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# Running Aground in a Sea of Complex Litigation: A Case Comment on the Exxon Valdez Litigation

*Robert E. Jenkins*  
*Jill Watry Kastner\**

## I.

### INTRODUCTION

*Oil spills leave more than an environmental mess in their wake. They usually leave a mess of litigants and court dockets jammed with lawsuits filed by private and public parties, making claims for damages based upon a myriad of theories of liability.<sup>1</sup>*

On March 23, 1989, the supertanker Exxon Valdez slowly left Valdez, Alaska carrying 53 million gallons of crude oil. Its next planned stop was Long Beach, California.<sup>2</sup> The ship traveled at a speed of no more than six knots during the first leg of its journey because there were small islands, reefs and, most likely, ice ahead. Captain Joseph Hazelwood stood on the bridge of the ship with the third mate Gregory Cousins. As the ship began making its way toward Prince William Sound, Hazelwood left to go to his office to do paperwork after telling Cousins to call if he needed anything.<sup>3</sup> Exxon's manual dictated that the captain had

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\* Robert Jenkins is a J.D. Candidate, UCLA School of Law, 2000; Bachelor of Journalism, University of Texas, Austin, 1997; and would like to dedicate this work to his mother, Jennifer Jenkins, who taught him the meaning of unconditional love through her constant support as he journeyed down the rocky road of life creating his own obstacles until he found his path to a legal career. Jill Watry Kastner is a J.D. Candidate, UCLA School of Law, 2000; B.A. University of Wisconsin, Oshkosh, 1997; and would like to thank her husband J.P. for all his love and support during her law school years.

1. Bruce B. Weyhrauch, *Oil Spill Litigation: Private Party Lawsuits and Limitations*, 1992. 27 LAND & WATER L. REV. 363, 363.

2. DAVID LEBEDOFF, CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME 1 (The Free Press 1997).

3. *Id.* at 12-13.

to be on the bridge “whenever conditions present a potential threat to the vessel such as passing in the vicinity of shoals, rocks or other hazards presenting any threat to safe navigation.”<sup>4</sup>

A short time later, Hazelwood received a call that there was ice ahead and that they would need to maneuver around it. Hazelwood returned to the bridge, studied the ice reports, and ordered the helmsman to change course. Hazelwood then gave instructions to Cousins regarding the next turn the Exxon Valdez would need to make. Hazelwood left the bridge again and returned to his office down below.<sup>5</sup> While Hazelwood did paperwork, Cousins went into the chart room to look at the map, leaving the helmsman alone on the bridge. Suddenly, the lookout sounded an alarm and cried that the flashing red buoy marking Bligh Reef could be seen off the starboard when it was supposed to be on the port side. Cousins quickly ordered a turn. However, the huge ship could not turn fast enough. Cousins called Hazelwood in his office and told the captain, “We’re in serious trouble.”<sup>6</sup>

Just after midnight, the Exxon Valdez ran aground on Bligh Reef tearing open the hull of the ship. Bligh Reef was a well-known navigational hazard in Prince William Sound and clearly marked on the ship’s navigating charts. The damage caused the ship to gush oil into the Sound at a rate of 200,000 gallons a minute. At the time, Prince William Sound was regarded as “one of the most pristine and diverse ecological systems in the world.”<sup>7</sup>

Chief Warrant Officer Mark Delozier of the Coast Guard was called out to the Exxon Valdez. When he arrived, he spoke to Hazelwood. While talking to Hazelwood, Delozier could smell the odor of alcohol. He ordered Hazelwood and some of the crewmembers to be tested for alcohol. It would later be discovered that Hazelwood spent much of the previous afternoon in a bar. Due to numerous delays, however, Hazelwood’s blood sample was taken nearly eleven hours after the grounding. Although the authenticity of the samples was later challenged in trial, the test revealed that Hazelwood’s blood alcohol level was .061 eleven hours after the accident. Federal law prohibits a

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4. *Id.*

5. *Id.* at 14.

6. *Id.* at 15.

7. N. Robert Stoll, *Litigating and Managing a Mass Disaster Case: an Oregon Plaintiff Lawyer’s Experience in the Exxon Valdez Oil Spill Litigation*, 56 OR. ST. B. BULL. 14, Oct., 1995, at 15.

crewmember from operating a vessel if his blood alcohol level is over .04.<sup>8</sup> Exxon fired Captain Hazelwood immediately.<sup>9</sup>

Eleven million gallons of oil from the damaged hull poured out and eventually spread over 2,592 miles of coastline.<sup>10</sup> It has been called the worst environmental disaster in United States history.<sup>11</sup> The oil spill caused the death of more wildlife than any other single human catastrophe. More than 250,000 seabirds, 3,500 otters and hundreds of bald eagles were killed.<sup>12</sup> Additionally, the spill had an extensive impact on almost all levels of life in Alaska. Nearly 60,000 Alaskans claimed the oil spill impacted their lives.<sup>13</sup> No one knows what the long-term effects of the oil spill will be. What is certain is that this spill sparked the beginning of one of America's "largest and most complex litigation in history" that would involve thousands of people, hundreds of lawyers and years of court battles.<sup>14</sup>

Following the spill, thousands of plaintiffs filed hundreds of claims seeking compensation for their losses and punitive damages against Exxon. The plaintiffs included individuals, area businesses, environmental groups, and local, state and the federal governments. The plaintiffs filed individual claims and class actions in both state and federal court.

Now, nearly eleven years after the spill and six years after the trial, the plaintiffs have yet to receive even a portion of the \$5 billion punitive damages they were awarded by the jury. The case reached the first level appeals in May 1999, and none of the plaintiffs' attorneys expect to see a cent of the award in the foreseeable future. Many of those who have followed the case closely have asked themselves: has justice been served?

The purpose of this comment is to describe the history of the Exxon Valdez litigation and analyze whether the courts and corresponding laws are equipped to effectively handle mass environmental litigation. Due to the extended duration and complexity of the Exxon Valdez litigation and the limited space of this com-

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8. LEBEDOFF, *supra* note 2.

9. *Id.*

10. Michele Galen & Vicky Cahan, *Getting Ready for Exxon v. Practically Everybody*, Bus. Wk., Sept. 25, 1989, at 190.

11. George J. Church, *The Big Spill*, TIME, Apr. 10, 1989, at 38.

12. *60 Minutes: Ten Years Later* (CBS television broadcast, Mar. 21, 1999).

13. Christopher Cartwright, Note, *National Resource Damage Assessment: The Exxon Valdez Oil Spill and Its Implications*, 17 RUTGERS COMPUTER TECH. L. J. 451, 453 (1991).

14. Stoll, *supra* note 17.

ment, a thorough analysis of every aspect of this case would prove impossible. As a result, this comment focuses almost exclusively on the litigation between the numerous plaintiffs who suffered injuries as a result of the spill and the defendant Exxon.<sup>15</sup> Although this paper focuses on Exxon, it is important to note that plaintiffs filed suit against other defendants who played a role in the tragedy.<sup>16</sup> Despite these other suits, the plaintiffs' primarily focused their efforts on Exxon.

The analysis in Part II discusses the strategies chosen by the plaintiffs for pursuing their cases against Exxon, their goals, and the strengths and weaknesses of their choices. Part III consists of two parts: Section A discusses the substantive and procedural tools used by Exxon to minimize the number of plaintiffs proceeding with claims and their ultimate results; Section B analyzes Exxon's use of settlements, particularly with the governments of Alaska and the United States to limit its liability to private parties. Part IV describes Exxon's numerous post-trial motions and appeals as well as allegations by plaintiffs that Exxon is using delay tactics to avoid payment.

