STATE OF MISSISSIPPI

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Hearing before the United States House of Representatives
Committee on the Judiciary

on

Liability Issues Surrounding the Gulf Coast Oil Disaster
Thursday, May 27, 2010

Chairman Conyers and Members of the Committee:

Thank you for inviting me to speak to you regarding legal liability issues related to the Gulf Oil Spill. It is an honor to appear before you and to share my thoughts regarding these critical matters. The threat posed by this devastating event to our shared natural resources and to the economic livelihood of both private citizens and local and state government entities is enormous. I am gratified to see the joint efforts at the federal, state, and local levels thus far in working toward the common goal of recovery from this disaster and am pleased to be a part of those endeavors. I also appreciate BP's spirit of cooperation to date with the State Attorneys General and expect to see those shared efforts continue as we move forward.

I. Potential State Claims Arising From the Oil Spill

As the Attorney General of the State of Mississippi, it is my duty to protect the public interest of the state, including management of litigation of statewide interest. It is everyone's hope that liability issues may be resolved and that recovery of clean-up costs, natural resource damages, lost revenues, and all other damages related to the oil spill may be accomplished without the need for litigation. However, as part of my duty, it is incumbent on me to look ahead and prepare for the possibility of having to pursue relief in the courts on behalf of the state. Toward that end, my office has begun the process of reviewing all potential legal claims on behalf of the state arising out of the oil spill incident. Those

claims fall into four basic categories: state statutory claims, state common law claims, federal statutory claims, and federal common law claims.

A. Mississippi Statutory Law

While several states have adopted their own oil spill legislation, Mississippi has not done so. Accordingly, the Mississippi statutory law applicable to an oil spill comes in the form of the Mississippi Air and Water Pollution Control Law and the Coastal Wetlands Protection Act.

The Mississippi Air and Water Pollution Control Law makes it unlawful to cause pollution of any of the state's waters and declares any such action to be a public nuisance. The law provides for recovery for wildlife replenishing and remediation costs as a result of pollution, and authorizes civil actions for injunctive relief, civil penalties, removal costs, remedial costs and the costs of restocking state waters with fish and wildlife.

The Coastal Wetlands Protection Act imposes civil liability on persons for wetland destruction, including killing or materially damaging any plants or animals on or in any coastal wetlands, and for removal of sunken vessels. Persons held in violation of the Act are liable for the restoration of all affected coastal wetlands to their previous condition, insofar as is possible, and for any and all damages to the wetlands. The Act also provides for discretionary imposition of punitive damages. In addition, the Act expressly reserves other statutory and common law remedies allowable by law.

B. Mississippi Common Law Claims

The public trust doctrine vests states with the duty to hold and preserve certain resources, including wildlife and fisheries, for the benefit of its citizens. As a practical matter, the public trust doctrine provides standing to a state attorney general to pursue legal action for these claims. Attorneys General may then utilize several alternative and complementary common law theories of recovery, including public nuisance, strict liability, negligence, and trespass.

C. Federal Common Law

Prior to the adoption of the Oil Pollution Act of 1990 ("OPA 90"), general maritime law governed claims arising from damages caused by oil spills on navigable waters. However, it seems clear that OPA 90 preempts the general maritime law (at least in part), leaving OPA 90 and state law as the sole sources for claims arising out of oil spills.

D. The Oil Pollution Act of 1990

As this Committee is aware, OPA 90 is a strict liability scheme in which a "responsible party" owes a variety of damages to any eligible claimant, including a sovereign state. States can recover: removal costs, losses of government revenue, costs of increased public services, and natural resource damages. Importantly, OPA 90 contains a non-preemption provision which expressly allows a state to establish "additional liability requirements" for damages arising in oil spills and grants jurisdiction to state courts to hear claims arising under OPA 90.

Despite this grant of concurrent jurisdiction, at least one federal district court in Louisiana has found that OPA 90 claims do give rise to federal question jurisdiction sufficient to sustain the removal of claims from state to federal court. *Tanguis v. M/V WESTCHESTER*, 153 F.Supp.2d 859 (E.D. La. 2001).

II. Needed Legislative Assistance

In anticipating any potential litigation arising out of this oil spill, the threat of removal to federal court will be a hindrance to the pursuit of legitimate claims by victims, including the states. This concern is compounded by the possibility that thousands of claims will be consolidated once removed. The result is that parties rightfully entitled to compensation will forgo assertion of certain valid claims for fear of being dragged into lengthy federal litigation. At a time when those impacted require immediate resolution and recovery, they instead will be subjected to the endless morass of protracted lawsuits. This is exactly what happened in the Exxon Valdez litigation, and it is exactly what I ask this Committee to work toward preventing now. *See* William B. Hirsch, "The Exxon Valdez Litigation Justice Delayed: Seven Years Later and No End in Sight" (1996) (attached hereto as Appendix A).

As a veteran of the insurance wars following Hurricane Katrina, I have experienced first-hand the frustration of unnecessary postponement of the judicial process caused by dilatory defense tactics, including imprudent removal to federal court. The American constitutional order is a federal system requiring a

strong role for both the federal government and the governments of the states. Respect for this fundamental concept of federalism extends to the states' legal systems. When companies are allowed to remove to federal court every action brought against them in state court, as is routinely practiced, it causes a breakdown in the system due to overloaded federal dockets. When it is a state itself who is the plaintiff party in interest, this encroachment on state sovereignty is a particular insult.

In this light, I propose a handful of legislative changes that should serve to reduce the unfair stalling tactics commonly employed by corporate wrongdoers in litigation brought by a state. My first suggestion is that Congress simply pass plainly-worded legislation which would prohibit the removal to federal court of any action initiated on behalf of a state. *See* Proposed Legislative Amendments, Section I (attached hereto as Appendix B). In connection with the current situation, OPA 90 should be amended to prohibit removal to federal court of claims filed on behalf of a State in state court. *See* Appendix B, Section II. OPA 90 does contain a non-preemption provision which expressly allows a state to establish "additional liability requirements" for damages resulting from oil spills and grants jurisdiction to state courts to hear claims arising under OPA 90. However, the statute should be amended to specifically prohibit removal to federal court of any such claims filed on behalf of a State. *See* Appendix B, Section II. Similarly, it has become far too commonplace for defendants to seek

removal of actions instituted by a state on the basis that the action implicates federal issues. State and local governments have experienced this delay tactic far too often in recent years. *See, e.g., Hood v. Ortho-McNeil-Janssen Pharm., Inc.*, Civ. Action No. 1:08CV166-SA-JAD, 2009 WL 561575 (N.D. Miss. Mar. 4, 2009). I ask that Congress amend 28 U.S.C. § 1445 to explicitly prohibit this practice *See* Appendix B, Section I. Allowing the states to pursue their claims in a state forum would revive the Eleventh Amendment's assurance of state sovereignty, a right which has been severely eroded over the last decade.

Secondly, I urge Congress to amend 28 U.S.C. § 1447, governing the procedure following removal, in order to establish a fixed deadline for federal courts to rule on motions to remand and to impose penalties on party defendants who file frivolous notices of removal. *See* Appendix B, Section III. Having experienced lengthy delays in important state litigation while cases languished in federal court before overloaded federal judges, I feel very strongly that change is needed to deter companies from abusing the system to delay justice and deny injured parties of their rightful day in court. Justice delayed is justice denied.

Thirdly, I propose that the Anti-Injunction Act be amended to specify that no federal court may enjoin parallel litigation pursued by a state in its own courts. *See* Appendix B, Section IV. The All Writs Act, 28 U.S.C. § 1651, as limited by the Anti-Injunction Act, 28 U.S.C. § 2283, grants a federal court authority to enjoin state court litigation if the federal court determines an injunction is "necessary in

aid of its jurisdiction" or "to protect or effectuate its judgments." In recent years, federal multi-district litigation courts have utilized this grant of authority in a wide range of circumstances. In fact, BP has already filed a motion pursuant to 28 U.S.C. § 1407, seeking to consolidate cases related to the Deepwater Horizon incident in the Southern District of Texas. *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (currently pending on motion to transfer). I am deeply concerned that, without such an amendment to the Anti-Injunction Act, the parties responsible for this disaster may seek to utilize the ambiguous grant of authority provided by the Act to hinder my efforts to obtain full and complete justice for the citizens of Mississippi.

Finally, Congress should amend the Limitation of Liability Act, 46 U.S.C. §§ 30501 to 30512, and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, to exempt sovereign states from the procedural and substantive rights granted vessel owners. *See* Appendix B, Section V. As we have already witnessed with Transocean's recent filing in a Houston, Texas federal court, limitation of liability actions are sometimes commenced by a vessel owner without legal justification for the purpose of delaying and defeating the rights of damaged claimants, including states. This practice must stop.

III. Expedient Claims Resolution Procedure

In the aftermath of Hurricane Katrina, I learned that it was in everyone's interest for property owners' claims to be evaluated and paid through an expedited, equitable, and transparent process to facilitate the recovery process. We need such a claims process on the Gulf Coast now to remedy the harm caused by the oil spill before it is compounded by delay. Steps have already been taken in a coordinated effort between the Gulf Coast State Attorneys General and BP to establish such a claims process to assist victims. It is critical that this process be implemented to provide immediate relief to our Gulf Coast residents, businesses, and local governments. Endorsement of the procedure by the State Attorneys General would encourage greater participation in it, thereby reducing the need for future prolonged litigation. However, I and my colleagues cannot embrace any claims review process unless we receive adequate assurances of its fairness. Among those assurances are the need for an elimination of any overall or aggregate caps or maximum individual payments, and the retention of each claimant's right to pursue legal action in the future. I have attached a letter listing other demands on BP. *See* Appendix C. Although BP individually has informally made these commitments to us, anything that this Committee can do to encourage cooperation among all of the companies would go a long way toward recovery.

