

No. 07-219

FILED

SEP 20 2007

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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

—v.—

GRANT BAKER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE AMERICAN INSTITUTE OF
MARINE UNDERWRITERS AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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**AMERICAN INSTITUTE OF MARINE
UNDERWRITERS' BRIEF IN SUPPORT OF A
PETITION FOR A WRIT OF CERTIORARI**

The American Institute of Marine Underwriters (“AIMU”) respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by Exxon Shipping Company (now known as SeaRiver Maritime, Inc.) and Exxon Mobil Corporation (collectively, “Exxon”).

INTEREST OF AMICUS CURIAE¹

AIMU is a non-profit trade association representing the ocean marine insurance industry in the United States as an advocate, promoter, source of information and center for education. (*see* www.aimu.org). AIMU represents 49 marine insurance companies in the United States. Those companies underwrite the vast majority of the ocean marine risks insured in the United States.

The risks insured by AIMU’s members include physical damage to vessels, liabilities of shipowners including pollution liabilities² and, where permitted by public

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* declares that this brief was not authored in whole or in part by counsel for a party and certify that no one other than *amicus curiae* or counsel contributed monetarily to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), the Parties have consented to the filing of this brief. This consent, in the form of a blanket consent from counsel for petitioner and a letter from counsel for respondents, has been filed with the Clerk of this Court.

² While AIMU understands that Petitioners’ liability for any punitive damages in this case will be uninsured, and no AIMU member has a pecuniary interest in the outcome of this litigation, AIMU and its members have a strong interest in the impact this decision will have on future cases.

policy³ and not excluded by policy wording, punitive damages and penalties. In 2006, AIMU's members underwrote marine insurance policies with collective total premiums of approximately \$2.5 billion.

AIMU works in conjunction with the United States government and international groups to monitor and ameliorate the legal environment for the marine insurance industry and the broader maritime industry generally. AIMU is the forum for action on the important and timely issues that affect United States marine insurers, reinsurers and the maritime community at large.

This brief focuses on the key issue presented in the petition for a writ of certiorari: whether the punitive damages award imposed on Exxon was permissible and proper under federal maritime law. The resolution of this question is of major significance not only to Exxon but to all participants in maritime commerce, including marine insurers. Those insurers (the members of AIMU) provide critical support for the maritime industry; without marine insurance, most carriers and shippers of cargoes would simply be unable to operate.

AIMU supports Exxon's petition for a writ of certiorari because the resolution of this litigation will directly impact AIMU's members. The Court has the opportunity in this case to resolve a conflict among the Circuits and to clarify the standards for the assessment of punitive damages in the maritime context. AIMU's members can operate efficiently and provide the maritime industry with vital insurance products only if the rules imposing liability are clear and predictable, allowing the parties to

³ In most United States jurisdictions, courts have determined that insurance coverage of punitive damages is not contrary to public policy. Lorelie S. Masters, *Punitive Damages: Covered or Not?*, 55 *Bus. Law* 283, 294 (1999).

rationaly decide whether and how to insure carriers' potential liabilities.

AIMU therefore has a keen interest in the resolution by this Court of the essential issue in this case, and AIMU urges the Court to grant Exxon's petition.

STATEMENT

The underlying facts are set forth in Exxon's Petition and are therefore only briefly summarized here. In 1989, the *Exxon Valdez* ran aground on a reef in Prince William Sound, Alaska, resulting in a spill of 32 Kilotons of crude oil. Exxon engaged in prompt and extensive cleanup efforts to remove oil from the water and restore natural resources, years before the commencement of the trial in this case. Moreover, Exxon compensated the victims of the spill and paid substantial state and federal penalties. Nonetheless, under the jury instructions given by the trial court in this case, the jury was allowed to assess punitive damages based solely on the reckless conduct of the master of the vessel.

The question presented here is whether punitive damage awards are permissible under federal maritime law and, if so, what limitations are there on such awards. The First, Fifth, Sixth and Seventh Circuits have all held that punitive damages may not be imposed against the owner of a vessel for the tortious acts of the master or crew unless the owner "directed," "countenanced," or "participated in" the wrong. See *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995); *In re P&E Boat Rentals*, 872 F.2d 642, 652 (5th Cir. 1989) (*en banc*); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896); see also *The Amiable Nancy*, 16 U.S. 546, 559 (1818). The Ninth Circuit, however,

departed from this tenet of federal maritime law, first enunciated almost 200 years ago and upheld by every other circuit confronting this issue, and instead allowed the imposition of vicarious liability for punitive damages based on the misconduct of a vessel's master or "managerial employee." *Protectus Alpha Nav. Co. v. North Pac. Grain Growers*, 767 F.2d 1379, 1386 (9th Cir. 1979). The Ninth Circuit also departed from decisions of this Court and other Circuits when it held that punitive damages may be awarded in the context of an oil spill even though Congress made no provision for such punitive damages in the Clean Water Act or in any other federal law. See *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998); *Miles v. Apex Marine Corp.*, 451 U.S. 304 (1981); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618 (1978). Finally, the Ninth Circuit failed to perform its duty as a maritime court by refusing to articulate the standards of maritime law which should govern and limit the size of punitive damages awards, independently of the due process limitations imposed by the Constitution. See *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

ARGUMENT

The current conflict between the Ninth Circuit's decision below and the decisions of the other circuits that have addressed the issue of punitive damages under federal maritime law has resulted in a significant erosion of the clarity and predictability on which the members of AIMU depend to provide insurance that is vital to maritime commerce. It is therefore critical to marine insurers that the Court resolve this conflict.

