a series of pro-business decisions.

Fisher brushed off the idea that the Supreme Court took the case just to reverse the lower court, which would hand the win to Exxon. Rather, the court took the case because it's historic and a very big verdict, Fisher said.

"The court takes one group of cases to consider reversal, and another group because they're important," Fisher said. "This case falls into the latter category."

Maybe. At the request of Minnpost.com, Marilyn Raia, a partner with [Bolivant, Houser, Bailey in San Francisco](#) who has practiced maritime law for 32 years, mostly representing plaintiffs, reviewed the briefs submitted by Exxon and the fishermen.

"I could see a split decision, for Exxon," Raia said. "The petitioner has the stronger argument." The fishermen's argument that they deserve the \$2.5 billion from Exxon to make them whole ignores the point of punitive damages, she said. "Punitives are to punish and deter the defendant, not reward the plaintiff."

She bought Exxon's argument that it had already been "punished by the billions" in the money it spent cleaning up the mess. But more significant, she agreed with Exxon's contention that under maritime law a ship's owner is not responsible for what its captain does.

"The very name Exxon makes people upset, and I'm usually a plaintiff's lawyer," she said. "But uniformity and tradition are important in maritime law."

### **What it means**

The current judgment is \$2.5 billion, but it's really more because that money has been earning interest. [Here's a timeline.](#)

O'Neill has a program on his computer that constantly tabulates how much money Exxon owes in real time, at 5.9 percent interest, compounded annually. The numbers click by faster than the dollars and cents on a gas pump. In early February, the total was just short of \$5 billion.

Assuming the court finds \$2.5 billion is a reasonable punishment, the fishermen would receive an average of about \$70,000 each, O'Neill said. Some would get more than \$1 million. "Some were substantial small businesses that were destroyed," O'Neill said.

Although Faegre represents 3,500 of the approximately 33,000 claimants, its clients are fighting for 17 percent of the punitive damages. A total of 61 other law firms represent the fishermen not in the Faegre fold.

But the case is much more than that for the fishermen and for environmentalists. To them, a win would be cathartic, a justification of their almost two-decade battle.

And what of the lawyers?

Most of the time, Faegre & Benson, founded in 1886, works the defense side of courtroom, usually representing big corporations such as, say, Exxon. Back in the days when lawyers actually wore vests, there was a joke going around that Faegre lawyers are so conservative they had them tattooed on their chests. While that's hardly true, there's no question that attorneys at Faegre most often bill their clients on an hourly basis, win or lose, rather than roll the dice to earn the customary third of a successful plaintiff's award.

In his 1997 book, Minneapolis author and lawyer David Lebedoff called the case "the biggest legal bonanza of our time." But this is hardly a windfall. More like a giant gamble. The Faegre partners, who have

spent about \$30 million in fees and another \$3 million to \$4 million in cash to finance O'Neill's representation of the fishermen, have been paid \$1.5 million out of the compensatory damages Exxon has paid the fishermen. "Sometimes we didn't charge the clients out of the check because they were so small," O'Neill said.

If the court finds for the fishermen, Faegre can expect to earn more than \$100 million, according to O'Neill. It would be a pot of gold that Exxon case-watchers, especially fund-raisers in the Twin Cities, have lusted after for many years. But if the justices agree with Exxon, the fishermen will have to decide whether to walk away or try the case all over again before a new jury.

"I fully intend to retry this case if we have to," O'Neill said. "I would have to move up there for a year and try it at 62, which would cost far more than the value of the money. But it will take whatever it takes."

The court will issue its decision before the term concludes at the end of June.

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