Finally, the conclusion to this paper contains a general analysis of how the court system performed in handling this complex environmental litigation. Bearing in mind that the court had to deal with numerous and diverse claims with limited resources, the conclusion discusses areas where the court performed well, areas where the court made less than ideal decisions, and areas

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15. For purposes of this article, the defendant collectively known as Exxon includes Exxon Corporation, Exxon Shipping Company, and the Exxon Pipeline Company. Scott Kerin, *Alaska Sport Fishing Association v. Exxon Corporation Highlights The Need To Take A Hard Look At The Doctrine of Parens Patria When Applied In Natural Resource Damage Litigation*, 25 ENVTL. L. 897, 903 (1995).

16. Plaintiffs filed suits against the State of Alaska and the United States, arguing that the governments were liable for not having stronger regulations or otherwise preventing the spill. Additionally, plaintiffs claimed the governments' inadequate handling of the spill further contributed to the disaster. Plaintiffs also filed suit against the Alyeska Pipeline Service Company. Alyeska is a seven-member consortium of oil companies, including Exxon, that run the trans-Alaska pipeline and is responsible for prevention and cleanup efforts for any spills. Kara Swisher, *Lawyers Coordinate Myriad Suits Against Exxon; Courts Put Most Oil Spill Litigation Under Committee Guidance*, WASHINGTON POST, Jan. 30, 1990. While the oil clearly belonged to Exxon, plaintiffs claimed that much of the damage could be linked to the "dismal failure of early efforts to contain and clean up the spill." Barnaby J. Feder, *Valdez Grounding Fuels Lawsuits*, ORANGE COUNTY REGISTER, Nov. 19, 1989. Alyeska eventually reached a settlement with private plaintiffs totaling \$98 million on October 29, 1993. *In re Exxon Valdez*, No. A89-0095-CV (HRH), 1993 WL64910, at \*1 (D. Alaska Dec. 8, 1993) (Order No. 163).

where the judicial system in general could improve in order to better handle mass environmental litigation.

## II.

### THE PLAINTIFFS GATHER: MAY WE BE HEARD?

*The litigants . . . are as varied as the species of wildlife in Prince William Sound.*<sup>17</sup>

The more than eleven million gallons of oil that poured into the Prince William Sound and eventually spread over thousands of miles of Alaskan coastline severely altered the ecological balance in the area. The effects of the oil devastated the natural resources, which in turn had an extensive impact on almost all levels of life in Alaska. Tens of thousands of Alaskans as well as thousands from outside Alaska claimed the oil spill damaged their livelihood and their lives.<sup>18</sup> The makings of mass environmental litigation had begun.

The Exxon Valdez litigation began with more than 52,000 plaintiffs and 84 law firms filing more than 200 suits in both state and federal court in the first year alone. While the army of plaintiffs were allies against a common enemy, they also had competing interests. Specifically, the plaintiffs were in disagreement on whether to proceed as individual claimants or to implement representative litigation through class certification. Those in favor of representative litigation believed it was the most effective way to combat a deep-pocket defendant like Exxon on behalf of plaintiffs who would otherwise lack the resources to pursue their claims. The plaintiffs favoring individualism through the pursuit of their own claims argued that representative litigation would be inefficient, take longer, and would deny them their constitutional right to the counsel of their choice.<sup>19</sup>

Exxon, for its part, argued that "certification would unnecessarily complicate the case, lead to logistical and paperwork problems, and allow for frivolous claims."<sup>20</sup> Exxon wanted to continue their ongoing claims-settlement program which had already paid a total of \$235 million to about 10,500 claimants.<sup>21</sup>

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17. Swisher, *supra* note 16.

18. Stoll, *supra* note 7.

19. Steve Keeva, *After The Spill: New Issues in Environmental Law*, 77 A.B.A. J., Feb. 1991, at 66.

20. *Id.*

21. *Id.*

### A. *The Plaintiffs Gather, But Who Represents Whom?*

The Exxon Valdez plaintiffs who preferred a representative litigation approach proposed several classes for certification. For example, on June 21, 1989, the Alaska Sport Fishing Association (ASFA) filed a claim in state court for the loss of use of Prince William Sound by members of the class of sports fishermen.<sup>22</sup> The class represented approximately 130,000 recreational fishermen. Shortly thereafter, on July 14, 1989, ASFA joined in an amended consolidated class action complaint with other certified class actions.<sup>23</sup> Several environmental groups also filed class actions in state court against Exxon for damage to the natural resources.<sup>24</sup> The environmental groups' claims were consolidated with the sport fishermen's class action and together they filed a motion for certification of a Conservation Trust Plaintiffs (CTPs) class for mandatory injunctive relief to create a conservation fund. The consolidated group also sought in the alternative, damages for lost use of the damaged area and creation of a fund from any undistributed damages that may remain. The certification of the CTPs was eventually granted.<sup>25</sup>

In July 1989, a group designated as the Alaska Natives Class which included all Alaska natives, native villages and government organizations, also filed claims in state and federal court against Exxon for damages to the subsistence resources and their subsistence way of life.<sup>26</sup> A subsistence way of life was defined as one that is "dependent upon the preservation of uncontaminated natural resources, marine life and wildlife, and reflects a personal, economic, psychological, social, cultural, communal and religious form of daily living."<sup>27</sup> Superior Court Judge Shortell granted the group's motion for certification as class action plaintiffs.<sup>28</sup> The class consisted of 3,445 individual Alaska natives.<sup>29</sup>

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22. Alaska Sport Fishing Ass'n v. Alyeska Pipeline Serv. Co., Class Action Complaint Pl, Civ. No. 3AN-89-5188 (Alaska Super. Ct. filed June 21, 1989).

23. Kerin, *supra* note 15, at 907. The sport fishermen's action was later consolidated with several environmental groups to form the Conservation Trust Plaintiffs.

24. Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769, 771 (9th Cir. 1994).

25. Kerin, *supra* note 15, at 907.

26. Exxon Valdez Oil Spill Litigation, 3AN-89-2533 (Super. Ct. Alaska 1989); *In re the Exxon Valdez*, 104 F.3d 1196, 1197 (9th Cir. 1997).

27. *In re the Exxon Valdez*, 104 F.3d 1196, 1197 (9th Cir. 1997).

28. AP, *Way Cleared for Damages In Oil Spill*, THE TULSA TRIBUNE, Feb. 15, 1991.

29. *In re the Exxon Valdez*, 104 F.3d at 1197.