Thank you again for the opportunity to address you today. I look forward to working with you to ensure that all individuals, private companies, and governmental entities are fully compensated for all losses associated with this devastating event.

Thank you to Mary Jo Woods, Special Assistant Attorney General, for assisting in the preparation of these materials. Copies are available upon request via e-mail to mwood@ago.state.ms.us.

EXXON VALDEZ OIL DISASTER AND CLASS ACTION LAWSUIT

ARTICLE

THE EXXON VALDEZ LITIGATION JUSTICE DELAYED: SEVEN YEARS LATER AND NO END IN SIGHT (1996)

by William B. Hirsch

Introduction

Five years after the Exxon Valdez crashed into Bligh Island, triggering the greatest environmental disaster in history, twelve jurors looked out on an overflowing courtroom and began a four and a half month odyssey that culminated in a $5 billion punitive damages award against Exxon Corporation.

Now, more than seven years after the spill and nearly two years after the jury verdict, no final judgment on the jury verdict has been entered by the federal court, the agonizingly long appeals process has not yet begun, and the ten thousand fishermen who won at trial face years of additional litigation and delay. Moreover, thousands of other victims of the spill have helplessly watched the federal court dismiss their claims on technical legal grounds, leaving these individuals with appellate rights but little else.

Exxon can afford to stall, and actually benefits from delay, but the commercial fishermen and others injured by the oil spill have not yet recovered, financially or emotionally. Perhaps a decade after the oil spill -- maybe in 1999 -- this case will end. More likely, the gloating prediction of Exxon's chief strategist will turn out true, and the case will stretch into the 21st century.

And even if plaintiffs are ultimately successful, they will have paid twice: once for the spill, which devastated their communities and left many in financial ruin, and again for daring to demand justice, which has already consumed their time, energy and hopes for seven years. Meanwhile, Exxon has continued to make record profits, spent hundreds of millions of dollars to defeat the injured victims and their lawyers, and nurtured a public image that is directly contradicted by the approach and strategy it has pursued throughout the litigation.

Newspapers in Alaska recently carried articles about the "spillionaires," victims of the oil spill who stand to make a million dollars or more if the $5 billion punitive damage award stands up. It is true -- some of the victims may end up rich. But none chose this path, and few, if any, would wish to relive the last seven years, whatever their potential recovery may be. Indeed, if justice comes, it will be hard to recognize.

In the following pages, we will explain how the litigation has developed over the last seven years, and what is likely to happen in the future. In the process, we will see how Exxon has skillfully used the judge, the law, and its own vast resources to ensure that the litigation will continue into the 21st century, even though the whole world knows -- and Exxon admits -- that it is responsible for the greatest environmental disaster in history.

Unlike many toxic or environmental disasters, there is no doubt about what happened here. At its simplest, Exxon's largest ship, the *Exxon Valdez*, ran into Bligh Island, and spilled 11 million gallons of oil into prime fishing grounds in Prince William Sound ("PWS") and beyond. The thick messy oil spread throughout PWS, washed up on beaches and land, and killed thousands of fish, otters, whales, birds and other wildlife. The ownership of the *Exxon Valdez* and its cargo was never in dispute, and Exxon's liability seemed obvious, especially since Lawrence Rawls, Exxon's Chairman, announced on national television a week after the spill (*Face the Nation*) that Captain Joseph Hazelwood was drunk at the time and that it was "gross error" and "bad judgment...in a going-in basis" on Exxon's part to return Hazelwood to his position as captain given his history of alcohol abuse. In a public letter published in newspapers across the company a few days after the spill, Rawls said that Exxon would "meet our obligations to all those who suffered damage from the spill."

Immediately after the spill, Exxon sent teams of public relations specialists to the area, and conducted many public meetings where it again proclaimed, in the words of one of its most ardent spokesmen:

"You are lucky. You have got Exxon. We take care of our problems." Within weeks of the spill, Exxon set up a "claims program" to provide fishermen and others with immediate relief and to pay for the damages they suffered. Many other fishermen and other local residents were hired by Exxon for spill clean-up and were well-paid for their boats, equipment and time. All told, Exxon claims that it spent $3.5 billion cleaning up the spill, without coercion from the government or the courts.

Exxon's clean-up effort, however, was inadequate. Alyeska Pipeline Service Company, which was formed by Exxon and the other oil companies, and which was responsible for creating an emergency response plan and responding to an oil spill, was similarly unable to cope with an oil spill of this magnitude. Perhaps 15% of the oil was picked up. Much of it still lies beneath the sand and beaches of PWS.

Moreover, the claims payments paid by Exxon did not fully compensate the victims for their losses. For many, like the fishermen, these losses stretched for years into the future. For others, their losses were not covered by the claims program.

Most of all, amidst the environmental destruction and the agony suffered in towns and villages throughout PWS, Kodiak Island, and Cook Inlet, everyone wanted to know how this happened. How could Exxon let a known alcoholic with a long history of alcohol abuse captain a supertanker carrying 55 million gallons of crude oil in precarious and environmentally sensitive waters, endangering a wonderfully rich and diverse ecosystem and exposing the local communities and their residents to financial ruin? Who was going to pay for the real damage, the long-term damage caused by this senseless tragedy? And what could be done to make sure nothing like this ever happened again?

So, despite Exxon's promise to take responsibility for the spill and to compensate the victims, individual and class action lawsuits were filed almost immediately. And from the beginning, it was clear that the *Exxon Valdez* case would not be just about liability and compensatory damages. It was and always has been about punitive or exemplary damages. That is the real question, and the driving force behind the litigation.

Plaintiffs filed class and direct action lawsuits in both federal and state court. This is permissible under our federal form of government, which in many areas of the law (including maritime claims) grants overlapping jurisdiction to the federal and state courts.

In both courts, claims were made by commercial fishermen, natives, native corporations, land owners, area businesses, municipalities, tenderers, cannery workers, processors, recreational users and others. The primary defendants were Exxon and Alyeska.

From the beginning, Exxon pursued a complicated and sophisticated legal strategy. In the early stages of the litigation, Exxon, with the assistance of Alyeska, vigorously fought efforts by the plaintiffs to treat the case as a class action and sought to dismiss the claims of large numbers of injured parties on technical legal grounds. When it became apparent that the federal judge, the Honorable H. Russel Holland, was generally sympathetic to Exxon's position and more likely to rule in its favor on major issues than the state judge, the Honorable Brian Shortell, Exxon managed to transfer the bulk of the state cases to federal court, where they were dismissed by Judge Holland.

Finally, nearly five years after plaintiffs filed their original motion seeking class action treatment, Exxon changed its earlier position and persuaded Judge Holland to certify a "mandatory punitive damages class," thus stripping Judge Shortell of his authority to try punitive damages in his courtroom and limiting Exxon's exposure to a single punitive damages trial. Prior to trial, Exxon's strategy to narrow and limit the case worked according to plan.

Narrowing The Claims

Plaintiffs sued Exxon and Alyeska under various legal theories, including common law negligence, nuisance, and misrepresentation. Plaintiffs also brought claims in federal court for strict liability under the Trans-Alaska Pipeline Authorization Act ("TAPAA"); in state court, the strict liability claim was brought under the Alaska Environmental Conservation Act (the "Alaska Act").

Typically, common law claims are based on state law. However, the Constitution establishes that the federal judicial power extends to "all cases of admiralty and maritime law." Once admiralty jurisdiction is established, the substantive law of admiralty is applied.

Early on in this litigation, both the federal and state courts were asked to decide whether maritime law applied to the case, whether it preempted state common law, and whether, under maritime law, certain types of claims were precluded. These questions were of critical importance: the answer would

determine which groups of injured plaintiffs would be legally entitled to bring claims.

In February 1991, nearly two years after the catastrophe, the federal court gave its answer. In Order No. 38, Judge Holland first ruled that the oil spill was a "maritime tort" since it satisfied the "locality" and "maritime nexus" tests, which together are used to determine whether maritime jurisdiction is invoked. Judge Holland then ruled that maritime jurisdiction applied not only to injuries suffered at sea, but also to injuries that occurred on land, so long as they were proximately caused by a vessel at sea. Thus, for example, owners of a restaurant, a boatyard, and a marine supply company, whose businesses were damaged by the spill, were swept within the jurisdiction of maritime law.

The next step in Judge Holland's analysis was crucial. Applying what has become known as the *Robins Dry Dock* rule, Judge Holland concluded that, in the absence of physical injury to person or property, a party may not recover for pecuniary or economic losses suffered as a result of a maritime tort. In other words, liability is limited to those physically touched by the oil. While the justification for this rule is usually couched in terms of public policy (the need to limit claims in order to prevent an endless chain of recoverable economic harm), the reality is grounded in commercial policy: the *Robins Dry Dock* rule limits the liability of the shipping industry in order to enhance business. Indeed, this judicial liability limitation is inconsistent with, and contradicted by, the legal standard applied to similar incidents occurring on land.

Finally, Judge Holland ruled that maritime law preempted all state common law. In other words, the Court held that an injured plaintiff was only permitted to seek redress under maritime law, and could not also pursue claims under state law. This was the key, for claims for negligence under state law permit an injured plaintiff to recover for all damages that are "proximately caused" by the wrongful act. Under a traditional proximate cause analysis, there is no prohibition against recovering for economic loss, even in the absence of physical injury.

The significance of this ruling cannot be overemphasized. Order No. 38 became the law of the case, and led to a number of rulings just before trial dismissing the claims of the following groups of plaintiffs: processors, cannery workers, tenderers, area businesses, and municipalities. Judge Holland also dismissed the claims of "unoiled" property owners for devaluation of their property, and the Alaska Natives' claims for injury to their subsistence culture.

