No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

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

BRIEF OF INTERNATIONAL CHAMBER OF SHIPPING, THE BALTIC AND INTERNATIONAL MARITIME COUNCIL, CHAMBER OF SHIPPING OF AMERICA, TEEKAY CORPORATION, AND THE BAHAMAS SHIPOWNERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

RICHARD J. REISERT
CLARK, ATCHESON & REISERT
7800 River Road
North Bergen, NJ 07047
(201) 537-1200

Attorneys for Amicus The Bahamas Shipowners Association

CHESTER D. HOOPER
Counsel of Record
JOVI TENEV
HARMONY I. LOUBE
LISSA D. SCHAUPP
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

Attorneys for Amici International Chamber of Shipping, The Baltic and International Maritime Council, Chamber of Shipping of America, Teekay Corporation, and The Bahamas Shipowners Association

211168

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Blank Page

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Cited Authorities

TREATIES

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

Page

FEDERAL STATUTES

CODE OF FEDERAL REGULATIONS

OTHER AUTHORITIES

Cited Authorities

Blank Page

INTEREST OF THE AMICI CURIAE[1]

The amici curiae represent members of the United States and international maritime industry. The maritime industry transports about 97 percent of United States trade by weight excluding trade with Canada or Mexico.[2] That trade is vital to our nation's economic and national security, and uniform and predictable laws are critical to the maritime community.

International Chamber of Shipping

Formed in 1921, the International Chamber of Shipping ("ICS") is the trade association for the international shipping industry. Its membership comprises shipowners' associations and shipping companies from thirty-five countries (including the United States, Canada, and Mexico).[3]

ICS coordinates its efforts with the European Community Shipowners' Associations (ECSA), which represents the European shipping industry. In addition to associations that belong to ICS, ECSA membership includes associations from Estonia, Latvia, Lithuania, Malta, Poland, Portugal, and Slovenia. ICS also coordinates with national shipowners' associations from China, Chinese Taipei, Indonesia, Korea, Malaysia, the Philippines, Thailand, and Vietnam through the

---

[1] No counsel for any party authored this brief in whole or in part, and no person other than the *amici curiae* represented in this brief made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

[2] *See* Bureau of Transportation Statistics, Figure 2: *Modal Shares of U.S. Merchandise Trade Handled by Land, Water, and Air Gateways by Value and Weight: 2003*, *at* http://www.bts.gov/publications/americas_freight_transportation_gateways/.

[3] The membership of ICS also comprises national shipowners' associations from the following countries: Australia, Austria, Belgium, Bulgaria, Canada, Chile, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Ireland, Italy, Japan, Kuwait, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Singapore, Spain, Sweden, Switzerland, Turkey, the United Arab Emirates, the United Kingdom, and the United States of America.

Asian Shipowners' Forum, a voluntary organization that is now being formalized.

Shipowner members of ICS represent about 450 million gross tons,[4] which constitute about two thirds of the world merchant fleet. ICS members carry about two thirds of the volume of United States ocean-going trade a year, making approximately fifty thousand United States port calls per year.

The shipowner members of ICS operate ships in all sectors and trades, including containerships (which carry the shipping containers in which the overwhelming majority of U.S. imports and experts, in terms of value, is transported), bulk carriers (which carry raw materials such as grain, ore, coal and other cargo that is not packaged and is shipped in large quantities), oil and chemical tankers (which carry petroleum products and the many different chemicals that are transported worldwide), gas carriers (which carry liquefied gas), general cargo ships (which carry many different kinds of cargo that are not carried in containers, including large pieces of cargo that would not fit inside a container), specialist ships (e.g. automobile carriers and offshore oil rig supply vessels), and passenger ships. ICS members serve over 100 nations—virtually every nation with a seagoing port.

ICS acts as an advocate for the maritime industry on issues of maritime affairs, shipping policy, legal and technical matters, ship construction, operation, safety, and management, to develop the best possible practices in the industry. To accomplish these goals, ICS strives for a uniform regulatory environment that embraces safe shipping operations, protection of the environment, maintenance of open markets, and fair competition, as well as adherence to internationally adopted standards and procedures. ICS supports regulation of shipping at an international level to obtain uniform regulations that will be enforced worldwide.

---

[4] Gross tonnage of a vessel "consists of its total measured cubic contents expressed in units of 100 cubic feet or 2.83 cubic meters." René DeKerchove, *International Maritime Dictionary* 339 (2d ed. 1948).