In December 1990, an Alaska state court certified a Cannery Workers class consisting of cannery workers and seafood process employees alleging damages caused by the spill. The court defined the class as those workers with a reasonable expectation of employment after the date of and in the area of the spill. The members of the class claimed lost wages, jobs, and work opportunities.<sup>30</sup> On the same day the state court certified the Cannery Workers class action, a federal court denied a motion for certification of several classes. The federal judge denied certification on the grounds that individual issues predominated over common questions of fact.<sup>31</sup> Superior Court Judge Shortell certified two more classes, one for landowners claiming the spill caused a drop in property values and the other for area businesses claiming losses related to the spill.<sup>32</sup>

In March of 1991, both the State of Alaska and the United States filed claims against Exxon on behalf of the public for the substantial damage to the natural resources caused by the oil spill.<sup>33</sup> Also, a group of commercial fishermen claimed the March 24, 1989 spill in Prince William Sound resulted in lower fish prices and diminished boat and fishing permit values.<sup>34</sup> Additionally, the commercial fishermen class claimed the oil caused the value of salmon caught in areas outside Prince William Sound to also suffer.<sup>35</sup> Superior Court Judge Shortell granted the commercial fishermen's request for class certification in their state court claims.<sup>36</sup>

"A more unusual legal twist developed when J. Garrett Kendrick, a sole practitioner in Los Angeles who supports marine conservation groups, began pondering how he could express his anger with Exxon."<sup>37</sup> Kendrick filed a class-action suit on behalf of California drivers seeking damages for the increase in gas prices resulting from the oil spill. This group of plaintiffs were certified as a class and referred to as the California Motorists. The California Motorists consisted of California drivers who had

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30. *In re Exxon Valdez Oil Spill Litig.*, No. 3AN-89-2533 (Alaska Super. Ct., December 14, 1990) (Class Certification), excerpted in 5 TXLR 967 (Jan. 9, 1991).

31. *In re Exxon Valdez*, No. A89-095 (D. Alaska 1990), excerpted in 5 TXLR 642.

32. AP, *supra* note 28.

33. *See Alaska Sport Fishing Assoc. v. Exxon Corp.*, 34 F.3d at 771.

34. *In re the Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 182856 at \*6 (D. Alaska, Mar. 23, 1994) (Order No. 188).

35. *Id.* at 8.

36. AP, *supra* note 28.

37. Feder, *supra* note 16.



to pay up to 20 cents a gallon more for gasoline after the Valdez grounding temporarily closed the port of Valdez and interrupted the flow of North Slope oil to California refineries.<sup>38</sup>

The final class to be certified was a mandatory punitive damages class which included "all person or entities who possess or have asserted claims for punitive damages against Exxon."<sup>39</sup> Unlike most of the other certified classes, this class action was certified in federal court under the Chief Judge of the United States District Court for the District of Alaska, the Honorable H. Russel Holland, who would later preside over the claims filed in federal court.<sup>40</sup>

One of the primary interests our judicial system strives to protect is the idea that everybody is entitled to his/her day in court. That day in court comes with the ability to guide the presentation of your case with key decisions including the choice of attorney, the witnesses called, and the theories presented. The power to guide one's day in court is crucial because all parties to a claim are bound by the outcome. However, an individual that is not a party to the litigation generally preserves his/her day in court even if the claim arises from the same occurrence that is being litigated by another. Representative litigation is an exception to this general rule because somebody represents the group of individuals and the entire group is bound by the outcome.

While our legal system is based on a theory of individualism, there are times when the advantages of representative litigation make it the better choice such as cases of mass environmental damages. Many critics believe "[t]he usefulness of the class-action device in litigating mass tort cases goes to the very heart of the management problems posed by such megacases."<sup>41</sup>

There are several identifiable problems that can arise with individualism. One problem is that individuals with small damage claims may not have an incentive to sue. For example, the canner workers and process employees decided to pursue their claims through representative litigation because it would be economically infeasible for each worker to file an individual claim.<sup>42</sup>

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38. *Id.*

39. *In re Exxon Valdez*, No. A89-0095-CIV, 1993 WL 527990, at \*9 (D. Alaska Jan. 27, 1995) (Order No. 264).

40. *Id.*

41. Keeva, *supra* note 19.

42. D. Alan Rudlin, *Packaging Toxic Tort Cases For Trial; Use of Test Cases, Bifurcation and Class Actions*, 406 PLI/LIT 185, 276 (Mar. 1991).

The plaintiffs in the cannery workers class sought damages for lost wages, jobs, and work opportunities. While these losses were significant to the individuals that suffered them, the actual pecuniary loss was minimal compared to the expense required to have their day in court. Few cannery workers would be in the financial position to obtain legal representation. In addition, they would have difficulty finding counsel to pursue their individual claims on a contingency basis because the potential damages were relatively small. By moving for certification, those with small claims for damages caused by the spill had incentive to pursue their claims.

Another reason representative litigation was the better choice for the plaintiffs in the Valdez litigation was because litigating against Exxon meant litigating against one of the world's largest corporations.<sup>43</sup> Representative litigation enables plaintiffs to combine resources—a more effective way for individuals with limited funds to do battle against a deep-pocket defendant with seemingly limitless resources. For example, as of March 1999, Exxon spent more than \$300 million in legal fees and appears willing to spend whatever it takes to litigate the matter through every possible level.<sup>44</sup>

Representative litigation in a case of this magnitude may also have the advantage of preventing a race to the courthouse for a limited fund. Parties might fear that their interests will be impaired by other plaintiff's judgments. Exxon's company profits for the year of the spill exceeded \$4 billion.<sup>45</sup> While it is true that Exxon had tremendous economic strength, by September 1991, 252 private lawsuits were filed seeking a total of \$59 billion.<sup>46</sup> Even an economic giant like Exxon could be slain and bankrupted by massive litigation. Thus, the possibility of a race for the courthouse suggests that representative litigation is a better approach for plaintiffs in environmental disasters of this magnitude. To this end, the certification of a mandatory punitive damages class was also appropriate. After all, punitive damages are designed to punish and not to destroy. Courts have found that

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43. Stoll, *supra* note 7 (Stating that as a country, Exxon would be ranked as the 23rd largest economy in the world).

44. Mark Curriden, *Exxon Finds Slow Pace of Valdez Case Profitable: Company Says Fairness, Not Money, Is the Issue*, Dallas Morning News, Mar. 14, 1999, at A1.

45. Emily Barker, *The Exxon Trial: A Do-It-Yourself Jury*, THE AMERICAN LAWYER, Nov., 1994, at 68.

46. *Governments Reach Second Settlement With Exxon*, N.Y. TIMES, Sept. 30, 1991, at A11.

excessive damage awards can be a violation of a defendant's due process rights. These constitutional concerns could have come into play if Exxon had suffered unlimited multiple punishments.<sup>47</sup> The certification of the mandatory punitive damages class helped insure that if punishing Exxon was appropriate, it would be possible without doing so numerous times. More importantly, the punitive damages would be distributed equitably among all plaintiffs as opposed to rewarding only the claimants that won the race to the courthouse. Plaintiffs in favor of the punitive damages class claim also felt that it would give them greater power to negotiate a large settlement.<sup>48</sup>

Additionally, representative litigation is favored when there are numerous plaintiffs in multiple forums, such that there is a great risk of inconsistent outcomes if individual plaintiffs each have their own day in court. Inconsistent verdicts among similarly situated people can undermine the legitimacy of the judiciary. The public wants to believe that like cases will be treated alike. This was a real problem in the Valdez litigation because many plaintiffs filed in both state and federal court so the potential for conflict was considerable. Unfortunately, not even representative litigation could completely remedy this problem. From the beginning, the two judges, Holland and Shortell, differed on whether federal maritime law or state strict liability laws should apply to the claims brought against Exxon. The two judges also made contrary rulings on whether class certification was an appropriate method for dealing with the large number of plaintiffs.<sup>49</sup> While representative litigation could not completely resolve the concern of inconsistency among forums, it did minimize the number of inconsistent rulings.

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47. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996). The Court determined that the size of the punitive damages award violated the defendant's substantive due process rights.

