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Supreme Court weighs possible cut in Exxon damages

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WASHINGTON, D.C. – It took 6,914 days from the moment the Exxon Valdez grounded on Bligh Reef for the fierce battle over punitive damages against Exxon Mobil Corp. to reach the U.S. Supreme Court.

That span of almost 19 years did not deter surviving plaintiffs from Alaska fishing communities from showing up in person to watch the justices weigh arguments for reducing the \$2.5 billion at stake.

A total of 52 observers, most from Cordova and the Prince William Sound, snagged every one of the seats available for members of public to view oral arguments in front of the Supreme Court, which began at 10:08 a.m. on Wednesday, Feb. 27.

Ninety minutes of lively crossfire among the justices and two lawyers left an impression that four centrists on a fractured court may lean toward reducing the award to something in the neighborhood of \$1 billion.

That would translate to a bit more than \$30,000 for each of the 32,667 plaintiffs.

But no one will know for certain until the court issues its opinion sometime before the end of June.

Lengthy delays created in part by the sluggish 9th Circuit Court of Appeals in San Francisco worked to Exxon's advantage.

With the passage of nearly two decades, the members of the Supreme Court have found themselves more and more adverse to massive punitive awards.

Indeed, Justice Antonin Scalia indicated at the Feb. 27 arguments that the vast numbers of dollars at stake, as well as murky legal precedents, led the court to accept Exxon's appeal seeking to throw out the entire \$2.5 billion.

Working to the plaintiffs' advantage, however, is the recusal based on Exxon stock ownership of Justice Samuel A. Alito Jr., who removes a possible pro-Exxon vote and further raises the possibility of a 4-4 tie that would let the award stand.

While at times it seems as if damaged lives in Cordova were lost in the shuffle of legal arcana, the real suffering of Prince William Sound residents broke through at times during the oral arguments.

Sharp questioning by Justice Ruth Bader Ginsburg focused on Exxon's decision to put a known drunk at the helm of an oil tanker.

And the plaintiffs' lawyer, the aptly named Jeffrey L. Fisher, noted that the oil spill had "destroyed an entire regional economy."

Finally, the justices operated under the watchful presence of Alaskans who had curled up in sleeping bags outside the court the previous night, as well as a record number of Alaska journalists from small newspapers in fishing towns -- several invited by court officers to move forward at the last minute to places of honor among the permanent press corps.

Camping outside the court

On a freezing Tuesday night, environmentalist and former Cordova fisherman Margaret Salmon curled up to sleep on the sidewalk in front of the Supreme Court.

The first two Alaskans had arrived at 9:30 p.m., more than 12 hours early. By midnight, five had gathered. At 4 a.m., all 52 of those who would later be seated at the oral arguments had arrived.

A bitter northwest wind sweeping across Washington's Mall did not deter them. Sylvia Lange, owner of Cordova's Reluctant Fisherman Inn, sat in a chair, swathed in blankets, determined to be at the front of the line the next morning.

In parkas, long johns and sleeping bags, Salmon and Cordova's Riki Ott rested and waited.

Zak Jacobs, 21, a summer deckhand on the Cordova fishing fleet, was loaned a blanket by a George Washington University law student.

Elsewhere around Washington, sleeping warm indoors, were the central players who would help decide the final act of oil spill's legal aftermath: Fisher; Ginsburg and the seven other justices who would bombard him with their questions; and Exxon's Washington-based attorney, Walter E. Dellinger.

Cordova activists had spared no effort in making their views known on how the Supreme Court should handle the appeal, with a well-attended press conference and twilight candlelight vigil on Feb. 26.

After dawn on Feb. 27, they washed up in the Supreme Court's restrooms, as incredulous local high school students treated them like rock stars.

"Omigod, you're from Alaska!" said one to Salmon, who smiled, appearing none the worse for wear.

The Cordovans took their seats in the courtroom to await the oral arguments in Alaska style.

