At Issue in 'Exxon' Case: How Decisive Is Stare Decisis?

Justice Breyer's opinion in the 'Sand' case may play a big role in how the Court decides the suit against the oil giant

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The topic of the day at the Supreme Court on Feb. 27 was oil and water -- specifically, the Exxon Valdez oil spill into Alaska's Prince William Sound in 1989.

So why did Justice Stephen Breyer keep referring to sand during the 90 minutes of oral argument? He was using shorthand to refer to *John R. Sand & Gravel Co. v. United States*, a decision he had written a mere six weeks earlier.

The ruling gained little attention at the time, but its discussion of the value of precedent may play a significant role in deciding whether Exxon Mobil can free itself from a $2.5 billion punitive damages award stemming from the spill.

The precedent that was debated most urgently during oral arguments last week in the case *Exxon Shipping Co. v. Baker* was the case of a hijacked Haitian schooner named Amiable Nancy, an 1818 decision, written by Justice Joseph Story.

Walter Dellinger of O'Melveny & Myers, arguing for Exxon Mobil and fighting the flu on the day of the argument, strenuously asserted that the decision stands for the proposition that ship owners are immune from punitive damages for the independent mistakes of their captains. Furthermore, he argued that the *Amiable Nancy* case and a handful of subsequent decisions that adhered to it, including a railroad case, have ended debate over the question of maritime punitive damages for nearly two centuries. If the Court agrees, it could wipe out the *Exxon Valdez* damage award altogether.

But Justice Ruth Bader Ginsburg was relentlessly skeptical of that assertion from the start, telling Dellinger that it is "an exaggeration to call it a long line of settled decisions in maritime law."

Dellinger replied, "The issue has been so well-settled ... that the issue understandably doesn't come up."

Even so, Justice David Souter seemed to suggest, immunizing Exxon Mobil might not make sense anymore. A ship in the era of the Amiable Nancy was "sort of a floating world by itself," Souter said. With modern communications, however, it is harder to argue that a boat captain is any different from a division chief of a corporation that should be held accountable when something goes wrong.

So, one question for the Court in evaluating *Amiable Nancy* is whether a sparse line of cases following it means that it should be exalted as the Court's definitive word, or set aside as obsolete, especially in light of new realities.

Breyer dealt with that question in *Sand*, issued Jan. 8. That case involved statutes of limitations on claims in the Court of Federal

Claims and precedents going back to the 1880s.

The Court should be wary of tossing aside old precedents, Breyer wrote. "To overturn a decision settling one such matter simply because we believe that the decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness would itself threaten to substitute disruption, confusion and uncertainty for necessary legal stability."

Ginsburg and Justice John Paul Stevens countered Breyer in dissents. "It damages the coherence of the law if we cling to outworn precedent," Ginsburg wrote. Stevens said the Court should opt for clarity "rather than preserving an anachronism whose doctrinal underpinnings were discarded years ago."

So, when Breyer repeatedly brought up the *Sand* decision, he said the issue of stare decisis was of "more than inordinate concern to me."

Breyer cited *Sand* to Jeffrey Fisher, a Stanford Law School professor who argued on behalf of the Alaska plaintiffs seeking to preserve the damage award. Fisher replied to Breyer's views in several ways. He said that *Amiable Nancy* did not involve wrongdoing by a captain, so was not a decisive precedent. He also argued that "a spattering of a few old decisions" should not bind the Court to adhering to the case anyway. "You have a fairly open issue before you today." It was for that reason, Fisher speculated, that the Court had taken up the Exxon case in the first place.

"That, and $3.5 billion," Justice Antonin Scalia interjected. He was reminding Fisher, and probably Breyer, that more was at stake than abstract principles of stare decisis.

On the issue of whether the damages were excessive -- $2.5 billion, not the $3.5 billion Scalia mentioned -- the Court seemed split as well. Most seemed to believe that $2.5 billion was too high, but they groped for principles or ratios that would reduce it rationally.

A jury had awarded the 32,000-member Alaska plaintiff class $287 million in compensatory damages and $5 billion in punitives, but the 9th U.S. Circuit Court of Appeals cut the punitive award in half.

Dellinger acknowledged the spill was "one of the worst environmental tragedies in U.S. maritime history." But he said the company had been penalized and deterred enough, pointing to $400 million already paid for losses to commercial fishing plus other fines and restitutions amounting to $3.4 billion.

Fisher countered that Exxon Mobil in fact "has not been deterred" by all that has followed from the oil spill. Capt. Joseph Hazelwood is the only person the company fired, he said, while others further up the chain of command received raises and bonuses.

Justice Samuel Alito Jr. was missing from the bench, having recused in the case since it arrived at the Court last year. In his latest financial disclosure form, Alito reported he owns between $100,001 and $250,000 in Exxon Mobil stock.

His absence raises the possibility of a 4-4 tie, which would be a victory for the plaintiffs because a tie would mean that the lower court decision would stand. Some observers came away from the argument thinking that such a split might emerge on the *Amiable Nancy* issue, even if a majority might think the award is too high.