48. Keeva, *supra* note 19. While representative litigation helps to ensure that everyone injured gets a share of the award by leveling the playing field among plaintiffs, the attorneys in front of the judge at the time representative litigation is proposed have no incentive to want certification, unless, of course, they will be the attorney representing the class and getting the big payoff. Thus, the lawyers' pecuniary interests further fueled the tension between individualism and representative litigation in the Exxon Valdez case. Patrick Lynch, Exxon's lead counsel, commented that "there were more papers filed by plaintiff lawyers questioning the role and qualifications of other plaintiff lawyers than anything else in this case." Loren Berger, *Cleaning Up After Exxon: Speaking Softly, Diplomatic Litigator Rises To The Top In Mammoth Class Action Stemming From Valdez Spill*, LEGAL TIMES, Mar. 5, 1990.

49. *Combatants Prepare to Enter Legal Labyrinth*, LLOYD'S LIST INT'L 6, Mar. 24, 1994.

The plaintiffs' choice for using representative litigation to pursue their claims does come at a price. Individuals give up many rights including the right to have the counsel of their choice, the simplicity of their individual claim and, possibly, a longer litigation time frame resulting from the increased complexity. Also, it can be difficult to find adequate representatives of the group when the plaintiffs have different types of injuries and different interests. The Exxon Valdez plaintiffs proposed several sub-groups according to common injuries in order to minimize the disadvantages of inadequate representation.

One critic of representative litigation wrote "trial judges are being converted from neutral umpires, adjudicating factual disputes, into problem-solving bureaucrats dispensing social justice."<sup>50</sup> Any defendant accused of causing environmental destruction will likely be vulnerable in the halls of social justice. Exxon did try to minimize this disadvantage by mounting a public image campaign which included placing a letter of apology in newspapers that appeared across the country. It seems the defendant wanted to show the nation that it was doing "all it could" to clean up the mess caused by the spill before facing a jury of its peers.<sup>51</sup>

Unlike its resistance to the certification of plaintiffs' classes for compensatory damages, Exxon pursued and supported class certification for punitive damages. Exxon scored a big victory by getting a non-opt-out mandatory class for punitive damages. Thus, there would be only one trial for punitive damages to defend and no possibility for multiple punishments. This would reduce Exxon's litigation expenses and, more importantly, limit their exposure to punitive damages.

### B. *A Different Forum – A Difference of Opinion*

On the same day Alaska Superior Court Judge Shortell certified the Cannery Workers as a class action, federal district court Judge Holland denied certification for seven classes. Judge Holland's stated reason was that the individual issues predominated

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50. Coffee, *The Corruption of the Class Action*, THE WALL STREET JOURNAL, Sept. 7, 1994, at A15.

51. Miles Tolbert, Comment, *Public As Plaintiff: Public Nuisance and Federal Citizens' Suits in the Exxon Valdez Litigation*, 14 HARV. ENVTL. L. REV. 511 (1990). The plaintiffs, however, claimed that the ad was merely a part of a national public-relations campaign and not a genuine apology.

over those common among the classes.<sup>52</sup> Judge Holland also expressed concern that numerous classes would assure confusion in an already complex litigation.<sup>53</sup>

Judge Holland's stated reasoning for his denial of class certification was questionable at best. The classes had organized themselves into sub-groups according to the commonality of their claims. All plaintiffs were injured by the same oil spill and all those within the sub-groups suffered similar injuries. Additionally, requiring thousands of plaintiffs to bring their claims individually against common defendants for an injury caused by a single event would be much more confusing than having seven class actions. The demands that would be placed on the judicial system by all the individual claims would be unrealistic. Judge Holland's denial of class certification was likely to motivate the thousands of plaintiffs to seek alternative means for obtaining relief. This theory is supported by Judge Holland's additional ruling that the plaintiffs in federal court must exhaust the Trans-Alaskan Pipeline Fund (TAPLF) administrative payment proceedings prior to pursuing their claims in federal court litigation.<sup>54</sup>

Congress created the TAPLF to cover liability for oil spills with a standard of strict liability. The purpose of the fund was that in the event of a major spill, injured parties could be compensated quickly rather than have to wait years for a court to determine liability and damages.<sup>55</sup> At the time of the spill, the TAPLF contained approximately \$285 million. The money in the fund came from a five-cents-a-barrel tax levied against oil companies using the Alaska pipeline. Congress capped the maximum pay out for any one spill at \$100 million. At the time Judge Holland denied certification of the classes, the TAPLF had just started being used for the first time to settle claims from a spill in Glacier Bay that occurred several years prior to the Valdez spill. There was still uncertainty as to how the TAPLF should operate when Judge Holland directed the plaintiffs to exhaust the fund prior to proceeding with their cases.<sup>56</sup>

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52. Rudlin, *supra* note 42.

53. *Id.*

54. *Id.*

55. LEBEDOFF, *supra* note 2, at 84.

56. Anne Kornhauser, *Exxon Litigation In Untested Waters; Judge Steers Oil-Spill Plaintiffs Away From Court*, LEGAL TIMES, Dec. 24, 1990, at 2.

Part of a judge's responsibility is to guide the litigation toward an efficient and equitable end. However, some critics believe that Judge Holland's decision actually "created an administrative nightmare that [would] cause confusion and delay."<sup>57</sup> Requiring plaintiffs to seek compensation from the TAPLF until it is exhausted before they can have their day in court "creates more issues than it answers and makes the case much more complicated."<sup>58</sup> Adding to the complexity, the plaintiffs' claims far exceeded the \$100 million capped amount available through the TAPLF. Thus, Judge Holland's decision could have actually created more litigation if plaintiffs challenged either the funds cap or sought additional damages in court.

Also, Judge Holland's requirement of exhausting the TAPLF delayed litigation while administration of the fund was implemented. Although Judge Holland indicated that the federal litigation could continue, he expressly stated that he would "likely hold off on significant decisions, such as class certification and certain damage awards, until the administrative procedure is completed."<sup>59</sup> It can be argued that allowing the litigation to go forward while plaintiffs sought redress from the fund could undermine its administration. However, refusing to make key decisions in ongoing litigation while requiring an extra-judicial administrative proceeding to be completed defeats the previously stated purpose Judge Holland gave for denying certification in the first place—minimizing the complexity of the case. There is also the problem of added delay.

Both authors of this comment believe that Judge Holland's underlying purpose in denying class certification was to promote alternative dispute resolution, namely the utilization of the TAPLF. The authors disagree, however, on whether Judge Holland should have exercised his discretion in this manner. Jenkins believes this was a bad decision by Judge Holland. The TAPLF was designed for the benefit of those injured by an oil spill. Its purpose is to ensure that plaintiffs can recoup damages quickly and without needing to resort to the more complex and lengthy procedures of the courts. Judge Holland's decision turned the Fund into a device that delayed claimants from having their day in court, despite having chosen to seek redress through the judicial system instead of the TAPLF.