"I'm wearing my long underwear," Ott joked quietly, just before the justices entered the courtroom.

Oral arguments begin

"Good morning," said Dellinger, Exxon's white-haired lawyer, appearing a bit like an older Peter Falk.

It was almost the last thing he said without interruption.

He spoke for perhaps another minute before Ginsburg jumped in mid-sentence.

She challenged Dellinger's line of argument that two centuries of maritime law, notably involving an 1814 raid against a sugar ship called *The Amiable Nancy*, held ship owners harmless for captain's errors that defied company policies.

"No one even raised the question of punitive or exemplary damages in those cases. So what is the long-settled line of decisions of this court in maritime law that you are relying on?" said the justice, so tiny that she was barely visible over the winged, mahogany bench, in appearance like a child almost hidden at a dinner table sized for adults.

Chief Justice John Roberts, appearing like a vigorous tennis pro, especially compared to the 87-year-old Justice John Paul Stevens sitting at his right, jumped in next.

"So the ship owner is, I suppose, the owner of Exxon or the hundreds of thousands of shareholders, right? So you have to have a shareholder driving the boat before you can assess liability?" Roberts said.

Justice David Souter shot further holes in attempts to look at *The Amiable Nancy* case for guidance.

"In those days, when a ship put to sea, the ship was sort of a floating world by itself. And the contact with the ship owner was simply gone until the thing came back into port again. That is certainly not the case today, and we know it's not the case in the circumstances here."

Dellinger often seemed to scramble, like a novice iceskater trying to maintain his balance on a slick surface, as many justices seemed to scoff at *The Amiable Nancy*'s idea of autonomous captains, a precedent that seemed to have fared better with the 9th Circuit.

After many minutes of debating whether a tanker captain was a manager or policymaker within Exxon's corporate structure, Ginsburg jumped in again.

"The jury could have found that Exxon knew that this captain had a severe alcohol problem and yet they let him stay on voyage after voyage and did nothing about it," she said.

"So the jury could have found: Never mind the captain. Exxon, itself, is a grave wrongdoer because it allowed the tanker to be operated by a captain who was certainly not fit," she added.

Justice Anthony M. Kennedy next probed whether, if Dellinger thought the Clean Water Act or other laws provided for punitive damages, whether these should be capped, say, at about double the actual damages.

With Exxon's \$2.5 billion in punitive damages at a 5-to-1 ratio to the actual damages of \$500 million, a cap of

2-to-1 would reduce damages to around \$1 billion for the plaintiffs.

Dellinger swiftly countered that the 2-to-1 ratio might better apply to the criminal fines in the oil spill, a much lower figure of about \$80 million.

“When you start with payments that have reached \$3.4 billion in terms of compensation, fines, remediation, restitution, that clearly obviates the need for deterrence,” Dellinger told the justices.

“If you look to punishment, here the one thing that is clear is that this was not an intentional act. It was not malicious. The company did not stand to make one dollar of profit. There was no effort to enhance the profits of the company, nor was there any possibility of concealment,” Exxon’s lawyer said.

“If you look to punishment, that can’t be a black hole into which all the limits on punitive damages disappear,” he concluded.

Case against Exxon

Fisher, the plaintiffs’ lawyer, with tousled steel-grey hair, a willowy build and glasses, seemed to have a somewhat easier time with the court.

Relaxed, confident and in command, and not harried in mid-thought as Dellinger was by Ginsburg, Fisher debated Roberts, Kennedy and Justice Stephen G. Breyer on technical points of case law.

Then the Supremes lived up to their local reputation as the best show in town, as Roberts leaned forward theatrically.

“So what can a corporation do to protect itself against punitive damages awards such as this?” the chief justice said.

“Well, it can hire fit and competent people,” Fisher shot back.

“Well, assume it has a policy that we will hire fit and competent people,” Roberts said, indicating some lingering attachment to The Amiable Nancy argument.

“... What if there is a breach of the corporate policy? I don’t see what more a corporation can do,” Roberts said, indicating a possible tilt toward Exxon’s position.