The only group to escape under this ruling were the commercial fishermen, and only because of a 1974 ruling by the Ninth Circuit Court of Appeals creating a commercial fishermen exception to the Robins Dry Dock rule. And even as to this exception, Judge Holland took a narrow view, ruling that other groups that lived off of the sea -- such as tenderers (those who take the fish from the fishermen at sea, weigh the fish, and deliver the fish to the seafood processors) -- could not pursue claims under Robins Dry Dock, even though there was no principled distinction between them and commercial fishermen. Moreover, even as to the commercial fishermen, Judge Holland ruled that they were not permitted to recover for the devaluation of their boats or fishing permits, because such damages, unlike lost harvests, were not directly related to fishing. Judge Holland also dismissed the fishermen's claims for "hedonic" damages (damages for loss of the quality and enjoyment of life), on the grounds that the Oppen exception does not apply to fishermen's non-economic injuries.

An ironic and important twist in this case is that Judge Shortell disagreed with Judge Holland, and ruled in plaintiffs' favor on these issues. Judge Shortell held that state law was not preempted by maritime law, and that a long line of Supreme Court cases permitted states to supplement rights of recovery provided by maritime law, especially where the state was exercising its right to provide remedies for oil pollution within its own territorial waters. Thus, it appeared for a time that claims that were disallowed in federal court were still viable in state court, providing plaintiffs with an alternate avenue for recovery.

However, as will be discussed more fully below, after it became clear that Judge Holland was more sympathetic to Exxon's positions than Judge Shortell, Exxon concocted a number of legal theories designed to remove cases from state court to federal court, effectively diminishing the role of Judge Shortell. Ultimately, most plaintiffs were forced into federal court, where claims that were viable under the rulings of Judge Shortell were dismissed by Judge Holland.

The end result was that Exxon, after publicly and loudly proclaiming that it would compensate all victims of the spill, relied on esoteric legal rulings and a sympathetic judge to avoid compensating thousands of individuals for the economic injuries inflicted upon them by the Exxon Valdez oil spill.

Within days if not hours of the spill, seemingly hundreds of lawyers descended on small towns and villages throughout Alaska. Lawyers from Alaska, mostly untrained in complex litigation and

unprepared to mount the huge financial, logistical, and strategic effort necessary to battle a major corporation such as Exxon in a case such as this, were joined by lawyers from every part of the country, most of whom had no knowledge of Alaska, oil or commercial fishing.

These lawyers fell into two groups. One group, the "direct action" lawyers, sought to represent individual fishermen and other victims of the spill in the traditional manner. These lawyers were hired by and entered into contracts with their clients, and eventually brought suits on behalf of the individuals who engaged them. Some of these lawyers sued on behalf of hundreds of individuals, with a few representing more than a thousand plaintiffs.

The other group of lawyers were "class action" lawyers. In a class action, a small group of individuals bring a lawsuit on behalf of a larger group who have suffered similar injuries in a similar way. However, to proceed as a class action, the case must be "certified" as a class action: that is, a court must determine that the class action criteria set forth in Rule 23 of the Federal Rules of Civil Procedure have been met. The court must make that determination "as soon as practicable after the commencement of the action."

Rule 23 has two prongs. The first prong (Rule 23(a)) has four requirements, commonly referred to as numerosity, commonality, adequacy, and typicality. Each of these elements must be satisfied in every class action. The second prong (Rule 23(b)) has three parts. If any one of these three conditions is satisfied, the court may certify the class.

A class certified under Rule 23(b)(3) is distinct from a class certified under Rule 23(b) (1) or (2) in one important way. If a Rule 23(b)(3) class is certified, "notice" of the class action must be sent to class members and an opportunity to "opt out" of the class must be provided. Any potential class member who opts out is not bound by any legal determinations made in the case, or by the results at trial, but is also not entitled to participate in any monetary recovery that may be obtained on behalf of the class. In contrast, a class certified under Rule 23(b)(1) or (2) is "mandatory," notice is not required, and no class member may opt out.

In this case, class actions were brought on behalf of commercial fishermen, Alaskan natives, local governments, property owners, area businesses, cannery workers, and recreational users. Initially, most of these plaintiffs sought to have their classes certified under Rule 23(b)(3).

The main arguments for and against class certification were not substantially different here than in most mass tort cases. Plaintiffs argued that Exxon and the other defendants engaged in a common course of conduct that did not vary from plaintiff to plaintiff, ensuring that common questions of law and fact would predominate over questions regarding individual damages and causation. Plaintiffs also argued that a class action would be superior to other methods of adjudicating the claims because it would be more efficient and economical, and enable the court to more effectively manage the litigation. As the Sixth Circuit observed in a similar type of case:

> In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action.

In contrast, Exxon and the other defendants argued that questions regarding individual damages and causation would predominate over the common questions and that a class action would not be superior to the claims program and other administrative procedures available to resolve the claims. Some of the direct action plaintiffs also joined Exxon in opposing class certification, arguing that they had been engaged by a large number of individuals, all of whom would opt out, and that a class action therefore would not be superior to other methods of adjudicating the claims.

The same arguments were played out in both federal and state court. However, once again, Judge Holland and Judge Shortell ruled differently. On December 14, 1990, Judge Holland denied class certification, while on the same day Judge Shortell certified a class of cannery workers and, two months later, four additional classes (commercial fishing, area business, Alaska Native, and property owner classes). This provided yet another reason for Exxon to seek a way to divest Judge Shortell of jurisdiction.

By late 1991, it was clear that both Exxon and Alyeska preferred to be in federal court. The problem was how to get the cases out of state court and into federal court, and keep them there.

On November 8, 1991, Judge Shortell issued a pretrial order setting an April 1993 trial date for both compensatory and punitive damages. This apparently brought the matter to a head, for a few days later, Exxon began "removing" cases to federal court.

A defendant can "remove" (transfer) any case from state to federal court by filing a petition asserting that the state court case raises a federal issue. Once a case is removed, it may be "remanded" (sent back) to state court on the grounds that the removal was improper. However, the decision to remand must be made by the federal court.

The first case Exxon removed to federal court in November 1991 was the consolidated class action. At the beginning of the case, Judge Shortell had ordered the class plaintiffs to join all of their complaints into a single consolidated complaint, with each class separately asserting its own claims. As explained above, Judge Shortell certified several of the classes, but not others. After Exxon removed all of the cases joined in the consolidated complaint to federal court, Judge Holland refused to send any of the cases back to state court, employing a complicated and highly attenuated analysis.

In essence, Judge Holland held that one group of plaintiffs (a group of environmental organizations) had raised a "federal question" in a brief they had filed solely on their own behalf in support of their motion for class certification, thus justifying removal to federal court. Judge Holland further ruled that the commercial fishermen class, the native class, and every other plaintiff class that Judge Shortell had certified had also properly been brought into federal court, because they, along with the environmental plaintiffs, had been part of the consolidated complaint.

The lawsuits brought by many of the direct action plaintiffs were also removed to federal court (this time by Alyeska, not Exxon), and kept there by Judge Holland. The justification, however, was different. Alyeska argued, and Judge Holland ruled, that certain direct action plaintiffs were properly removed to federal court based on a 50 page document they filed in state court listing factual issues that they intended to prove at trial. On page 9, plaintiffs stated that one factual issue was whether Exxon was reckless because the Exxon Valdez was a single hull, not a double hull, tanker, and thus more likely to spill great quantities of oil in the event the hull was damaged.

At the time that the Alaska pipeline was built, the state of Alaska passed a law requiring that tankers be equipped with double hulls. In 1978, in a case called *Chevron U.S.A. v. Alaska*, the Alaska federal court ruled that this state statute was preempted by federal law, thus stripping the state of the power to impose this requirement on oil companies. Fifteen years later, Judge Holland held that certain direct action plaintiffs had "collaterally attacked" this ruling by stating that the use of a single hull tanker was reckless, thus raising a federal question and justifying the removal of all of these claims to federal court. Judge Holland made this ruling even though no plaintiff in this case was a party in *Chevron*, no claim in this case is based on or mentions *Chevron*, and *Chevron* did not purport to bind private litigants.

Not surprisingly, plaintiffs appealed these rulings to the Ninth Circuit Court of Appeals, which has jurisdiction over claims filed in federal court in Alaska. The Ninth Circuit accepted the appeal, and oral argument was held in July 1993, with the promise of an early determination. The Ninth Circuit, however, did not rule until May of 1994, after the federal trial had begun. And the Ninth Circuit's one page ruling appeared confused and poorly thought out. In essence, it ordered Judge Holland to remand the direct action cases (but not the class action cases) back to state court.

However, by this time, plaintiffs and Exxon had already agreed to a federal trial plan which would resolve the claims of all salmon and herring fishermen on an aggregate basis. This would be impossible to do in the federal trial if the claims of some fishermen were remanded, and at best would cause delay and confusion. Since no one wanted to try the same claims twice, the parties agreed, prior to the Ninth Circuit's ruling, to be bound by the federal verdict regarding these claims. In the event that either the class or direct action cases were remanded, thus resurrecting certain types of claims dismissed by Judge Holland but not Judge Shortell (*e.g.*, permit devaluation claims), these would subsequently be tried in state court in a separate trial.

Ultimately, after Exxon filed a motion for reconsideration, the Ninth Circuit issued an order requiring Judge Holland to remand the direct action cases, unless there was some other basis for federal jurisdiction. Exxon responded by resurrecting a declaratory relief action that it had filed before it began its removal campaign, and which Judge Holland had stayed. Known as *Airport Depot Diner*, this action sought to invest the federal court with jurisdiction over all claims. Exxon argued that federal jurisdiction was necessary to protect the uniformity of federal maritime law, because the state court intended to apply state law, not federal maritime law, to the claims before it.