The Baltic and International Maritime Council

The Baltic and International Maritime Council ("BIMCO"), founded in 1905, is the world's oldest and one of the largest association of shipowners, ship managers, ship brokers, agents, operators, associations, and other entities connected with the international shipping industry. Almost 1,000 shipowners, 1,400 ship brokers, and other shipping related companies are BIMCO members. Shipowner members represent more than 65% of the world's available cargo-carrying capacity.

BIMCO strives to raise standards of its members through the harmonization of commercial shipping practices. It promotes quality, safety, security, and environmental protection, the fair treatment of seafarers, and free trade and open access to markets. To accomplish these goals, when appropriate and circumstances so demand, BIMCO takes a position on important issues facing the shipping industry, including filing briefs amicus curiae with this Court.

BIMCO also is a leader in producing standard contractual documents for the shipping industry.[5] These documents are balanced to be acceptable both to shipowners and to charterers[6] of ships. Use of standard documents reduces the need to negotiate each contract, promotes uniformity, and raises standards. These balanced documents are trusted by all parties in the maritime industry. BIMCO drafted the documents in reliance on existing statutes and treaties. This reliance would be impossible if the underlying statutory and treaty provisions could be circumvented by an award of punitive damages.

---

[5] The documents are published and may be found at the BIMCO website, *at* http://www.bimco.org/. The many BIMCO documents can be found by clicking on the "Documentary" menu.

[6] A charterer is a person or entity who, pursuant to an agreement, called a charter party, hires a ship from a shipowner for a period of time, or who reserves all or part of a ship for carriage of goods for a period of time or voyage. *See* Jo Desha Lucas, *Cases and Materials on Admiralty* 587-88 (Foundation Press 1969).

Chamber of Shipping of America

The Chamber of Shipping of America ("CSA") represents 30 U.S. based companies that own, operate, or charter oceangoing container ships, dry bulk vessels, and tankers engaged in both the domestic and international trades, and companies that maintain a commercial interest in the operation of such oceangoing vessels.

CSA provides the voice of the U.S. maritime industry in promoting sound public policy through legislative and regulatory initiatives that include marine safety, maritime security, and environmentally protective operating principles. CSA supports a viable United States domestic maritime industry and promotes open international trade in shipping services. CSA also provides strong technical expertise, marine experience, and knowledge in order to be an authoritative and effective forum for U.S. maritime issues.

CSA represents owners, operators, and charterers of both U.S. and foreign flag ocean vessels before U.S. regulatory, legislative, and administrative entities.

Teekay Corporation

Teekay Corporation ("Teekay") operates a fleet of approximately 170 vessels, including time chartered and commercially managed vessels, and is an essential marine link in the global energy supply chain. Teekay's vessels connect upstream gas and oil production with their downstream refining and distribution.

In 2006, Teekay's tanker fleet transported 236.8 million metric tons of oil and 3.9 million metric tons of liquefied natural gas ("LNG")[7] – representing approximately 10 percent of the

[7] Liquefied natural gas is natural gas that is cooled to about minus 161° Celsius and compressed to 25kPa (3.6 psi) to keep the LNG in liquid form. *See* MarAd website, *at* http://www.marad.dot.gov/dwp/lng/faqs/index.asp#faq_7. It is transported in specially designed ships. While LNG supplies about 4% of the natural gas consumed n the United States at this time, it predicted that LNG will supply 20% of natural gas consumed in the United States by 2015. Joe Silha, *Far East LNG demand siphons more supply from U.S.*, Reuters UK, Sept. 17, 2007, *available at* http://uk.reuters.com/article/oilRpt/idUKN1723399520070917/.

world's seaborne oil movements and about 2.4 percent of the world's LNG transport. Last year, the Teekay fleet completed 3307 voyages. In 2006, the United States imported about 12 million metric tons of LNG, about 10.1 million barrels per day of crude oil, and about 3.4 million barrels per day of other petroleum products.

The Bahamas Shipowners Association

The Bahamas Shipowners Association ("BSA") was inaugurated by The Bahamas Minister of Transport in 1997 to promote the interests of Bahamian registered vessels, currently 1,582 ships with a total of approximately 44 million gross tons. United States based shipowners represent more than 10 percent of the Bahamian tonnage.

The BSA fleet comprises a variety of ships, including cruise ships,[8] refrigerated cargo ships, dry bulk carriers, tankers, ferries, and ships involved in short sea shipping (coastal trade for short distances). BSA represents the interests of the owners of Bahamian registered vessels and voices its views on international policy before such organizations as the U.S. Coast Guard, the IMO, and the European community.