Fisher argued that Exxon had not enforced its own policy against drinking and driving a ship, mentioning a videotape of damaging interviews provided as evidence to the court.

“We showed 33 instances in the record of Exxon employees drinking with Hazelwood or learning that he drank. Up and down the corporation, as the district judge explained, for three years, upper management was receiving reports that this man was drinking aboard the vessel,” Fisher said.

“Now, its policy, Mr. Chief Justice, was that that was not allowed. But over a three-year span, as the district judge found again and again and again, they were told there was a problem.”

“You might win on that one. I mean if you show that,” Breyer said. “Now, what I’m interested in, in the back of my mind is: This is a very dramatic accident. It involves oil spills, and they cause a enormous amount of trouble. But there are accidents every day, and ships are filled with accidents, like automobiles in other places. And there are all kinds of things that go wrong.”

Addressing Fisher almost as an equal, Breyer closed with a plea for guidance. “What principles do you have to suggest, if any, for creating a fair system that isn’t just arbitrary?” Breyer asked.

Fisher indicated that the bulk of the Anchorage jury award, as revised to \$2.5 billion, should stand.

“We think the best place to start is with the common-law tradition, which is that cases are tried to juries,” he said. “... And so if you have, as in this case, destroyed an entire regional economy, that it would be inappropriate to give some sort of credit for that by a lower ratio just because you’ve harmed more people.”

Justice David Souter warmed to Kennedy’s notion of a 2-to-1 punitive damages ratio and asked what Fisher would think of that. “In this case, it’s worth remembering that the plaintiffs are only standing to recover \$75,000 apiece in punitive damages,” Fisher reminded the justices.

“In the wake of the spill ... Exxon fired one person – Capt. (Joseph) Hazelwood. They reassigned the third mate. Everybody ... further up the chain of command who allowed this to happen received bonuses and raises. They have taken no action inside the company to express in any meaningful way that they’ve been deterred by what happened in this incident,” Fisher said.

“What you have today are 32,000 plaintiffs standing before this court, each of whom have received only \$15,000 for having their lives and livelihood destroyed and haven’t received a dime of emotional distress damages,” he said.

And the oral arguments came to a close.

Waiting for an opinion

In front of the court, the dozens of Alaskans gathered, buoyed by what seemed to be a strong performance by Fisher. Constitutional lawyer Robert S. Peck, who teaches at George Washington University, was ebullient. “I think 7-1, maybe 6-2,” he said, predicting a court opinion in favor of keeping punitive damages for the plaintiffs. A move to allowing punitive damages at a ratio of 2-to-1 of actual damages is a “strong possibility,” he said. “I’m optimistic,” said Zak Jacobs, the 21-year-old deckhand. “You have to be.” Jeff Bailey, owner of Cordova’s Prime Select Seafoods, was cautiously hopeful as well.

“My glass is always half full,” he said. “This has been a long drawn-out litigation by the powers that be. We represent the little people. If they give Exxon a pass, that will be a message to all the major shippers.”

Fisher emerged to mingle with the Alaska plaintiffs.

Margaret Salmon, near the spot where she had slept overnight, thanked the tall lawyer with a smile and a big hug.

The lawyer, rated as one of the nation’s 100 most influential, then strolled with Riki Ott to address a giant circle of microphones and cameras.

And the clock ticked toward May 1, when Cordova would celebrate its 100th birthday, and toward the end of June, when the Supreme Court would have finally issued its opinion.

The fishing town would then find out whether there might be light at the end of the tunnel, 7,000 days after the Exxon Valdez oil spill.

Jeannette Belliveau is a copy editor for Alaska Newspapers Inc.

On the Web:

Transcript of oral arguments in Exxon Shipping Co. vs. Baker, case number 07-219, at www.supremecourtus.gov/oral_arguments/argument_transcripts/07-219.pdf

The Whole Truth campaign, at www.wholetruth.net.

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