In 1995, Judge Holland clung to this theory to keep the direct action cases in federal court, and then dismissed them under *Robins Dry Dock*. However, by this time, plaintiffs were of a mixed mind, since remand would mean a separate trial and appeal of these claims, and would possibly prolong the federal litigation. Since plaintiffs are satisfied with the jury award in the federal case, most believe that

their primary task is holding on to the jury award, not augmenting it and subjecting the case to yet another round of litigation and appeals.

In July 1993, Alyeska settled with all plaintiffs for $98 million, forever changing the dynamics of the litigation. Alyeska had reluctantly joined hands with Exxon, forging a united front in the litigation even though its members were critical of Exxon's scorched earth tactics. The Alyeska settlement caught Exxon by surprise, and was kept secret from it until the last minute. The reason: this was a fundamental break in ranks. It was a public repudiation of Exxon and its handling of the spill, the cleanup, and the litigation.

The groundwork for the settlement was laid six months earlier, in San Diego. There, for the first time, plaintiffs' counsel began the arduous task of analyzing their own case and putting themselves in position to settle all claims on a global basis. San Diego was a watershed because plaintiffs as a group recognized that there could be, and would be, no resolution of their collective claims unless all of the different groups of claimants agreed on a common method to allocate any recovery among themselves.

Plaintiffs had originally joined forces to conduct discovery and litigate the case, but the San Diego conference was the first time that plaintiffs explicitly set forth the conditions for forging an all-inclusive alliance to settle the case. Until San Diego, plaintiffs could not, or would not, join hands because of the perceived opportunity to settle with Exxon piecemeal; either by group of claimants (*e.g.*, Alaska natives) or, more likely, by an individual lawyer on behalf of all of his clients. However, when plaintiffs finally realized that Exxon was not interested in settling with any one group, on any terms, plaintiffs decided that no settlement would ever be possible unless they could present a unified front, and the prospect of a global resolution of all claims.

In San Diego, plaintiffs' counsel started with a rudimentary evaluation and comparison of the damages suffered by all groups of plaintiffs, and unleashed a process that, except during trial, would consume much of their time and energy for the next three years. The idea was simple: build a damage "matrix" from the ground up. This was done by identifying each respective group of claimants, including a breakdown of the commercial fishermen by species, area and gear type (*e.g.*, PWS salmon seine), and using expert reports to "objectively" determine each group's damages. By adding up the damages of each group, a total damage figure could be ascertained, and each group's percentage share could be determined. Using this matrix as a base, each group could then calculate what any particular settlement offer was worth to it.

The matrix was further refined since it divided each group of claimants into "class" and "non-class" segments. For non-class claimants, each group was further divided according to the attorney representing each plaintiff. This enabled every group and sub-group of plaintiffs, and every attorney, to determine their shares of any settlement.

At the time of the Alyeska settlement, this damage matrix was still in a rudimentary stage of development. Over the next two and a half years, counsel for plaintiffs would refine the expert reports, undergo extensive and often tense negotiations, and make adjustments based on additional information obtained from the working groups formed to analyze the matrix. Crude as it was, the original damage matrix enabled the plaintiffs to settle with Alyeska, because it provided a mechanism to allocate the gross settlement of $98 million among the different groups of plaintiffs.

Unlike settlements in individual cases, class action settlements require notice to the class members and the approval of the court. Normally, proposed class action settlements involve a three step approval process: (1) the proposed settlement is presented to the court for preliminary approval; (2) after preliminary approval, notice of the settlement is sent to the class members, with an opportunity to object; and (3) final approval is granted (or denied) by the court, after a formal and open hearing. This process ensures that the court is able to perform its role as the guardian of the interests of the class, by enabling the court to scrutinize a settlement and approve it only if it is a "fundamentally fair, adequate and reasonable" compromise of class claims.

Convincing plaintiffs that the settlement was in their interest and should be approved required class counsel to confer with their clients and spend considerable time explaining the benefits of the settlement and the matrix. Counsel organized mass meetings in towns throughout PWS, Kodiak and Cook Inlet, and met and talked with hundreds of individuals outside of these meetings. The talks were not easy. While $98 million is a lot of money, the damage matrix was based on total damages of approximately $2 billion. To many of the plaintiffs, Alyeska was no less a villain than Exxon, for they believed that Alyeska was not properly prepared for a major emergency, and that the contingency plans it had routinely filed with the state were fundamentally flawed and inadequate to cope with a

major spill.

However, emotion aside, the settlement made sense. It eliminated a significant but nevertheless subsidiary defendant, allowing plaintiffs to focus on Exxon for trial. It provided a small but welcome source of recovery for plaintiffs, helping them through yet another weak fishing season. It provided a war chest for the litigation, helping to alleviate the strain on plaintiffs' counsel, who were funding the litigation out of their own pockets and on a pure contingency basis.

The parties conditioned the settlement on the issuance of a court order barring Exxon from seeking "contribution" or "indemnity" from Alyeska in the event Exxon lost at trial. Such a "contribution bar order" is a standard part of any settlement where there are multiple defendants, for it is the mechanism that ensures that the settling defendant (here, Alyeska) buys "total peace." However, as the non-settling defendants are entitled to offset the settlement against any trial award they are required to pay, a court must determine whether the amount of the settlement will be offset against an adverse judgment pro tanto (dollar for dollar) or on the basis of "proportionate fault." To ensure that the settlement would not diminish the ultimate recovery against Exxon, plaintiffs agreed to proceed with the settlement only if the offset was *pro tanto*.

Exxon, however, wanted to tie up the settlement in court, and delay its implementation and the distribution of money to plaintiffs. Exxon therefore devised a very clever strategy. First, Exxon agreed that the offset should be *pro tanto*, but it insisted that a "good faith" hearing would be necessary. Such a hearing, however, would negate many of the advantages of the settlement, since it would require a full evidentiary hearing on each of the parties' relative culpability. From the plaintiffs' perspective, such a hearing would have been interesting, for it would have pitted the two defendants against each other. However, Judge Holland ruled that a separate good faith hearing was not necessary to determine that the settlement was fair.

Exxon next argued that the contribution bar order should be reciprocal, but that it did not apply to either party's contractual rights for indemnity. Judge Holland agreed. However, since Alyeska was unwilling to go forward with the settlement on these terms because it wanted to seek contractual indemnification from Exxon for the costs of the clean-up, the settlement was stalled. Faced with the prospect of trying a case against "an empty chair" at trial, the parties finally agreed that Exxon would be entitled to additional offsets based on plaintiffs' recovery.

The effect of Exxon's maneuvers was to delay distribution of the Alyeska money for over a year, placing further pressure on plaintiffs as they went to trial.

The last significant legal development before trial was Judge Holland's certification of a "mandatory punitive damages class" in March 1994. The class action plaintiffs had originally sought to have such a class certified by Judge Shortell in 1990, but Judge Shortell did not do so, in the face of vehement opposition from Exxon, Alyeska, and certain of the plaintiffs. However, once the cases were removed to federal court, and trial was imminent, Exxon brought its own motion, before Judge Holland, to certify a mandatory punitive damage class.

Under Rule 23(b)(1)(B), a court may certify a mandatory class (no opt outs) if there is a risk that the resolution of the claims of some plaintiffs would be "dispositive of the interests" of other class members or would "substantially impair or impede their ability to protect their interests." Courts have interpreted this to mean that a mandatory class is appropriate in circumstances where there is a "limited fund" available to compensate victims. This may occur, for example, when a company does not have sufficient resources to satisfy the claims against it, or the only money available is in the form of an insurance policy which is not large enough to pay all of the victims in full. To avoid a race to the courthouse, where the first plaintiff to get a judgment gets the money, leaving nothing (or much less) for other equally deserving plaintiffs, all plaintiffs with the same type of claim can be placed in a mandatory class. This ensures that the available funds for recovery are divided equitably.

In this case, such a theory seems absurd, given the fact that Exxon has revenues of over $100 billion a year, average net profits of $5 billion a year, and equity of approximately $35 billion. Even on a bad day, Exxon appears capable of paying any conceivable judgment. However, Judge Holland, at Exxon's urging, nevertheless certified a mandatory punitive damage class on a limited fund theory.

In essence, Judge Holland based his ruling on Supreme Court precedent establishing that any punitive damage award should be no greater "than reasonably necessary to punish and deter" and that the "Due Process Clause of the Fourteenth Amendment imposes substantive limits beyond which penalties may not go." While the Supreme Court has resisted drawing a bright line marking the acceptable ratio, it has insisted that in each particular case, punitive damages cannot be so great as to

be disproportionate to the value of the actual damages suffered. Since this test establishes some outside limit on the amount of punitive damages that may be awarded, Judge Holland reasoned that there was a limited fund:

> ...it is apparent that a defendant's assets are not the only consideration which may limit a punitive damages award. Substantive due process also limits punitive damages by placing reasonable limits on punishment. A defendant with tremendous assets, such as Exxon, does not face unlimited punitive damages. Rather, due process places a limit on punitive damages and, in substance, creates a limited fund from which punitive damages may be awarded.

To ensure that the limited fund is equitably divided among all potential claimants, and not exhausted before all plaintiffs have had their day in court, Judge Holland certified a punitive damages class consisting of "all persons or entities who possess or who have asserted claims for punitive damages against Exxon...which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill."

Many plaintiffs' attorneys opposed certification of a mandatory punitive damages class, and viewed it as another ploy by Exxon to divest Judge Shortell of his authority. By prohibiting Judge Shortell from trying punitive damages as part of the claims of those few plaintiffs that were still in his court, Exxon sought to hold the punitive damage trial in a favorable courtroom with a favorable judge. Plaintiffs, of course, had the same perception, and were concerned that Judge Holland would, in essence, minimize the risk to Exxon by setting up a trial stacked in Exxon's favor and, if necessary, protecting Exxon if the jury imposed a large punitive damage judgement against Exxon. In contrast, if Exxon faced a punitive damage trial in state court, where its risks were greater, some plaintiffs' attorneys were convinced that Exxon would come to the bargaining table.