SUMMARY OF ARGUMENT

The amici curiae seek uniformity and predictability in the law governing ocean shipping and international trade. Shipping law will be more uniform and predictable if acts of Congress and treaties are applied as written. When, as here, Congress has prescribed a certain punishment for a certain act or provided certain defenses or limitations, the courts should not displace the uniformity and predictability furnished by that legislation by inventing and imposing other punishments or ignoring the Congressionally mandated defenses and limitations. The Judiciary should not amend treaties and laws. Awarding punitive damages in an area of admiralty law governed by a statute or treaty that does not provide for punitive damages, as in this

---

[8] Cruise ships contributed more than $35 billion to the United States economy in 2006. Sandra Spears, *Hard-hitting cruise sector adds $35bn to US economy*, Lloyd's List, Sept. 3, 2007, at 7.

case, will harm or destroy the order, uniformity, and predictability furnished by treaty and statute.

Imposing punitive damages in this case also threatens order, uniformity, and predictability in many aspects of ocean shipping and world trade governed by treaties and statutes unrelated to pollution. Many of these treaties and statutes punish grievous behavior by denying the shipowner or carrier the right to limit its liability; none of these statutes or treaties imposes, or permits imposing, punitive damages.

Order, uniformity, and predictability would be further harmed if punitive damages were imposed on a carrier for an act or omission not committed by a carrier, as in this case, but by a so-called "managerial employee" of the carrier, even though the employee acted contrary to the carrier's instructions.

Guidance from this Court is needed on the subject of punitive damages in federal causes of action.

ARGUMENT

I. The Court Should Prevent the *De Facto* Amendment of an Act of Congress, the Clean Water Act, by the Lower Courts in This Case to Prevent Serious Harm to the Uniformity and Predictability Needed in All Areas of the Maritime Industry.

The Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*,[9] governs Exxon Shipping Company's and Exxon Mobil's[10] liability and specifies the punishment to be imposed on Exxon for the EXXON VALDEZ spill. The CWA does not provide for the award of punitive damages against Exxon, the owner of the EXXON VALDEZ, and the statutorily-mandated responsible party. Instead, the CWA, on the one hand, limits the liability of the party responsible for the oil spill, but, on the other hand, denies limitation of that liability if the "discharge was the result of wilful negligence or wilful misconduct within the privity and knowledge of the owner." 33 U.S.C. § 1321(f). We understand

[9] 62 Stat. 1155, 33 U.S.C. § 1251, *et seq.*, as the Clean Water Act read on March 24, 1989, the date EXXON VALDEZ grounded.

[10] Exxon Shipping Company and Exxon Mobil are referred to hereinafter as "Exxon."

that Exxon voluntarily paid for virtually all the damage caused by the spill and did not attempt to limit its liability.

Punitive damages were imposed, despite the CWA, because a jury, acting under faulty instructions, determined that Exxon was reckless.[11] Punitive damages were awarded against Exxon as an employer for acts of its employee that were prohibited by Exxon. Punitive damage awards have no basis whatsoever in the statutory scheme of sanctions Congress crafted in the CWA.

The amendment of the CWA by the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C. §§ 2701-2761, after the EXXON VALDEZ spill and as a result of that spill, does not lessen the danger presented by the Ninth Circuit's opinion in this case. OPA 90 provides punishment for a party responsible for spilling oil.[12] It also provides for limitation of liability unless the incident "was proximately caused by . . . gross negligence or wilful misconduct" or by "the violation of an applicable Federal safety, construction, or operating regulation" by "the responsible party, an agent or employee of the responsible party or a person acting pursuant to a contractual relationship with the responsible party." 33 U.S.C. § 2704(c)(1).

OPA 90 does not provide for punitive damages. 33 U.S.C. § 2702(b); *see also South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58, 64-65 (1st Cir. 2000). OPA 90 does far more to prevent an oil spill than the threat of punitive damages could do. OPA 90 requires the carrier to take specified measures to prevent an oil spill. *See, e.g.*, 46 U.S.C. §§ 3703, 3703a.[13] Punitive damages cannot, of course, specify any

---

[11] *See* Jury Instructions on Vicarious Liability for Punitive Damages, Jury Instruction No. 33 (reproduced as Appendix K to Exxon's Petition for Certiorari at 301a).

[12] *See, e.g.*, 33 U.S.C. § 1319(c).