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57. *Id.*

58. *Id.*

59. *Id.*

Another aspect to Judge Holland's ruling that troubles Jenkins is that it was made without statutory or case law authority. True, a court should promote alternative dispute resolution, but doing so without apparent authority undermines the legitimacy of the judiciary by stepping into the role of the legislature. Judge Holland's decision turned a fund designed to benefit those needing quick redress into a mandatory remedy. There was no reason both proceedings could not go forward simultaneously, allowing those not wishing to wait to use the Fund and those willing to wait to use the courts. "He's really put pressure on everybody to use the fund," said Jerry Cohen, one of the lead attorneys for the plaintiffs.<sup>60</sup> Some critics of Judge Holland's decision said he "seems to have invented the administrative process he is invoking."<sup>61</sup> Neither the statute nor the regulations that govern the TAPLF specify that people injured by an oil spill must exhaust the fund prior to proceeding with their claims in court as Judge Holland required. On the contrary, the fund was designed as an alternative to the courts. Perhaps the aspect of Judge Holland's ruling that Jenkins finds most egregious is that no party to the Exxon Valdez litigation suggested the TAPLF process as a remedy prior to the ruling. "This came out of Judge Holland's brain" criticized one plaintiff's attorney.<sup>62</sup>

Kastner, on the other hand, points to the fact that Congress created the fund to ensure that those injured by an oil spill would be compensated regardless of whether negligence could be proved. By creating this strict liability standard for the TAPLF, Congress eliminated the need to litigate the question of blame or fault, at least to the \$100 million cap. When Congress creates administrative remedies and administrative agencies, courts, following the precepts of administrative law, often defer to the agency and will not allow plaintiffs to even go before the court until a final determination is made.<sup>63</sup> In the case of the TAPLF, Kastner agrees that Congress does not require injured parties to first seek this administrative remedy but believes that Judge Holland behaved appropriately by encouraging the plaintiffs to first submit a claim to the TAPLF. Kastner argues that Judge Holland acted reasonably and within his judicial discretion for two basic rea-

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60. *Id.*

61. *Id.*

62. *Id.*

63. See generally *FTC v. Standard Oil*, 449 U.S. 232 (1980); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

sons. First, the decision gave this new, congressionally-created fund an opportunity to fulfill its mandate and to settle these claims. Second, any claim resolved under the TAPLF was one fewer claim that needed to be resolved by the courts, thus reducing the drain on judicial resources.

As for the argument that no case law supports the court's action, Kastner finds this completely unpersuasive. According to Kastner, the important consideration is that Congress saw fit to establish the TAPLF and give it the power to handle these types of claims. Thus, it is not inappropriate for the court to strongly encourage plaintiffs to utilize this administrative remedy prior to taking up the time and resources of the courts. Kastner disagrees with Jenkins' assertion that Judge Holland stepped into the role of the legislature in his decision to delay class certification. Instead, Kastner believes that Judge Holland showed respect and deference to Congress' decision to create the TAPLF by promoting its utilization.

### C. *Conclusion: The Need for Representative Litigation*

The claims filed against Exxon were brought to vindicate individual rights, but there were too many people with too many claims to allow each individual to have their own day in court. The courts did not have the resources to handle this multitude of cases. The problem that arises is how to render justice without giving everyone their own day in court. The solution, notwithstanding Judge Holland's ruling, was to certify classes so that the majority of the Exxon litigation would proceed through representative litigation. In fact, it was estimated that as many as 100,000 people could be included in just four of the class-action groups that were certified under Judge Shortell in state court. This is about one fifth of the of the total population in Alaska.<sup>64</sup> Therefore, we conclude that the best way to keep this type of environmental litigation from overwhelming the court system is to use representative litigation and consolidate the thousands of plaintiffs into manageable class actions.

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64. *Combatants Prepare to Enter Legal Labyrinth*, LLOYD'S LIST INT'L 6, Mar. 24, 1994.



## III.

## EXXON'S LEGAL STRATEGY: AVOIDING THE HUNGRY SHARKS OR ESCAPING LIABILITY?

*There is no question but that the Exxon Valdez grounding impacted, in one fashion or another, far more people than will ever recover anything in these proceedings. There is an understandable public perception that if one suffers harm which is perceived to be a result of the conduct of another, the harmed person should be compensated. That perception does not always square up with the institutional guidelines (statutes and case law) under which the court must operate . . . This court has no power to change those rules. The court is obligated to apply those rules as they currently exist.*

—Chief Judge Holland<sup>65</sup>

Within days if not hours of the most infamous oil spill in U.S. history, most of the developed world knew about the 11 million gallons of oil that spilled into Prince William Sound. Many also realized that this spill would cause damage to the area's ecosystem as well as cause problems for individuals and local businesses. For Exxon, it was soon realized that it was not just oil that had spilled into the cold waters of Alaska; it was also blood—blood which the sharks could smell from thousands of miles away. Within weeks, lawyers from all around the country were arriving in Alaska. Like sharks drawn to the scent of blood, these lawyers were all drawn to the possibility of multiple lawsuits against the world's largest oil company. They all wanted a piece of the seemingly vulnerable Exxon. As one author wrote: "the Exxon Valdez oil spill did more than create the largest oil spill in North American history. It touched off an avalanche of litigation so vast that its legal effects will likely rival the oil's natural effects for longevity and significance."<sup>66</sup>

By 1991, these predictions appeared to be coming true. Just two years after the spill, there were more than 30,000 claims stemming from more than 200 suits filed in both state and federal court against Exxon.<sup>67</sup> Lawyers from more than 100 law firms became involved in the litigation, representing every type of plaintiff from the fisherman who suffered lower catches to an

65. *In re the Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 830647 (D. Alaska Mar. 23, 1994) (Order No. 189).

66. Miles Tolbert, Comment, *Public as Plaintiff: Public Nuisance and Federal Citizen Suits in the Exxon Valdez Litigation*, 14 HARV. ENVTL. L. REV. 511 (1990).

67. Marla Williams, *Mess of Lawsuits is Proving Stickier than Valdez Oil Spill*, SEATTLE TIMES, July 26, 1991, at A1.

Alaskan bartender who claimed damages for lost tips that he would have received if the fishermen had had a better year.<sup>68</sup> Eventually, 330 civil suits were filed against Exxon and its affiliates.<sup>69</sup> Many of these suits alleged high amounts of compensatory damages and sought millions, if not billions, in punitive damages. Because of the vast number of claims and the high amounts of relief sought, one article speculated that “there looms the prospect of a liability of such gigantic proportions that even an entity the size of Exxon might find daunting.”<sup>70</sup>

Exxon believed many of these claims were unfounded or that the damages sought were excessive. For example, the various fishermen had filed claims for more than \$45 billion, most of which was claimed to be actual losses.<sup>71</sup> However, the statistics from the year before indicated a grand total of about \$1 billion in fish sales. Thus, even assuming that the spill caused the fishermen to catch no fish at all—something not claimed by any of the fishermen—the suits’ alleged damages exceeded actual losses by \$44 billion.<sup>72</sup>

Exxon knew that it would have to pay billions of dollars in clean-up, damages, and penalties; however, it sought to minimize these costs. To end what many might consider litigation madness, Exxon proceeded with a view toward limiting its liability by eliminating all the lawsuits it could through implementation of various judicial tools at its disposal, including certain methods specifically geared toward this type of environmental disaster. Section A focuses on Exxon’s use of substantive law such as the Robins Dry Dock Rule and the special injury rules to eliminate claims and also asks whether these doctrines should be applied in such a way as to seriously limit the ability of many types of plaintiffs to recover. Section B discusses Exxon’s effort to further limit its liability by settling cases through its claims program and by settling with the federal government and the State of Alaska for all public and natural resource damages. This settlement be-

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68. *Id.* at A13. See Barnaby J. Feder, *Exxon Valdez’s Sea of Litigation*, N.Y. TIMES, Nov. 19, 1989, at A1.

69. Cartwright, *supra* note 15.

70. Frank L. Amoroso & Linda R. Keenan, *Natural Resource Damage Recovery Actions: A Legal Tidal Waive Looming*, 17 WESTCHESTER B.J. 109 (1990).