For these reasons, those plaintiffs still in state court and scheduled to begin trial in June 1994, a month after the federal trial was scheduled to begin, sought Ninth Circuit "interlocutory review" of Judge Holland's order. These plaintiffs argued that Judge Holland's order violated the Anti-Injunction Act. This act, which was designed to ensure that federal courts do not unnecessarily infringe on the jurisdiction of state courts, prohibits federal courts from enjoining state court actions except in a narrow set of circumstances, including where it is "necessary in aid of its jurisdiction."

The Ninth Circuit heard the petition for review on an expedited basis, within days of receiving the petition and in a hearing held by telephone (since all the parties were in Alaska, preparing for trial). In ruling on the petition, the Ninth Circuit did not reach Exxon's argument that the order was necessary to aid the jurisdiction of the federal court, an argument that plaintiffs contended was spurious. Instead, the Ninth Circuit affirmed Judge Holland's order on the grounds that it did not even implicate the Anti-Injunction Act. According to the Ninth Circuit, Judge Holland did not explicitly prohibit Judge Shortell from permitting plaintiffs to try their claim for punitive damages, but simply "requested" that Judge Shortell voluntarily comply with the order as a matter of "comity" and common sense.

Although in a technical, legal sense Judge Shortell voluntarily complied with Judge Holland's request, there was no doubt that he had no real alternative, without risking open warfare with a federal judge and inviting further direct orders from Judge Holland. However, the Ninth Circuit (with one dissenting voice) took the easy way out, and determined that, since Judge Shortell had not been formally enjoined to comply with the order, the Anti-Injunction Act was not at issue.

In the end, none of this mattered. Exxon's legal strategy prevailed -- there was a single punitive damage trial before Judge Holland. And Judge Holland provided Exxon with almost all of the procedural protections it sought. However, the jury still decided that a punitive damage award of $5 billion was necessary to deter and punish Exxon, and Judge Holland has consistently refused to disturb the jury's award.

Discovery in a mass tort or environmental case is usually expensive, time-consuming, and exhaustive. The issues concerning liability, causation and damages are difficult, and often involved complex legal as well as factual questions. Millions of pages of documents must be produced and reviewed, witnesses must be deposed, and experts must be hired to conduct studies and submit reports.

During discovery, the parties figure out the case, and their angle on the facts. From the perspective of the plaintiffs' attorneys, discovery is the vehicle that travels inside the company and into the corporate boardroom, allowing plaintiffs an opportunity to figure out what defendants knew and when, and what they did, or did not do. During discovery, defendants start to look past their indignation at being sued, and analyze the risks they face.

In this case, discovery took almost five years, and was conducted during the same time that the legal issues discussed above were hashed out. The defendants collectively produced millions of pages of documents. Plaintiffs took over a thousand depositions. Exxon took the deposition of thousands of plaintiffs, including virtually every fishermen, native and anyone else who brought an individual case, and required these plaintiffs to produce tax returns, business records, and other documents related to their damages. In addition, plaintiffs and Exxon each designated over a hundred individuals as expert witnesses. Most of these produced expert reports, collectively costing tens of millions of dollars, and were deposed, often for several days.

Plaintiffs conducted discovery on two fronts: liability and damages. As to liability, no one could contest that the *Exxon Valdez* crashed into the rocks, sending millions of gallons of oil into prize fishing grounds and onto the beaches and land bordering Prince William Sound. However, there were questions as to what caused the crash (Hazelwood's drunkenness, or crew fatigue) and the legal cause of the damages (were there intervening causes, such as a faulty steering mechanism or inadequate emergency clean-up plans). And of course, the key question for punitive damages, if not liability itself, was whether Exxon was reckless, not merely negligent. This turned in large part on Exxon's internal policies, its monitoring of Captain Hazelwood after he was released from an alcohol treatment center in 1985, and its response to warning signals and problems in the weeks and days proceeding the spill. While much of this discovery involved documents and fact witnesses, experts were engaged by both sides to analyze each of these issues.

The other front was damages, a field primarily for experts. These experts analyzed the impact of the spill on the environment, the fishing grounds, the communities and the different classes of plaintiffs. There were scientists, economists, sociologists, and individuals involved in the fishing industry. For example, experts studied the impact of the spill on the salmon and fishing harvests for 1989 and beyond, the price of fish in the market (the "taint" effect), and the value of fishing permits and fishing boats. There were also other experts analyzing the impact of the spill on property values, native culture, and the local communities. Studies were also conducted to assess the social and psychological impacts of the spill.

The Battle Over Privileged Documents

Discovery is also characterized by disputes: what documents are privileged, what documents are relevant, whether responses to interrogatories (written questions) are adequate. Here, the battle over privileged documents illustrates how a party can use discovery as a tactical weapon, causing delay and increasing the burden and expense on another party.

Typically, a party must produce all documents which are admissible at trial or likely to lead to admissible evidence. This standard is broader than the relevance standard used at trial, for discovery is just that, a time for exploration, within reasonable limits. Nonetheless, a party may withhold all privileged documents and all documents protected by the "work product doctrine." The law has established certain privileges, including the attorney-client privilege and the psychotherapist-client privilege. Any document not produced on the grounds of privilege or work product must be listed on a "privilege log," in which the author, recipients, subject matter and the claimed privilege of each document must be listed. A party may challenge the claim of privilege and, if necessary, file a motion with the court compelling the other party to produce the document.

Here, Exxon produced a series of privilege logs, on which it listed over 12,000 documents. However, plaintiffs were not able to evaluate the privilege claim based on the information contained in the privilege logs. Although plaintiffs tried to force Exxon to file more complete privilege logs, the parties, at Exxon's request, were ultimately ordered by the court to follow a "protocol" setting forth the rules and procedures for "challenging" documents claimed to be privileged. This process was enormously time-consuming. The end result was that plaintiffs were only able to challenge 3,000 of the 12,000 documents on Exxon's privilege log. While Exxon eventually produced over 90% of the challenged documents, over 9,000 documents were never challenged, even though it is likely that many of them were not privileged and should have been produced. Whether important but unprivileged documents were thus "hidden" on the privilege log will never be known.

By the time the trial started in May 1994, nearly everyone in the country remembered the sickening pictures of oil drenched animals and thousands of dying otters, birds and fish. Most, however, thought the case was over, that Exxon had long ago admitted responsibility and paid the victims for their losses. Of course, Exxon had widely publicized its clean-up efforts after the spill and its $900 million settlement (consent decree) in 1991 with the state and federal governments for damage to the environment. And by the time the lawyers gave their opening statements in May of 1994, the criminal

trial and acquittal of Captain Joseph Hazelwood was long over.

So, when the trial against Exxon began, many were surprised. Plaintiffs were also surprised, for few thought that Exxon would actually permit a jury to sit in judgment. After all, a jury is perhaps the only institution beyond the control of a corporation like Exxon -- a corporation that dwarfs most countries and stands as the 26th largest organization (including the major industrial nations) in the world.

Yet, Exxon had successfully shaped and limited the case before trial, and the trial was conducted according to rules favoring Exxon. Most evidence that Exxon found objectionable or "prejudicial" was excluded from the trial, and the jury instructions ultimately delivered were, at least in plaintiffs' view, tilted in Exxon's favor. And perhaps even more important from Exxon's perspective, Anchorage, Alaska was probably the best forum in the country to try this case. After all, the major industry in Alaska is oil, many Alaskans migrated to Alaska because of the great economic boom fueled by the Alyeska pipeline in the 1970s, and Alaska's 500,000 residents do not pay state taxes because the taxes collected from the oil industry are sufficient to finance government activities at the state level. Even more ominous for plaintiffs, commercial fishermen are not beloved throughout the state, and many residents consider them to be greedy, spoiled and selfish.

If nothing else, Exxon has been consistent. At no time before (or after) trial has Exxon expressed an interest in serious settlement negotiations. Perhaps Exxon thought it would defeat plaintiffs' claim for punitive damages. Perhaps it thought that Judge Holland would bail them out if the amount awarded was too large. Or perhaps Exxon was simply prepared to take its best shot and, if it lost, it was further prepared to delay the day of reckoning for several more years.

Prior to trial, the parties agreed on a four-phase trial plan. Phases I-III were to be tried before the same jury, and would determine: (1) in Phase I, whether Exxon was reckless (not merely negligent), thus entitling plaintiffs' to punitive damages; (2) in Phase II, the amount of compensatory damages to be paid to the commercial fishermen for salmon and herring losses; and (3) in Phase III, the amount of punitive damages, if plaintiffs prevailed in Phase I.

Phase IV, to be conducted at some later time before another jury, would determine compensatory damages for any plaintiffs whose claims were not tried in Phase II, including other types of fishermen (e.g., crab, shrimp), certain property owners whose land was touched by the spilled oil, and aquacultural associations.

In Phase I, the jury determined liability. For tactical reasons, Exxon stipulated before trial that it was negligent (what else could it say and maintain its credibility?). However, as punitive damages cannot be awarded based on negligent conduct, the question was whether Exxon's conduct was reckless.

Phase II of the trial plan was designed to try the claims of all commercial fishermen on an aggregate basis. This was possible because their claims for economic damages were based on lost fishing harvests for the years 1989-1994, and diminishment of fish prices due to the fact that salmon and herring from PWS and other areas were "tainted" in the market because of the spill. The jury was not asked to determine the damages suffered by any one fisherman, but it did determine damages suffered by fishermen, broken down by area (e.g. PWS, Kodiak, Cook Inlet), year, and species of fish.