[13] 46 U.S.C. § 3703 and its implementing regulations set forth regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels. Section 3703 is implemented via 33 C.F.R. §§ 155, 156, 157, 162, 163 and 46 C.F.R. §§ 2, 8, 15, 30-32, 34-36, 38, 39, 50, 52-54, 56-64, 70, (Cont'd)

preventive measure a shipowner should take. OPA 90 also requires a carrier to establish means to pay for damage that an oil spill might cause. 33 U.S.C. §§ 2716, 2716(a). Further, OPA 90's proscriptions punish shipowners by depriving them of statutory defenses as well as imposing extremely serious consequences – unlimited statutory liability for compensatory damages – when the incident was proximately caused by "gross negligence or wilful misconduct." 33 U.S.C. § 2704(c)(2)(A).

The problems that could be caused by the Ninth Circuit opinion allowing a court to award a remedy not provided by a statute in an area of admiralty law governed by statute prove the wisdom of Justice Story's opinion in *The Amiable Isabella*, 19 U.S. 1, 71, 72 (1821), which concerned the analogous issue of treaty interpretation:

> [T]his Court does not possess any treaty-making power . . . ; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law.
>
> * * * *
>
> [T]his Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise.

This established principle of law was relied on by the Court recently in *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2679-80 (2006). In *Sanchez*, the Court, citing *The Amiable Isabella* states:

> . . . where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal

---

(Cont'd)
71, 90, 98, 105, 110-14, 146, 150, 151, 153, 154, 157-164, 170, 172, 174, 175, 178, 179, 199. 46 U.S.C. § 3703a and its implementing regulations set forth tank vessel constructions standards including double hull requirements. Section 3703a is implemented via 33 C.F.R. §§ 156, 157.

> courts to impose one on the States through lawmaking of their own.

Id. at 2680.

The same reasoning was applied by this Court to an act of Congress in *Miles v. Apex*, 498 U.S. 19 (1990). There, this Court awarded the remedies and only the remedies provided by an admiralty statute, the Jones Act. *Id.* at 33. Punitive damages and other remedies not provided by the Jones Act were not awarded:

> [W]e must . . . keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.
>
> * * * *
>
> [I]n an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." [Quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)].
>
> * * * *
>
> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.

Miles, 498 U.S. at 27, 31, 36.

The rule expressed in *Miles v. Apex* should prevent imposing punitive damages in any area of maritime law that is governed by a treaty or statute that does not provide for the imposition of punitive damages. The risk of punitive damages in such a case threatens to destroy the uniformity and predictability and the balance of rights and liabilities achieved by the many admiralty treaties and statutes.

Other maritime treaties or statutes, described below, would deprive a shipowner of a limitation for grievous acts or omissions by an employee, but none would impose punitive damages.

II. The Court Should Prevent a Unilateral Award of Punitive Damages From Disturbing the Appropriate Punishment for Egregious Conduct Established by Congress and the International Community of Nations to Maintain Uniformity and Allocation of Risks in the Maritime Industry.

Order, uniformity, and predictability are needed to obtain efficient insurance coverage in shipping. The adverse effect of the Ninth Circuit opinion is not limited to oil tankers. It could easily extend to all kinds of ships and marine ventures. Judge Kozinski, in his dissent from the Ninth Circuit's refusal to rehear the case en banc, noted:

> The panel's decision exposes owners of every vessel and port facility within our maritime jurisdiction – a staggeringly huge area – to punitive damages solely for the actions of managerial employees. Because of the harsh nature of vicarious liability, ship owners won't be able to protect themselves against our newfangled interpretation of maritime law through careful hiring practices. Accidents at sea happen – ships sink, collide and run aground – often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless. For centuries, companies have built their seaborne businesses on the understanding that they won't be subject to punitive damages if they "[n]either directed it, nor countenanced it, nor participated in" the wrong, *The Amiable Nancy*, 16 U.S. at 559; the panel opinion has thrown this protection overboard.
>
> * * * *
>
> If your vessels sail into the vast waters of the Ninth Circuit, a jury can shipwreck your operations through punitive

> damages and the fact that you did nothing wrong won't save you. Such major turbulence in the seascape of the law ought to come, if at all, from the Supreme Court.

Pet. App. at 291a-92a.