I. The Decision Below Will Result In Uncertainty As To Punitive Damage Awards In The Maritime Context And Consequent Undue Burdens On Marine Insurers And Their Insureds.

The potential for massive, unpredictable punitive damage awards imposes an unreasonable and excessive burden on the maritime industry and its insurers. From the perspective of AIMU's members, there are two potential consequences of the Ninth Circuit's decision in this case: marine insurers will be compelled to increase premiums that will consequently be passed on to their insured's customers, or marine insurers will explicitly exclude coverage of punitive damages altogether. Both of these consequences could have a severely adverse effect on maritime commerce.

The marine insurance industry relies on effective risk management in order to set premiums and terms of coverage. Although waterborne shipping entails risks, these risks can be managed when they are predictable. However, when potential punitive damages awards are arbitrary and unpredictable, the ability to effectively engage in risk management becomes extremely difficult, if not impossible. And the insurers of such risks cannot efficiently or effectively underwrite liability coverages without clear standards for punitive damages awards.

The Court below has ignored fundamental objectives of federal maritime law: uniformity, predictability and avoidance of undue burdens on maritime commerce. Federal maritime law provides limited liability for shipowners and fair and reasonable compensation for maritime injuries, and it promotes settlement and judicial economy. Each of these goals is undermined by massive, unpredictable punitive damages awards. Such awards punish maritime commerce rather than protect it. Such awards expand shipowners' potential liability

rather than limit it. They have nothing to do with compensation for injury and they hinder rather than encourage settlement and judicial economy. Moreover, the Court below has ignored the historic aversion to the imposition of punitive damages under federal maritime law.

If the standards for the assessment of punitive damages in the maritime context are not clarified by this Court, marine insurers will be unable to calculate premiums for policies that include coverage for punitive damages. As a result, such coverage is likely to become prohibitively expensive or unavailable. Thus, the decision below not only directly impacts the members of AIMU, but it will have an impact on the cost and availability of marine insurance coverages in the United States. Those coverages may be required by the participants in the maritime industry at large, or by their financiers, and thus the decision below, if not reversed, will have a chilling effect on maritime commerce.

Even when claims for punitive damages are not successful, without clear limitations on such awards, those claims will create unnecessary difficulties with risk management, defense and the settlement process. Litigation costs will increase for both the insurers and insureds as well as the courts. *Cf. In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1287-88 (2nd Cir. 1991) (explaining the policy considerations that support denial of punitive damages under the Warsaw Convention).

II. Separate And Apart From Insurability, Marine Insurers Have A Direct Interest In Clarifying Standards For Punitive Damage Awards.

The uncertainty and unpredictability that would result from the Ninth Circuit's decision also impacts AIMU's members directly, as in many cases, marine insurers are

themselves subject to claims for punitive damages. In two of the eight cases in which this Court has addressed punitive damages during the last twenty years, the defendant who was facing a massive punitive damages award was an insurer. See *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Marine insurers therefore share the same interest in this case as Exxon and other participants in the maritime industry—to clarify the standards for awarding punitive damages. See Exxon’s Petition for a Writ of Certiorari, dated August 20, 2007, at III-A.

Punitive damages should not be awarded in an irrational and arbitrary manner. Rather, there should be clear guideposts delineating how such damages should be awarded in order to avoid grossly excessive verdicts. See *State Farm Mut. Auto Ins. Co.*, 538 U.S. at 416. Punitive damages should be awarded only if the defendant’s conduct is so reprehensible as to necessitate the imposition of further sanctions to achieve punishment or deterrence. *Id.* at 419.

Ocean marine insurers provide vital insurance coverage for participants in the maritime industry. Without such insurance, maritime commerce would suffer immeasurably. A marine insurer faced with a grossly excessive punitive damages award could, as a result, cease underwriting a particular class of business, or cease underwriting marine insurance altogether.

The ocean marine insurance industry, like the maritime industry as a whole, requires a standard and uniform rule as to punitive damages. AIMU therefore implores this Court to grant Exxon’s petition for a writ of certiorari and clarify federal maritime law in the area of punitive damages. The petition should be granted so that this Court can articulate uniform standards for punitive damages awards

under federal maritime law. Like Exxon and other maritime industry participants, marine insurers need clear, simple, rational standards to avoid unlimited and arbitrary discretion in the award of punitive damages.

This case provides the Court with the opportunity to provide uniformity, certainty and predictability of risk for the marine insurance industry and the maritime industry at large.

CONCLUSION

For the foregoing reasons and as set forth in Exxon's petition, the petition for a writ of certiorari should be granted.

Dated: September 20, 2007

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