In many "mass tort" class actions, such a trial structure would not be viable. For example, while liability can be determined on a classwide basis, damages for personal injuries caused by a toxic spill or a defective product are individual in nature. There is no total damage figure, since damages are based on personal injuries that can not be aggregated. Here, however, there are only so many fish, and the question of which fishermen would have caught them does not affect the total damages caused by the spill. This simple fact allowed the parties to try the case without requiring every plaintiff to come into court and prove his or her damages.

Motions To Exclude Evidence At Trial

Motions "in limine" are filed prior to trial. They have two purposes: (1) to prevent the other side from introducing potentially prejudicial or irrelevant evidence at the trial and (2) to establish a grounds for appeal, should the evidence be admitted. For these reasons, motions in limine have great tactical, as well as practical, significance. For example, a party may file a motion in limine seeking to exclude certain evidence, hoping or expecting to lose the motion, in order to create an issue for appeal if it loses at trial. Or a party may oppose a motion in limine, even though it has no intention of introducing the evidence, to create an issue for appeal if it loses at trial. Or a party confident of victory at trial may decide that it does not want to introduce certain evidence, even if permitted to do so, for fear of creating an issue on appeal. At the same time, victory is never certain, and failure to introduce

important evidence, even if it creates an appealable issue, can backfire.

Exxon's strategy was to exclude as much potentially damaging evidence as possible. For weeks before the trial, and before Phases II and III, Exxon filed motion after motion seeking to exclude evidence. With very few exceptions, Judge Holland ruled in Exxon's favor. Thus, the Court excluded evidence of other groundings and oils spills for which Exxon was responsible, evidence regarding the full extent of Captain Hazelwood's drinking history and alcohol abuse, evidence of damages to natural resources and the environment, evidence that at least $700 million of the money Exxon claims it spent on the spill was actually borne by others, and evidence that Exxon could pay $1 billion a year for ten years without incurring any "material affect" on its business strategies, operation or financial condition. Judge Holland also excluded evidence of the psychological, emotional and social impacts of the spill, on the grounds that such evidence did not relate to the economic injuries that were suffered. The Court even excluded evidence that would impeach testimony that Exxon and Hazelwood introduced. For example, plaintiffs were precluded from introducing testimony contradicting Hazelwood's testimony that he had not had a drink since the night of the spill.

It is ironic that losing motions in limine is a blessing, if one wins at trial. While plaintiffs' legal team at trial was at times discouraged and battered by what seemed like a string of defeats, victory at trial left them grateful for the result. Indeed, Exxon's great success in excluding evidence has significantly reduced the issues it can raise on appeal.

In the American legal system, judges decide legal issues and juries decide factual issues. The factual issues, however, cannot be decided in the abstract. The law determines which factual issues must be decided, which factors may be considered, and the applicable standard of proof. The judge has the job of instructing the jury on the law, after the evidence has been heard and before the jury meets to discuss and decide the factual issues. However, before the judge instructs the jury, each party submits proposed jury instructions to the judge, supported by legal arguments and case authority. This is a very important part of the case, and sets up issues for appeal, because a party cannot argue on appeal that a jury instruction misstated the law unless that issue is first raised with the court prior to the issuance of the jury instructions.

Here, Judge Holland, as requested by Exxon, went well-beyond what the Supreme Court recently held were sufficient jury instructions regarding punitive damages. For example, the jury was told that it could not focus on Exxon's gross assets or earnings, and that it could consider the impact punitive damages would have on shareholders. Judge Holland also imposed an additional threshold on the decision to award punitive damages, instructing the jury that punitive damages should not be award unless the jury determined that Exxon's conduct was sufficiently "reprehensible," even though the jury had decided in Phase I that the plaintiffs were entitled to punitive damages because Exxon's conduct was reckless. The jury was further told that, as mitigating factors, it could consider Exxon's post-spill remedial acts and whether the wrongful conduct was conducted by low-level employees and violated Exxon's policies. None of this was mandated by the Supreme Court.

In fact, in its post-trial motions, discussed below, Exxon did not challenge any of the Phase III jury instructions, and only three Phase I instructions. Since over 35 of the Phase I and III jury instructions were disputed before trial, it is clear that Exxon prevailed most of the time.

The trial lasted four and a half months. It began on May 2, 1994 when lawyers for both sides gave "mini" opening statements to all potential members of the jury. It ended on September 16, 1994 when the jury returned its Phase III verdict against Exxon for $5 billion. Each side had victories, both perceived and real. The jury listened to hundreds of witnesses, and sat through months of both entertaining and riveting testimony, as well as highly technical scientific evidence. By the end, everyone was exhausted.

Each side spent months preparing for trial. Thousands of exhibits were reviewed and selected, and every deposition was scrutinized for useful testimony. Witnesses were interviewed and selected, and experts were prepped. Mock trials were conducted, jury consultants were hired, and charts, graphs and other demonstrative evidence was prepared. Every exhibit was bar coded, and could be instantly called up on a large video screen in the courtroom. Trial outlines were drafted, direct examinations were rehearsed, and cross-examination questions were choreographed so that any "wrong" answer could be readily impeached by prior inconsistent testimony or exhibits. And each day and night, final preparations were made for the next day.

At trial, Exxon had lawyers from two large national law firms and a famous trial attorney from Tennessee, and Captain Hazelwood had a lawyer of his own. It was often difficult to figure out who was calling the shots. In contrast, plaintiffs had a clear lead attorney at trial; only one other attorney

played a significant role in the courtroom.

In Phase I, plaintiffs put on evidence demonstrating that Exxon was aware of the risks involved in transporting crude oil in PWS and of the risk of assigning a master with an alcohol abuse problem to captain its supertankers; that Exxon ignored the risk of having a known relapsed alcoholic captain a supertanker; that Exxon was reckless in returning Hazelwood to sea without effectively monitoring or supervising his activities; and that Hazelwood had abused alcohol on the night of the grounding, was impaired at the time of the grounding, and was reckless in leaving the bridge and turning the ship over to an inexperienced, unqualified and fatigued third mate. Exxon denied that Hazelwood was drunk, claimed that Hazelwood was the "most carefully watched man in the fleet," and that others (the Coast Guard, the third mate) were responsible for the spill. Exxon also defended its internal policies and procedures, claiming that they were sufficient and that they were followed.

On the morning of June 13, 1994, after eight days of deliberation, the jury returned its verdict. This was the most important day of the trial, for there would be no Phase III if the jury found in Exxon's favor. It did not. Plaintiffs and their lawyers celebrated, ecstatic that their years of hard work had paid off.

In Phase II, the parties put on evidence of damages to commercial fishermen. Plaintiffs wanted to present a tight, hard-hitting case which maximized the total damages awarded, without regard to the particular damages of any one group of fishermen. Therefore, to ensure that there was a joint and cooperative effort, to maximize the total recovery, and to minimize the risks facing any particular group, plaintiffs' counsel entered into a "Joint Prosecution, Settlement, and Damages Allocation Agreement" that set the percentage of the total recovery that would be allocated to each group, regardless of the outcome at trial. These percentages were based on a refined version of the Alyeska damage matrix. It also included shares for other groups of claimants, who were not part of the Phase II trial, with discounts applied to their share to account for their chance of success on appeal. The goal was to ensure that each group would receive its fair share of any recovery, based on its damages as quantified by plaintiffs themselves.

Plaintiffs asked for total Phase II damages in the neighborhood of $900 million, based on lost harvests and diminished prices due to the spill. Most of the evidence concerned salmon and herring harvests since 1989 and beyond, the impact of the spill on the fisheries, and global environmental factors affecting salmon and herring runs.

However, from a monetary perspective, the most important evidence concerned the impact of the spill on salmon and herring prices, which precipitously dropped after the spill and never recovered, after hitting an all-time high in 1988, the year before the spill. Plaintiffs put on evidence that the drop in price was due to the "taint effect" of the spill, which caused Alaskan sockeye salmon (and other species) to lose their premium position in the world market and especially in Japan. Plaintiffs claimed that there was a taint effect in 1989, 1990 and 1991, based on econometric studies demonstrating that no other market factors could account for the drop in price. Exxon argued that the drop in price was due to increased competition from "farmed salmon" from Norway, Chile and other places, which began flooding the market in 1989; high salmon inventories at the time of the spill; increased supplies of canned salmon; decreased consumer demand; and other non-spill related factors.

This time, Exxon won. After 16 days of deliberation, the jury returned a verdict of $287 million, well below what plaintiffs had requested. The jury had been required to answer nearly 80 special interrogatories on the verdict form, setting damages for each species of salmon and herring, for each year, for each geographical area. The jury rejected claims for price diminishment after 1989 (a claim valued at about $430 million) and lost harvest damages for every year after 1989, except PWS salmon in 1992-93 and PWS herring in 1993. When Judge Holland read the verdict, the courtroom was very quiet.

Phase III was very short, lasting just a few days. The Supreme Court has set forth a set of criteria that should be considered by a jury that is deciding on the amount of punitive damages to award. These criteria include the defendant's conduct, the harm caused or likely to be caused by such conduct, and the defendant's financial position.

Prior to the Phase III trial, the parties stipulated to the harm caused by the spill, in addition to the damages ascertained in Phase II. The parties stipulated because the punitive damage award applies to all members of the punitive damage class; this included all plaintiffs with a potential claim against Exxon, not just the commercial fishermen who tried their compensatory damages claims in Phase II. The stipulated amounts were read to the jury, with the caveat that Exxon admitted that there was some loss, but contended that the loss was lower than the stated amount.