If the uncertainty produced by the Ninth Circuit's opinion were allowed to stand, insurance costs for maritime shipping, if insurance were even available, would increase the cost of trade with the United States. The more clearly risks inherent in the maritime industry are defined and assigned, the more efficient the insurance system protecting such risks can be. Efficient definition and assignment of risks are found in the many admiralty treaties and the many United States admiralty statutes.[14]

When maritime risks are clearly assigned to only one party, that party alone will obtain insurance cover and pay insurance premiums for that risk. When risks are not clearly assigned to only one party, then all parties to whom the risk might possibly be assigned need to obtain insurance cover and pay insurance premiums for the risk that might be assigned to them, resulting in increased business cost, and hence increased cost of trade with the United States.

Letting stand the Ninth Circuit opinion would call into question assignment of risks in maritime statutes and treaties across the board. The rationale of the Ninth Circuit could justify an award of punitive damages for an act or omission that by

[14] Although the United States has not ratified all of the world's admiralty treaties, even unratified treaties often apply in the United States under our conflict of law rules. *See, e.g., Man Ferrostal, Inc. v. M/V Vertigo*, 447 F.Supp.2d 316 (S.D.N.Y. 2006), *reconsideration and certificate of appealability denied*, 2006 U.S. Dist. LEXIS 66621 (S.D.N.Y. Sept 18, 2006)(applying 1910 Collision Convention); *Otal Investments Ltd., M/V Kariba*, 03 Civ. 4304, 03 Civ. 9962, 04 Civ. 1107, 2005 U.S. Dist. LEXIS 13321, 2005 AMC 2454 (S.D.N.Y. July 7, 2005)(applying 1910 Collision Convention), *aff'd in part, rev'd and remanded in part*, 494 F.3d 40 (2d Cir. 2007); *see also Itel Container Corp. v. M/T Titan Scan*, 139 F.3d 1450 (11th Cir. 1998), *cert. denied*, 525 U.S. 962 (1998) (applying the Hague/Visby Rules as incorporated by reference).

statute or treaty should be excused outright or should result in limited liability. Punitive damages could be imposed on a carrier in one case and on cargo interests in precisely the same circumstances in another case.

The treaties and statutes that govern the waterborne carriage of goods provide a good example of this comprehensive system relied upon by the community. Even when statutes and treaties do not necessarily govern contracts, they are commonly incorporated by reference into those contracts for the sake of uniformity and predictability.

The first statute to assign the risks inherent in the carriage of goods was the Harter Act, enacted by the United States in 1893.[15] The Hague Rules[16] refined and modified the assignment of risks in 1924. The United States adopted the Hague Rules as the Carriage of Goods by Sea Act (COGSA) with minor amendments in 1936[17] and ratified the Hague Rules with reservations for those minor amendments in 1937.[18] The Hague Rules assignment of risk still governs the carriage of goods in most of the maritime nations today. By assigning risks inherent in the carriage of goods, the Hague Rules determine risks for which the carrier would pay for insurance and those for which cargo interests would pay for insurance.

A great body of case law has developed on risk allocation for the carriage of goods by sea during over a century of experience with the governing statutes and treaties. Courts in the United States and abroad have interpreted the Harter Act

[15] Act of Feb. 13, 1893, ch. 105, 27 Stat. 445 (1893) (codified at 48 U.S.C. §§ 30702-30707).

[16] International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels, Aug. 25, 1924, 51 Stat. 233, 247, 120 L.N.T.S. 155 ("Hague Rules"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 1-1 (7th rev. ed. 2007).

[17] Carriage of Goods by Sea Act, Ch. 229, 49 Stat. 1207 (1936), Pub. L. No. 109-304, 120 Stat. 1485 (2006), *reprinted in* note following 46 U.S.C. § 30701 (formerly codified at 46 U.S.C. §§ 1300, *et seq.*)

[18] International Convention for the Unification of Certain Rules Relating to (Ocean) Bills of Lading ("Hague Rules"), June 29, 1937, 51 Stat. 233, T.S. 931, 120 L.N.T.S. 155, 157, 183.

since 1893, the Hague Rules since 1924, COGSA since 1936, and the Hague/Visby Rules since 1968.[19] These decisions have all built on those that went before, creating well-established authority, because changes among the successive regimes are primarily concerned with the limitation of value of the goods for which a carrier would be liable. Those changes did not affect the basic liability apportionment structure. Punitive damages seriously harm the precedential value of this entire line of authority.