71. Jeff Berliner, *Exxon Oil Spill Damage Claims—\$59 Billion*, UNITED PRESS INT’L, Apr. 5, 1991, at A3.

72. Economists Inc., *An Economic Analysis of the Effect of the Exxon Valdez Oil Spill on Alaskan Seafood Prices*, in REPORT OF THE TRANS-ALASKA PIPELINE LIABILITY FUND 358 (Dec. 1991).

came quite controversial because it later barred the claims of many individuals who believe the government did not do enough to force Exxon to restore Prince William Sound to its pre-spill condition.

#### A. *Separating the Wheat from the Chaff*

Like any good defense attorney, Exxon's lawyers sought to eliminate as many of the claims as they could during the earliest stages of litigation. The most effective tools at Exxon's disposal seemed to be motions to dismiss for failure to state a claim and motions for summary judgment. Due to the court's interpretation and application of several provisions of federal maritime law, the court often granted these motions, and the plaintiffs' cases were thrown out of court without ever going to trial, thus eliminating Exxon's potential liability and avoiding additional litigation costs.

For a tort to fall under admiralty jurisdiction, it must meet the two prong requirements of "locality" and "maritime nexus" as specified in the relevant Supreme Court decisions.<sup>73</sup> Because the spill occurred when the Exxon Valdez was grounded in navigable waters, the locality requirement was met. As for the maritime nexus requirement, this can be met if the spill had a "significant relationship to traditional maritime activity."<sup>74</sup> Because the Exxon Valdez was engaged in maritime commerce, the maritime nexus was also met.<sup>75</sup>

Under the Admiralty Extension Act, Congress extended the jurisdiction of maritime law to specifically cover damages occurring onshore as a result of a chemical spill.<sup>76</sup> Since its enactment in 1948, numerous courts have held that oil spills from vessels on navigable waters are to be considered maritime torts.<sup>77</sup> Although certain plaintiffs argued that their case should not be decided under maritime law, the black letter law of the two prong rule

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73. *East River Steamship Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 (1986). In this case, the Supreme Court held that when these two prongs are met, the court must consider the tort under relevant admiralty law.

74. *In re the Exxon Valdez*, 767 F. Supp. 1509, 1512 (D. Alaska Feb. 8, 1991) (citing *Executive Jet Aviation v. Cleveland*, 409 U.S. 249, 268 (1972)).

75. *Id.*

76. Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1, 12 (Jan. 1994). See also Admiralty Extension Act, 46 U.S.C. § 740 (1994).

77. *United States v. M/V Big Sam*, 681 F.2d 432 (5th Cir. 1982). *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909 (7th Cir. 1983).

and the relevant case law indicates that the courts made the correct decision—those claims seeking damages from the Exxon Valdez oil spill had to be tried under admiralty law.

### 1. Using Robins Dry Dock to Limit Potential Liability

Many jurisdictions consider Robins Dry Dock Doctrine to be an integral part of maritime law.<sup>78</sup> The “Robins Dry Dock Rule ‘is essentially a principle of disallowance of damages because of remoteness’”<sup>79</sup> Under the Robins Doctrine, plaintiffs can only recover for loss of a “benefit measurable in economic terms.”<sup>80</sup> In addition, an injured person must have suffered direct physical harm in order to recover economic losses.<sup>81</sup> Courts often dismiss claims under this doctrine because (1) the plaintiff did not suffer a physical injury to self or property, (2) the injury was not directly caused by the spill, or (3) the injury is not a purely economic damage. Only two exceptions to this rule could be applied in this case. The first is the Fishermen’s Exception, which allows commercial fishermen to recover lost profits from the defendant oil company when an oil spill causes diminished fish harvests.<sup>82</sup> The second came from Congress itself when it enacted the Trans-Alaska Pipeline Authorization Act (TAPAA) and, with it, the TAPLF.<sup>83</sup>

Under the TAPAA, if oil that has been transported through the Trans-Alaska Pipeline spills, the owner and operator of the

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78. *In re the Glacier Bay*, 746 F. Supp. 1379, 1389-90 (D. Alaska Sept. 28, 1990).

79. *In re the Exxon Valdez*, No. A89-0095-CIV (HRH) (D. Alaska Mar. 23, 1995)(Order No. 190, granting motion for Summary judgment) *citing* Holt Hauling & Warehousing Syst., v. M/V Ming Joy, 614 F. Supp. 890, 895 n. 13 (E.D. Pa.1985). *See also* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

80. *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196, 1198 (9th Cir. 1997).

81. *In re the Exxon Valdez*, No. A89-0095-CV (HRH), No. A89-0095, 1994 U.S. Dist. LEXIS 5995, at \*5 (D. Ala. Mar. 23, 1994) (Order No. 188 granting summary judgment motion). According to Judge Holland, the language of TAPAA as well as Congressional intent was for the TAPAA to trump federal and state law, including Robins Dry Dock, up to the \$100 million. *In re the Exxon Valdez*, No. A89-095-CIV(HRH), 1993 WL 787392, at \*2 (D. Alaska Dec. 23, 1993). Thus “Exxon Shipping’s strict liability ends with \$14 million.” *Id.* at \*3.

82. *Union Oil Co. v. Oppen*, 501 F.2d 558, 563 (9th Cir. 1974). The Ninth Circuit eroded the general applicability of the Robins Rule by creating a limited exception to the physical harm requirement for commercial fishermen, known as the fishermen’s exception. The Ninth Circuit held that *Oppen* considered the unique situation of the fishermen, particularly their dependence on the sea, and carved out the special exception only for this specific class. *See generally* Goldberg, *supra* note 76, at 3-4.

83. *Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166 (9th Cir. 1997).

vessel and the TAPLF shall be strictly liable for all damages caused by an oil spill.<sup>84</sup> "Strict liability for all claims arising out of any one incident shall not exceed \$100,000,000."<sup>85</sup> If the total claims allowed exceed \$100 million, each persons' claims are reduced proportionately.<sup>86</sup> The unpaid portion of any claim can be sought from the defendants in the courts. As such, after that \$100 million cap is met, relevant federal maritime provisions apply, including Robins Dry Dock.<sup>87</sup>

In the case of the Exxon Valdez, the amount of damages quickly exceeded the \$100 million cutoff.<sup>88</sup> To prevent the court from using the Robins Dry Dock doctrine, several plaintiffs groups argued that the State of Alaska, through a state law known as the Alaska Act, expanded the TAPAA in such a way that there would be no monetary limit. Thus, Robins Dry Dock could not be applied. Judge Holland rejected this argument saying that federal law preempted state law and thus the Alaska Act was valid only so long as it did not conflict with federal law.<sup>89</sup> Because the Alaska Act failed to mention any monetary limit, and any monetary limit or lack thereof that conflicted with the federally-created limit would conflict with federal law, the court would apply the \$100 million limit mandated under the TAPAA to the Exxon Valdez cases.<sup>90</sup>

In the case of the Exxon Valdez, thousands of plaintiffs' claims were thrown out because of the Robins Dry Dock Rule. The plaintiffs eliminated included individuals and classes who suffered damages in their capacity as taxidermists, refrigeration salesmen, tourist guides, seafood wholesalers, cannery employees, and others.<sup>91</sup>

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84. Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 163(1) (1994).

85. Keeva, *supra* note 19. See 43 U.S.C. § 163(3) (1994).

86. *Id.* Of the \$100 million that is paid, the first \$14 million must be paid by the owner/operator of the vessel. After more than \$14 million of claims are accepted, the TAPLF pays the next \$86 million. The Fund obtains its money by collecting a five cent fee from the owner for every barrel of oil that goes through the pipeline.