In addition, plaintiffs put on evidence of Exxon's financial condition, to show what it would take to "send a message" to Exxon, the largest and most powerful corporation in the world, with staggering resources. Although plaintiffs did not ask for a specific amount in punitive damages, plaintiffs used various financial indicators to suggest what it would take to deter and punish Exxon. Thus, for example, plaintiffs showed that Exxon had annual average net profits of $5 billion a year since the spill, had annual average cash flow of $10-12 billion since the spill, had paid dividends of over $17 billion since the spill, and had watched its stock increase in value by nearly $20 billion in the years after the spill. Plaintiffs also showed that Exxon rewarded its top corporate executives after the spill with huge bonuses, stock options, and salary increases, and took no action against any individual except Captain Hazelwood.

In response, Exxon put on evidence showing that it was a "good corporate citizen," and that it had "voluntarily" spent $2.7 billion after the spill, to clean up the oil, provide injured plaintiffs with emergency money, and otherwise remedy its mistake. Exxon also trumpeted the remedial measures it had taken since the spill, and countered the financial information by showing that Exxon's profits from operations in the United States and especially in Alaska were not substantial.

The jury again deliberated for a long time. Most of the attorneys working on the case went home, or on vacation, and those who stayed packed boxes. After 13 days of deliberation, the jury returned a verdict of $5 billion. Ironically, Exxon's stock went up the next day, for the market had expected an even higher award.

POST-TRIAL STRATEGY AND MOTIONS

After the jury verdict, plaintiffs had one goal: get Judge Holland to enter a "final judgment" so that the "interest clock" would start running on the punitive damage award and so that the appeals process would begin. Nearly two years later, plaintiffs are still waiting. Every day, plaintiffs lose more than $700,000 in interest.

Immediately after the jury verdict was announced, plaintiffs requested and Judge Holland entered a final judgment in the case. However, Exxon soon filed a motion to vacate the entry of judgment, on the grounds that final judgment could not be entered until all post-trial motions regarding Phases I-III had been decided and Phase IV had concluded. Judge Holland vacated his prior order.

A month after the jury announced its Phase III verdict, Exxon filed eleven post-trial motions asking for judgment as a matter of law on various issues or, in the alternative, for a new trial. In five of these motions, Exxon attacked the Phase I and III verdicts, and in the other six motions, Exxon challenged the Phase II verdict. In both types of motions, Exxon faced a strict standard of proof.

In January 1995, Judge Holland denied each of the eleven motions. He ruled that the jury had a reasonable basis for every one of its findings, and he refused to second guess the jury or re-weigh the evidence. Judge Holland specifically refused to reduce or throw out the punitive damage award, stating that "the oil spill was the greatest environmental disaster in American history [and] disrupted the lives of tens of thousands of people." Judge Holland concluded:

> The jury received conservative and comprehensive instructions on the purpose of punitive damages and the manner in which they were to be assessed. The comprehensive instructions insured that the jury was not left to whim, conjecture, or speculation....The jury did not vote precipitously...This verdict and the amount awarded were not the result of passion or prejudice against Exxon.

In the end, Judge Holland provided Exxon with every conceivable procedural safeguard at trial, but he stood by the jury and the jury system. Had Judge Holland done anything else, he would have admitted failure.

Prior to trial, the parties agreed to try the Phase II compensatory claims in the aggregate, and submit proposed adjustments to the verdict to Judge Holland prior to entry of final judgment. Specifically, the parties agreed to adjust the Phase II verdict because of payments made to plaintiffs through the Exxon claims program, the Alyeska settlement, and the TAPLF fund, and because of opt-outs, dismissed plaintiffs, and released claims.

After trial, however, Exxon claimed that it was entitled to other adjustments, not specifically agreed upon, based on general language in these agreements referring to "other offsets or adjustments." Using this language as a lever, Exxon made a demand on plaintiffs for adjustments that according to Judge Holland amounted to "a massive assault on the jury determinations." For months, Exxon stretched out negotiations with the plaintiffs to resolve these issues, in effect making demands that

would have left plaintiffs owing Exxon money. The strategy was to delay entry of final judgment (and payment of interest), and force plaintiffs to agree to reduce the Phase II verdict as the price of entry of final judgment.

Ultimately, the parties filed motions to adjust the Phase II verdicts because they could not agree on the amount of the stipulated adjustments, or on the additional adjustments requested by Exxon. With respect to additional adjustments, Exxon not only sought to reduce the verdict by arguing that the jury failed to make certain findings or consider certain evidence, it also asked Judge Holland to reduce the Phase II verdict because, by spilling the oil, it argued that it had enabled plaintiffs to avoid certain costs or enjoy certain benefits. Judge Holland rejected all such arguments, concluding that "it is specious for Exxon to argue that it conferred a benefit on commercial fishermen by spilling oil."

However, as a result of the offset motion, the Phase II verdict was reduced from $287 million, to $116 million. Eventually, it was further reduced to $20 million, plus interest. These orders, however, were not issued until September 1995, a year after the trial ended.

The last issue preventing entry of final judgment is the resolution of Phase IV. Phase IV was designed to try the compensatory damage claims of all plaintiffs who did not try their claims in Phase II. This included commercial fishing claims for species other than salmon and herring, opt-out natives, oiled landowners, certain Native Corporations, oiled aquacultural associations, and a collection of other claims, many unique, including some for personal injury. The prospect of trying these claims was daunting: it would be complex, time-consuming and expensive. Most important, it would delay bringing the action to a close and entry of a final judgment on the punitive damages awarded by the jury.

Therefore, after months of negotiations, plaintiffs finally agreed to settle the Phase IV claims for a relative pittance ($3.5 million, none of which will be paid due to offsets), because the cost of delay was much greater than the possible value of the Phase IV claims. This was true, even if the true value of the Phase IV claims was set at $100 million, or $200 million, or higher. For Exxon, driving down the settlement of the Phase IV claims will not only reduce the amount it must pay, but, more significantly, it will permit Exxon to argue on appeal that the stipulation read to the jury regarding Phase IV damages was grossly overstated, thus calling into question the amount of punitive damages awarded by the jury.

The settlement, however, does not stand alone. In order to induce the Phase IV plaintiffs to agree, and to protect their right to claim a fair portion of the punitive damage award (as members of the punitive damage class) the settlement was conditioned on court approval of a "Plan of Allocation." The Plan of Allocation sets forth, on a percentage share formula, the amount each category of plaintiffs will recover on all claims, regardless of the source of recovery (*e.g.*, compensatory damages in state and federal trials, Alyeska settlement, punitive damages).

Under the Plan of Allocation, the Phase IV plaintiffs in effect trade off the risk and delay inherent in a Phase IV trial, for the right to participate in all recoveries, including the punitive damage award if it is sustained on appeal. All other plaintiffs also benefit, as settlement of Phase IV permits entry of final judgment, which will in turn expedite appellate resolution of the punitive damage award, with interest running as of the date the judgment is entered.

The genesis of the Plan of Allocation was the Joint Prosecution Agreement, which formalized the agreement amongst plaintiffs' counsel to proceed against Exxon on a collective basis and share any recovery in accordance with an allocation matrix. After trial, that allocation matrix was further refined, and adjustments were made as more information was gathered and further negotiations were conducted between representatives of each category of plaintiffs. The Plan of Allocation is thus based on extensive analysis of the damages incurred by each group, with discounts applied to those whose claims have been dismissed by Judge Holland pursuant to *Robins Dry Dock*. It is the culmination of years of efforts by plaintiffs and their counsel to find a just, fair and equitable basis to distribute any recovery against Exxon amongst the victims of the spill.

Very few plaintiffs objected to the Plan of Allocation. After notice was sent to approximately 30,000 potential class members, the only objectors were a handful of individuals, a few Native Corporations, and a group of large corporate seafood processors known as the Seattle Seven. The Native Corporations objected to the Plan on the grounds that the share allocated to them (3%) was too small. The Seattle Seven objected to the Plan on the grounds that they had not been included in the Plan at all, and were entitled to approximately 14.9% ($745 million) of the punitive damage award, based on their pre-trial settlement of their claims against Exxon.

The saga of the Seattle Seven is perhaps the most remarkable part of this entire case. In January 1991, the Seattle Seven settled their claims against Exxon for $63 million and withdrew from the case.

Thus, plaintiffs did not include them in the Plan of Allocation. However, the terms of the settlement were kept secret until the Seattle Seven filed their objections to the Plan of Allocation in March 1996. Then, for the first time, the Seattle Seven disclosed that they had in fact agreed entered into a joint venture with Exxon to seek to reduce any punitive damage award granted against Exxon.

Such a joint venture appears to be unprecedented. In a typical settlement, a party will release all of its claims, including any claim it has for punitive damages. Here, in addition to releasing their claims, including "all claims whatsoever for punitive damages," the Seattle Seven agreed to "assist Exxon recapture or obtain a credit or offset for any punitive damage award," to participate, at Exxon's request and at Exxon's expense, in any action against Exxon for punitive damages, and to ensure that, if they ever obtained a right or interest in any punitive damage award against Exxon, it "inured" to Exxon's benefit. Thus, while the Seattle Seven settled and dismissed their claims against Exxon, they were secretly aligned with Exxon and obligated to help Exxon reduce any punitive damage award obtained by other plaintiffs who had not settled with Exxon.

In January 1996, sixteen months after the $5 billion punitive damage award was announced and just days before the Court granted preliminary approval to the Plan of Allocation (pending notice to the class and final approval), Exxon and the Seattle Seven "amended" the January 1991 agreement. Under the amended agreement, Exxon paid the Seattle Seven $6 million to object to the Plan of Allocation, with a promised bonus payment of another $12 million if the objection successfully reduces the amount of punitive damages Exxon is required to pay. Exxon also agreed to pay the Seattle Seven's attorneys for filing the objection, and to indemnify the Seattle Seven for any liability they may incur as a result of their participation in these efforts.