In the same manner, the Ninth Circuit opinion adversely affects a treaty that is currently being drafted by the United Nations Commission on International Trade Law (UNCITRAL) because the present draft of the proposed convention employs the same basic method used by the original Hague Rules and the Hague/Visby Rules to define the risk allocation between carriers and cargo interests.[20] UNCITRAL Working Group III, which is drafting the new treaty, is carefully balancing the interests of all parties. Non-governmental organizations are consultative members of UNCITRAL and attend the meetings to give their expert advice to the Working Group. Both amicus ICS and amicus BIMCO are consultative members of UNCITRAL and actively participate in drafting the new treaty. The United States is playing a very active role in drafting the treaty, which will likely be ratified. Like the Working Group as a whole, the United States Delegation to the Working Group is carefully balanced to reflect the interests of all segments of the industry. It comprises representatives of the U.S. State Department, the U.S. Maritime Administration, The Maritime

[19] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Signed at Brussels on Aug. 25, 1924, Feb. 23, 1968, 1412 U.N.T.S. 128 ("Hague-Visby Rules"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 1-2 (7th rev. ed. 2007).

[20] A/CN.9/WG.III/WP.81 – Transport Law: draft convention on the carriage of goods [wholly or partly] [by sea], dated February 13, 2007. The present draft of the proposed convention may be found at the UNCITRAL website: www.uncitral.org. by clicking on Working Group III.

Law Association of the United States, and trade organizations representing shippers, carriers, transportation intermediaries, insurers, inland carriers, and terminal operators.

The delicate balance between carrier interests and cargo interests in this risk allocation system, carefully crafted through more than a century of experience, and used in the UNCITRAL treaty now being drafted, should not be changed or circumvented by judicial awards of punitive damages. The Ninth Circuit's opinion in this case, however, in a single stroke, could nullify the defenses and limitations of liability provided in all of these laws and treaties and the system of commerce and commercial relations that has evolved and exists in reliance on them.

Congress and the international community have together established uniformity in admiralty law, which allows members of the community to plan and calculate the consequences of their actions. The regulations of the International Maritime Organization ("IMO"),[21] such as the International Maritime Dangerous Goods Code ("IMDG")[22] and the Nairobi International Convention on the Removal of Wrecks,[23] are other

[21] Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 3. IMO promotes cooperation among governments and the shipping industry to improve maritime safety and prevent marine pollution. IMO is the source of legal instruments that guide the regulatory development of its 167 member states to improve safety at sea, facilitate trade among seafaring states, and protect the maritime environment. International Maritime Organization, http://www.imo.org./home.asp (last visited, Sept. 17, 2007).

[22] International Maritime Dangerous Goods Code, London, November 2003, *at* www.imo.org/home.asp. The IMDG Code achieves world-wide uniformity for regulations concerning the transport of dangerous goods by sea as well as other modes of transport. *See id.*

[23] This new Convention, expected to go into force in 2009, provides a sound legal basis for coastal States to remove, or to have removed, from their coastlines, wrecks which pose a hazard to the safety of navigation or to the marine and coastal environment. It makes shipowners financially liable and requires them to have insurance or provide other financial security to cover costs of wreck removal. *See id.*

examples of this careful balance in statutes and treaties. This body of international maritime law, crafted by expert bodies and political branches of government, sets standards, sanctions unsafe behavior, and at the same time avoids indeterminacy and penalties that would discourage maritime commerce.[24]

III. The Court Should Prevent Awards of Punitive Damages Circumventing Further Refinement of Risk Assignment in the Maritime Industry by Liability Limitations.

Limitation of liability performs two valuable functions in the maritime world. It increases a carrier's ability to obtain insurance for risks assigned to it and thus assures that parties' losses will be paid. It also further defines the party to bear the risk of loss or damage.

Carriers bear the risk of damage, if they are liable, up to the limitation amount, and cargo interests bear the risk above the limitation amount. Shippers of expensive cargo must pay the insurance premium for the value of their cargo above the limitation amount. The carrier pays the insurance premium for its liability up to the limitation amount. The carrier pays the insurance premium from the freight that the carrier charges to carry the cargo. The freight charged by the carrier is not computed according to the value of the cargo. The carrier usually

---

[24] Other examples of this body of international law include the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2 ("SOLAS") (entered into force May 25, 1980), and its 1978 Protocol, Feb. 17, 1978, 32 U.S.T. 5577, 1226 U.N.T.S. 237 (entered into force May 1, 1981), as amended; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, July 7, 1978, S. Exec. Doc. No. 96-1 EE, 1361 U.N.T.S. 2 ("STCW") (entered into force Apr. 28, 1984, for the United States Oct. 1, 1991), and its July 7, 1995 amendments, *reprinted in* 6D Benedict on Admiralty Doc. No. 14-6 (7th rev. ed. 2007); and the International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 34 U.S.T. 3407, 1313 U.N.T.S. 3 ("MARPOL")(entered into force Mar. 30, 1983), and its 1978 Protocol, Feb. 17, 1978, 17 I.L.M. 546, 1340 U.N.T.S. 61 (entered into force Oct. 2, 1983), *reprinted in* 6A Benedict on Admiralty Doc. No. 6-1 (7th rev. ed. 2007). These treaties are subject to continuing amendment under the auspices of the IMO.