87. *In re Exxon Valdez*, No. A89-0095-CV(HRH), 1993 WL 787392, at \*1 (D. Alaska Dec. 23, 1993) (Order No. 121 granting motion for summary judgment).

88. *In re Exxon Valdez*, No. A89-0095-CIV(HRH), 1994 WL 830649, at \*3, (D. Alaska. Jan. 26, 1994) (Order No. 174, motion granting summary judgment).

89. *In re Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 830649, at \*1, 2 (D.Alaska, Jan 26, 1994) (Order No. 38).

90. *Id.*

91. *In re Exxon Valdez*, 1993 WL 787392, at \*2. In *Bullock v. Exxon Corp.*, the owner of a taxidermy business filed suit against Exxon claiming that his business was harmed by the public perception that the fish caught in Prince William Sound were all tainted by the oil spill. This image, he argued, caused a reduction in the value of

An example of one plaintiffs group that the court quickly removed was the California Motorists. This class of individuals sought damages stemming from the increase in gas prices in the wake of the oil spill. In July of 1990, Judge Gadbois of the United States District Court, Central District of California, applied the Robins Dry Dock Rule and granted Exxon's Rule 12(b)(6) motion to dismiss the lawsuit for failure to state a claim.<sup>92</sup> In his ruling, Gadbois stated that since "plaintiffs have alleged economic loss without alleging physical injury to their person or property, plaintiffs have not stated a claim under applicable maritime law."<sup>93</sup> The Ninth Circuit Court of Appeals affirmed this ruling. The court stated that the claims by the California Motorists were too far removed from the spill to be able to recover from Exxon, and, by law, Exxon was not liable for these indirect effects.<sup>94</sup>

In response to Exxon's numerous motions, the federal courts systematically dismissed cases and granted summary judgment against plaintiffs who did not meet the requirements of Robins Dry Dock. Some plaintiffs struggled to stretch the relevant facts and law to show that their economic losses were physically and directly caused by the spill.<sup>95</sup> At the same time, other plaintiffs attempted to persuade the courts that they should be given the Fishermen's Exception. One example can be seen in the case involving two scientists who studied the sea otter population in Prince William Sound. They filed suit against Exxon claiming

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the fish. The court granted summary judgment against both plaintiffs because neither plaintiff could allege physical damage caused by the spill, as required under Robins Dry Dock. *Id.*

Another business filed suit claiming that the oil spill caused Congress to reject a proposed oil exploration in the Arctic National Wildlife Refuge. The court granted Exxon's motion for summary judgment because the business never even argued that its economic harm was caused by physical damages. Order No. 191, at \*1. In a related case, a group of tourist guides filed suit claiming that fewer tourists in the area wished to take guided tours because the damage caused by the oil spill. Again, the court granted summary judgment for failure to allege physical injury. *In re Exxon Valdez* No. A89-0095-CV (HRH), 1994 WL 830647, at \*4 (D.Alaska Mar 23, 1994) (Order 189).

92. *BENEFIEL v. EXXON CORP.*, No. CV 90 2184 RG (EX), 1990 WL 180503, AT \*1 (C.D.CAL. JUL 27, 1990).

93. *Id.*

94. *Benefiel v. Exxon Corp.*, 959 F.2d 805, 808 (9th Cir. 1992).

95. *See In re Exxon Valdez*, No. A89-0095-CV (HRH), 1993 WL 787392, at \*1-2 (D. Alaska Dec. 23, 1993); *In re Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 830647, at \*3 (D. Alaska Mar. 23, 1994); *In re Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 830649, at \*1 (D. Alaska Jan. 26, 1994). *Exxon Valdez*, 1994 WL 830647, at \*2.

that the spilled oil caused a reduction in the number of sea otters that they could catch and then sell to aquariums and zoos.<sup>96</sup> The scientists argued that they literally fished for sea otters and that, due to the spill, they could no longer find as many healthy sea otters. The court rejected this argument. First, the court pointed out that otters are not fish. Second, the court held that the scientists captured the otters for scientific purposes. Because the scientists primarily earned their living from scientific endeavors and not from the capture and sale of the otters, they were unlike fishermen who earn their living from the capture and sale of fish. "Simply put, scientists are not fishermen and otters are not fish."<sup>97</sup> Thus, these scientists could not recover.

Although the fishermen have an exception to the Robins Dry Dock Rule, that does not mean that all of their claims were automatically accepted by the courts. The judicially created exception to the physical injury requirement of the Robins Dry Dock Rule has its limits.<sup>98</sup> In 1991, commercial fishermen filed suit to recover for the reductions in the value of their fishing permits and their vessels.<sup>99</sup> The court never doubted that the value of the vessels and the permits dropped significantly after the grounding of the Exxon Valdez. At the time of the spill, a commercial fishing permit could cost up to \$300,000. These permits became practically worthless immediately after the spill. Even in 1998, the permits were still only worth about \$27,000.<sup>100</sup> The court, however, granted Exxon's motion for summary judgment because these are not the types of damages the court felt were contemplated under relevant maritime law.<sup>101</sup>

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96. *In re the Exxon Valdez*, 1994 WL 182856, at \*2 (Order 189).

97. *Id.* at \*3. In the same order, the plaintiffs who sold salmon oil argued that, like fishermen, they earned their living from the sea. The court found that the sellers of salmon oil were not fishermen because they bought the salmon carcasses from fishermen and did not fish for the salmon themselves. Thus, because they could not use the fishermen's exception and because they suffered no direct physical injury from the oil spill, these plaintiffs could not recover. *Id.* See also *In re Exxon Valdez*, No. A89-0095-CIV(HRH), 1994 WL 830649, at \*1, (D. Alaska, Jan. 26, 1994) (Order No. 174).

98. *Oppen*, 501 F.2d at 570-71.

99. *In re the Exxon Valdez*, 1994 WL 182856, at \*6 (Order No. 188).

100. *60 Minutes, Ten Years Later*, *supra* note 12.

101. ANOTHER CLAIM MADE BY THE COMMERCIAL FISHERMEN WAS THAT THE OIL SPILL CAUSED THE VALUE OF THE SALMON THEY CAUGHT TO DECLINE EVEN IN AREAS UNTOUCHED BY THE OIL SPILL. THIS DID NOT MEET THE REQUIREMENTS OF THE ROBINS DRY DOCK RULE BECAUSE THE COURT DID NOT CONSIDER THIS TO BE A DIRECT IMPACT OF THE OIL SPILL. *In re the Exxon Valdez*, 1994 WL 182856, at \*7, 8 (Order No. 187). The court agreed and held that the fishermen could only recover

## 2. Exxon Avoids Liability For Public Nuisance; Court Applies the Special Injury Rule

In addition to the claims for damages that could be brought under maritime law, plaintiffs could also file suit against Exxon for maritime public nuisance. However, a plaintiff “cannot sue for public nuisance unless she claims to have had an injury that is ‘special’ or of a different kind than that suffered by the public generally.”<sup>102</sup> Simply put, if a claim filed against Exxon did not show how the plaintiff was harmed in a way that was distinct from the harm suffered by other Alaskans, the court would grant Exxon’s motion for summary judgment.