Plaintiffs did not hesitate to condemn these actions as a fraud on the Court and a legal sham, and contrary to the public policy of punishing and deterring wrongful conduct. If such a scheme was countenanced by the Court, it would permit and encourage manipulation of the judicial system to reduce liability for punitive damages. Indeed, it would invite defendants like Exxon to pay off plaintiffs with weak claims and little chance of recovery, in order to reduce their exposure to a punitive damage award for egregious conduct. And it could be done without disclosing the deal to the court, the plaintiffs or the jury.

On June 11, 1996, Judge Holland granted final approval to the Phase IV Settlement and the Plan of Allocation, and rejected the Seattle Seven's objection to the Plan. Judge Holland held that Exxon had misled the court and the jury at trial, and that Exxon's secret agreements with the Seattle Seven were "such pernicious and flagrant violations of public policy as to render unenforceable their requirements that the Seattle Seven seek punitive damages on behalf of Exxon." Judge Holland further stated that he was "shocked and disappointed that Exxon had entered into such a repugnant agreement with the Seattle Seven" and held that "public policy will not allow Exxon to use a secret deal to undercut the jury system, the court's numerous orders upholding the punitive verdict, and society's goal in punishing Exxon's recklessness."

Still, final judgment has not been entered, because Exxon filed a motion asking Judge Holland to reconsider his order. In its motion, Exxon argues that the agreements with the Seattle Seven did not violate public policy and that Exxon and its attorneys acted in an ethical and appropriate manner. Whatever the outcome, the entry of final judgment was once again delayed.

Exxon will undoubtedly appeal the final judgment, as soon as it is entered. The grounds for the appeal will be in large part based on the post-trial motions Exxon filed and lost, and will include the jury instructions that it opposed, the motions in limine that it lost, and the argument that the Phase II jury verdicts were not supported by the evidence. The most important grounds of appeal, however, will be that the evidence did not support the Phase III punitive damage award, and that the punitive damage award was excessive as a matter of law.

Exxon's strategy of delay may pay off. On May 20, 1996, in a case entitled BMW v. Gore, the Supreme Court issued an opinion on punitive damages that went beyond its previous opinions and reversed a punitive damage award as "grossly excessive." The Supreme Court did not change its earlier position that there must be a reasonable relationship between the compensatory damages and the punitive damages awarded, but it more clearly articulated the grounds upon which a punitive damage award may be considered "grossly excessive" and thus violative of the Due Process Clause of the Fourteenth Amendment. In essence, the Supreme Court held that a punitive damage award must be measured by the "degree of reprehensibility" of the conduct, the ratio between the actual harm and the punitive damage award, and the civil and criminal sanctions that could be imposed for comparable conduct. The Supreme Court did not draw "a mathematical bright line" determining the ratio for constitutionally acceptable awards, but in holding that the award was "too big," it substituted its version of fairness for

that of the jury and the state court.

It is impossible to predict whether the Ninth Circuit, or ultimately the Supreme Court, will determine that the punitive damages award in this case is "grossly excessive," but Exxon will certainly highlight the BMW case in any appeal it pursues. Even if plaintiffs win, however, the outcome will not be final for years. After final judgment is entered, Exxon will have 60 days to appeal. A briefing schedule will then be established, briefs and the court record will be submitted, and oral argument will be scheduled. Typically, the Ninth Circuit decides cases within two to three years, but there is no guarantee. And if plaintiffs lose, everything will begin anew, with a new trial and appeal looming.

CONCLUSION

Mass torts are part of the modern litigation landscape. The *Exxon Valdez* litigation and trial provides a case study of the perils of such litigation, and the myriad issues that can complicate and prolong such litigation. Courts continue to struggle to manage these massive cases, seeking to use the legal tools at hand. Powerful and well-funded defendants do not lack imagination or incentive to pose innumerable legal barriers, and aggressively assert their legal rights and otherwise use the law, the courts and the judicial system to serve their interests. Plaintiffs who sustain injuries must be prepared for years of litigation, during which time the laws may change, their resources may be exhausted, and their lives must continue.

Here, the battle has lasted for seven years. Procedural and substantive victories have faded in importance, as new legal and factual issues suddenly appear. Exxon has the time and resources to fight every battle, and its grand strategy may yet turn defeat into victory. But even now, only one thing is certain: more than seven years after the spill, and more than two years after the trial began, there is still no end in sight.

ENDNOTES

About Lieff Cabraser

Lieff Cabraser Heimann & Bernstein, LLP is a sixty-plus attorney law firm that has represented plaintiffs nationwide since 1972. We have offices in San Francisco, New York and Nashville. We represent plaintiffs in class and group actions and in individual lawsuits in cases involving substantial losses. For the last seven years, *The National Law Journal* has selected Lieff Cabraser as one of the top plaintiffs' law firms in the nation.

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Proposed Legislative Amendments To Protect States

I. Prohibit Removal to Federal Court of Actions filed by States

A. 28 U.S.C. § 1445 Nonremovable actions

(e) A civil action filed in state court by or on behalf of a State, regardless of whether the claims arise under state or federal law, and notwithstanding any other provision of law.

B. Class Action Fairness Act ("CAFA") 28 U.S.C. §§ 1332(d), 1453, and 1711-1715

No action filed in state court on behalf of a state may be removed to federal court under 28 U.S.C. Sections 1332(d), 1453, and 1711-1715 or any other provision of federal law. A party who improperly removes an action to federal court shall be liable for all costs and attorneys fees to the state.

II. Prohibit Removal to Federal Court of OPA 90 Claims by States 33 U.S.C. § 2717(c)

(c) State court jurisdiction

A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act. Any such action filed on behalf of any State shall not be subject to removal to federal court, absent express consent of the State.

III. Impose Deadline and Sanctions Related to Remand Proceedings 28 U.S.C. § 1447(c)

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). Not later than 30 days after the date on which a motion to remand is filed, the district court shall complete all action on the motion. If no action is taken by the district court within the 30-day period, the case shall be automatically remanded. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. ~~An order remanding the case may require~~ In all cases remanded, whether by order or by automatic remand, the removing party or parties shall be responsible for payment

of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

IV. Prohibit Injunctions of Actions Brought By or on Behalf of a State 28 U.S.C. § 2283

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. Notwithstanding these exceptions, a court of the United States may not under any circumstance grant an injunction to stay proceedings brought by a State in its own State court.

V. Exempt States from the Procedural and Substantive Rights Granted Vessel Owners

A. Rule F, Supplemental Rules for Admiralty or Maritime Claims, Federal Rules of Civil Procedure

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action. Notwithstanding the compliance of the owner with subdivision (1) of this rule and any application of the plaintiff to enjoin further action or proceeding, no vessel owner or plaintiff may utilize this rule to enjoin any action or proceeding brought by a state.

. . .

(10) Claims Made By a State. Any action or proceeding initiated by a state against a vessel owner in a state forum shall remain in that forum. No action, proceeding or claim of a state against a vessel owner shall be subject to this rule.

B. General Limit of Liability, 46 U.S.C. § 30505

(a) In general. Except as provided in section 30506 of this title [46 USCS § 30506], the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.

(b) Claims subject to limitation. Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

(c) Wages. Subsection (a) does not apply to a claim for wages.

(d) Claims by a State. Subsections (a) and(b) do not apply to claims made by a state. A vessel owner shall not be entitled to limit its liability to a state for costs, losses or damages incurred by the state.

STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

May 11, 2010

Mr. John E. (Jack) Lynch Jr.
Global Exploration and Production
Global Supply and Trading
US General Counsel
501 WestLake Park Boulevard
Houston, TX 77079

Re: Request for Additional Assurances

Dear Mr. Lynch:

Thank you for your prompt letter of May 10, 2010, in response to the joint letter from the Gulf Coast Attorneys General dated May 5, 2010. In it, you state that BP will not raise the caps under the Oil Pollution Act against individuals or states and that no claimant against the BP fund will waive its right to file or join a suit later. If my interpretation of your letter is not correct, please send me a letter or email advising me otherwise.

As a veteran of the insurance litigation after Katrina, I learned it is in everyone's interest that claims be paid quickly through a transparent claims process with no caps and no waivers. As I told you during our meeting, the people affected by the oil disaster will be looking to their attorneys general to assess the fairness of the BP claims process. During our meeting I explained that I would need more information and written assurances before I try to explain the BP claims process to our citizens.

In order for me to fully embrace the BP claims process and recommend it to the affected Mississippians, I must have written commitments from BP that it will do the following: (1) establish a website with a link on BP's homepage on which claimants may file claims electronically; (2) accept an independent monitor of the claims process; (3) provide my office with a claims manual describing the claims process with same being made available on your website and at your claims centers; (4) assure that any waivers signed by claimants or boat owners are effectively revoked, and submit to me a list of all of the claimants in Mississippi who signed these waivers and their contact information; and (5) disclose to me the maximum number of barrels per day that the well is capable of emitting.

As I explained to you in our meeting, any assertion by BP of federal preemption of potential state claims or removal by BP to federal court and consolidation of these claims would be viewed with disdain by the states. Consequently, the final assurance I need before agreeing to endorse the BP claims process is BP's written agreement that it will not assert

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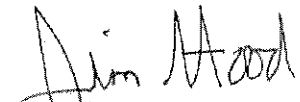
federal preemption and will not remove to federal court or attempt to consolidate claims asserted by the states.

Pursuant to your request, I hereby designate my assistant, Melanie Webb, to receive the daily updates for the State of Mississippi on the claims handling process. Please email daily the number of claims pending, the type of claims, how many have been paid, and the total amount of payments to date for each affected state to mwebb@ago.state.ms.us.

Please let me know when I can expect a response from you regarding these critical questions. I look forward to hearing from you and to working with BP to ensure that all individuals, private companies, and governmental entities are fully compensated for all losses associated with this event.

Sincerely yours,



Jim Hood
Attorney General