does not know the value of cargo it carries. Without limitation, shippers of moderately valued cargo would subsidize shippers of high value cargo. All cargo would pay the same freight rate and that freight would pay for insurance for the carrier's risk for all cargo, low value and high value.

Many admiralty treaties and statutes use loss of limitation, rather than punitive damages, to punish grievous behavior. Two general types of limitation provisions are common. "Global limitations" are provided by the United States Limitation of Liability Act of 1851, 46 U.S.C. §§ 30502-30512, the 1976 Limitation Convention,[25] and the 1996 Protocol to the 1976 Limitations Convention.[26] These limit all liability of shipowners, not only liability for cargo, subject to certain exceptions. The other type of limitation regime limits the carrier's liability for cargo damage to a set amount per package or other unit.

In the United States, the Limitation Act provides global limitation. It limits a shipowner's liability to the value of the ship at the end of the voyage plus freight earned on the voyage. The Limitation Act also provides a fund for wrongful death and personal injury claims. The shipowner is denied the right of limitation if it was liable and someone high enough in its corporate structure to be considered "the owner" knew, or should have known, of the fault for which the shipowner was be liable. 46 U.S.C. § 30505(b).

The 1976 Limitation Convention and its 1996 Protocol limit the liability of shipowners, charterers, and others for all claims

---

[25] International Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 1456 U.N.T.S. 221, 16 I.L.M. 606 ("1976 Limitation Convention"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 5.4 (7th rev. ed. 2007).

[26] Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, May 2, 1996, [2004] Austl. T.S. 16, 35 I.L.M. 1433, *reprinted in* 6 Benedict on Admiralty, Doc. No. 5.4A (7th rev. ed. 2007). The United States has not ratified or adhered to the 1976 Limitation Convention or its 1996 Protocol. United States courts, nevertheless, will apply these international treaties when appropriate under choice of law principles.

with certain exceptions.[27] This convention limits liability according to the tonnage of the ship. Limitation is denied "if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." 1976 Limitation Convention, Article 4.

The Athens Convention[28] established a regime of liability for damages suffered by passengers carried on seagoing vessels. Under Article 13 of the Athens Convention, a carrier's liability is limited to a fixed amount per incident, unless "if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

The Hague/Visby Rules[29] deprive a carrier of its right to limitation "if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result." Hague/Visby Rules, Article IV, Section 5(e).

---

[27] The 1976 Limitation Convention was preceded by a 1924 and a 1957 Convention. International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Vessels, 1924, 120 LNTS 123 (Brussels, August 25, 1924) ("1924 Convention"); The International Convention Relating to the Limitation of the Liability of Owners of SeaGoing Ships (Brussels, October 10, 1957) ("1957 Convention"). The 1924 Convention was similar to the United States Limitation Act in that it did not limit "obligations arising out of acts or faults of the Owner of the vessel . . ." Article 2 of the 1924 Convention. The 1957 Convention did not permit limitation if "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner."

[28] Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, Dec. 13, 1974, U.K.T.S. 43 (1989), 16 I.L.M. 625 ("Athens Convention"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 2.2 (7th rev. ed. 2007).

[29] Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 ("Hague/Visby Rules").

The UNCITRAL Instrument will probably use the same limitation mechanism as the Hague/Visby Rules, but the amount of the limitation has not yet been determined. Limitation of liability will probably be denied by the new treaty if the breach of the carrier's obligation "was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result."[30]

Although COGSA does not have a comparable provision for loss of limitation rights, case law interpreting COGSA's package limitation provision deprives a carrier of limitation rights if the carrier unreasonably deviated from the voyage[31] or fundamentally breached the contract of carriage.[32] But these doctrines are limited. Judge Friendly's decision in *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 507 F.2d 68 (2d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975), specifically held that wilful and wanton recklessness would not deprive a carrier of its limitation rights. There, the very test used by the Ninth Circuit to award punitive damages below was rejected by the Second Circuit to deprive a carrier of the COGSA limitation.[33]

---

[30] WP.81 article 64(1), note 20 *supra*.

[31] *See, e.g., P&E Shipping Corp. v. Empresa Cubana Exportada E Importadora de Alimentos*, 335 F.2d 678 (1st Cir. 1964).

[32] *See, e.g., Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2d Cir. 1985), *cert. denied*, 476 U.S. 1188 (1986).

[33] In *John Weyerhaeuser*, Judge Friendly explained that gross negligence or wilful and wanton misconduct should not deprive the carrier of its limitation rights. He described the advantage of a clear and narrow definition of the circumstances in which limitation rights could be lost. His reasoning indicates that uniformity and predictability should not be disturbed by punitive damages:

> [A]cceptance of plaintiff's argument would mean that in almost all cases of loss due to unseaworthiness, in addition to the inquiry, directed by § 4(1) of COGSA, . . . shippers or, realistically, their insurers would demand a further inquiry into the degree of the carrier's culpability, with

(Cont'd)

The drafters of all these admiralty statutes and treaties relied on the loss of limitation rather than punitive damages to deter egregious behavior. Courts should not now permit jury punitive damage awards to disturb that well-known system.

If allowed to stand, the decision of the Ninth Circuit in this case will wrongheadedly allow a single American jury to nullify the detailed consideration of the members of Congress, the international community and the UNCITRAL Working Group, by awarding punitive damages even though punitive damages are not included in the treaties and statutes, which themselves provide a comprehensive, orderly and uniform system of mandates, proscriptions, defenses, and sanctions governing waterborne shipping in the United States and abroad.

(Cont'd)

> enormous potential liability, as illustrated by this case, riding on the decision of the fact finder, protected in many circuits by the "unless clearly erroneous" rule, and enjoying great weight even in this one. . . . The difficulties that have been experienced in defining and applying varying degrees of negligence or even the concept of "wilful and wanton" are indicated in Prosser, Torts § 34 (4th ed. 1971).
>
> * * * *
>
> In sum, loss due to an allegedly exceptional degree of negligence in furnishing an unseaworthy ship falls into Lord Diplock's category of risks concerning which 'it is more practical and economical from the point of view of insurance to spread the risk to the cargo in excess of a fixed limit among a number of cargo insurers rather than to concentrate it in the carrier's [protection and indemnity] insurer.' Diplock, Conventions and Morals – Limitation Clauses in International Maritime Conventions, 1 J.Mar.L. & Comm. 525, 528-29 (1970).

507 F.2d at 7273 (internal citations omitted).

IV. The Court Should Prevent the Award of Punitive Damages Against An Employer for the Unauthorized Acts of Its Employee.

Order, uniformity, and predictability would be further harmed if punitive damages were imposed on a carrier for an act or omission not committed by a carrier, as in this case, but by a so-called "managerial employee" of the carrier, even though the employee acted contrary to the carrier's instructions.

The reasoning of this Court in the landmark *The Amiable Nancy*, 16 U.S. 546 (1818), referred to in Judge Kozinski's dissent,[34] should be upheld in this case. Imposing punitive damages for the unauthorized act of an employee, particularly an award as large as in this case, encourages unneeded and wasteful litigation. Judge Kozinski also noted the conflict between the circuits on the vicarious liability for punitive damages issue and that no circuit that dealt with the issue agreed with the Ninth Circuit opinion below. Pet. App. 288a-90a.

V. This Court Should Establish Clear Standards for the Award of Punitive Damages In Areas of General Maritime Law Not Governed By Treaties or Statutes.

Punitive damages should not be awarded in this case, because it is governed by the CWA, which does not provide for punitive damages. Nevertheless, guidance from this Court in this federal maritime case would assist future cases and would reduce future litigation. Guidance is needed to define when punitive damages should be awarded in non-statutory maritime cases and how large those awards may be.

CONCLUSION

The petition for writ of certiorari should be granted.

---

[34] Pet. App. at 287a-92a.

Respectfully submitted,

RICHARD J. REISERT
CLARK, ATCHESON & REISERT
7800 River Road
North Bergen, NJ 07047
(201) 537-1200

Attorneys for Amicus The Bahamas Shipowners Association

CHESTER D. HOOPER
Counsel of Record
JOVI TENEV
HARMONY I. LOUBE
LISSA D. SCHAUPP
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

Attorneys for Amici International Chamber of Shipping, The Baltic and International Maritime Council, Chamber of Shipping of America, Teekay Corporation, and The Bahamas Shipowners Association

Blank Page