For example, the Alaska Natives filed a public nuisance claim for damages to their subsistence lifestyle.<sup>103</sup> The class “argued that its members were entitled to recover for non-economic damages under general maritime law.”<sup>104</sup> The Alaska Natives noted that the “unique nature of their subsistence lifestyle is the keystone to their culture.”<sup>105</sup> The natives’ complaint emphasized the importance of subsistence living to the Native American culture and how this environmental catastrophe adversely affected their very way of life, which they claimed was a damage unique from that suffered by the general public.<sup>106</sup>

In his ruling, Judge Holland acknowledged the importance of the subsistence way of life to the native Alaskans as well as the important role it plays in native culture.<sup>107</sup> However, he noted that “the opportunity for subsistence uses of fish and wildlife is vitally important to rural Alaskans, both native and non-native.”<sup>108</sup> Judge Holland found that the natives’ claims were not of a different kind than that suffered by other members of the general public and thus were not a ‘special’ injury. He agreed that Natives may have suffered to a greater degree, but “differences

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for the fisheries that were physically affected by the contaminated area and thus directly affected by the spill.

102. Christopher V. Panoff, *In Re The Exxon Valdez Native Class v. Exxon Corp.: Cultural Resources, Subsistence Living, and the Special Injury Rule*, 28 ENVTL.L. 701 (Fall 1998).

103. Darrin J. Quam, *Right to Subsist: The Alaska Natives Campaign to Recover Damages Caused by the Exxon Valdez Spill*, 5 GEO. INT’L ENVTL. L. REV. 177, 186 (1995). See generally *Alaska Native Class*, 104 F.3d at 1197.

104. *Alaska Native Class*, 104 F.3d at 1197.

105. *In re Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 182856, at \*2, (D.Alaska Mar. 23, 1994) (Order No. 190).

106. Panoff, *supra* note 102, at 701.

107. *In re Exxon Valdez*, 1994 WL 182856, at \*4.

108. *Id.* at \*2.



in the intensity with which a public harm is felt does not justify a private claim for public nuisance."<sup>109</sup> As a result, the district court granted Exxon's motion for summary judgment.<sup>110</sup>

The Ninth Circuit affirmed Judge Holland's decision by finding that cultural damages were not sufficient to prove any "special injury" required to support a public nuisance action.<sup>111</sup> In determining this, the court looked to the Alaska Constitution and relevant case law, which gave all Alaskans the right to enjoy a subsistence way of life.<sup>112</sup> Because this injury was very similar to that suffered by the general public, the court dismissed the claim.<sup>113</sup>

### 3. Did the Court Make the Right Choice in Applying the Special Injury and Robins Dry Dock Rules?

Many plaintiffs and even some legal scholars argued that the court should not have applied the Robins Dry Dock Rule.<sup>114</sup> Some argued that the "Robins Dry Dock doctrine is antiquated."<sup>115</sup> Other scholars argued that because of this rule the "injurer seems to get off scot free on the basis of a technicality."<sup>116</sup> Still other plaintiffs argued that even if Robins is an acceptable doctrine, in this case state law should have preempted the federal maritime rule.<sup>117</sup> Indeed, Alaska has a state law similar to the TAPAA except that it does not have a monetary limit for strict liability claims. In October of 1990, state court judge Shortell ruled that state law principles are not precluded by "the federal maritime curtain" of Robins Dry Dock.<sup>118</sup> As discussed above, the Ninth Circuit felt differently. The federal courts held that the TAPAA should preempt any conflicting aspects of the state law.

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109. *Id.*

110. *Id.* at \*4.

111. Alaska Native Class, 104 F.3d at 1197.

112. Panoff, *supra* note 104, at 711.

113. Alaska Native Class, 104 F.3d at 1198.

114. Benefiel v. Exxon Corp., No. CV 90 2184 RG (EX), 1990 WL 180503, at \*3 (C.D.Cal. Jul 27, 1990); *In re Exxon Valdez*, No. A89-0095-CV(HRH), 1993 WL 787392, at \*4 (D. Alaska Dec. 23, 1993) (Order No. 121); *In re Exxon Valdez* No. A89-0095-CV (HRH), 1994 WL 830647, at \*2 (D. Alaska Mar 23, 1994) (Order 189); *In re Exxon Valdez*, No. A89-0095-CIV(HRH), 1994 WL 830649, at \*3, (D. Alaska. Jan. 26, 1994) (Order No. 174).

115. Keeva, *supra* note 19. *See also*, Weyhrauch, *supra* note 1.

116. Goldberg, *supra* note 76.

117. Keeva, *supra* note 19, at 69.

118. *Id.* at 69.

Many similar arguments were made against the use of the Special Injury Rule. Like Robins Dry Dock, the Special Injury Rule has not been abandoned despite the criticisms by numerous legal scholars.<sup>119</sup> Judge Holland was not the only one to conclude that the plaintiffs could not recover for injuries that were not sufficiently "special." The TAPLF also concluded that such claims were not entitled to recovery. The Fund denied the claim of the Alaska Natives for subsistence damages or damages to their cultural way of life.<sup>120</sup> Judge William W. Schwarzer, upholding the decision made by TAPLF administrators, said, "It was incumbent on the fund to draw a line at some point."<sup>121</sup> The court concluded that the TAPLF correctly decided not to accept claims for non-economic damages that are not of a "special" nature as required under public nuisance law.<sup>122</sup>

Despite the criticisms, the district court held, and the Ninth Circuit Court of Appeals affirmed, the use of the Special Injury and Robins Dry Dock rules to eliminate literally tens of thousands of claims. One plaintiffs' lawyer argued that this and other decisions by Judge Holland showed that he was biased toward Exxon and acted to protect the large corporation.<sup>123</sup> However, this statement, and others like it, are unfair and seem to avoid the more likely cause of Judge Holland's rulings: legal precedent and the rule of law. Robins Dry Dock is an accepted principle of maritime law, as are the Ninth Circuit's continual holdings that the Fishermen's Exception to the Robins Dry Dock Rule is not to be expanded.<sup>124</sup> In the same way, because the Special Injury Rule is still good law, we feel the Ninth Circuit was justified in its decision to apply that rule.<sup>125</sup> In one of the orders granting summary judgment, Judge Holland acknowledged the confines of his role as a district court judge in the judicial system when he wrote:

It is the function of both Congress and the courts (principally the courts of appeal and supreme courts) to determine the extent to

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119. Panoff, *supra* note 102.

120. Quam, *supra* note 103.

121. James Cahoy, *Lost Businesses Claims 'Too Remote' to Be Compensated From Exxon Valdez Oil Spill Fund, 9th Circuit Says*, WEST'S LEGAL NEWS, Nov. 26, 1996. See also *Adkins v. Trans-Alaska Pipeline Liability Fund*, 101 F.3d 86 (9th Cir. 1996).

122. *Id.*

123. Panoff, *supra* note 102.

124. *In re the Glacier Bay*, 746 F. Supp. 1379, 1389-90. (D. Alaska Sept. 28, 1990); *Slaven v. BP America, Inc.*, 786 F. Supp. 853, 867-69 (C.D. Cal. 1992).

125. Panoff, *supra* note 102.

which public expectations with respect to financial responsibility are to be realized. . . . In making this and other related decisions, the court applies the rules of law provided to it by Congress and the appellate courts. This court has no power to change those rules.<sup>126</sup>

Thus, it appears clear that Judge Holland granted and denied Exxon's motions for summary judgment based on generally accepted principles of law. As a district court judge, Judge Holland clearly states that he does not see his role as one who makes new law or overturns existing law. "To those who say it ought to be, the court must answer: Congress and the appellate courts make law, not this court."<sup>127</sup>

Those who challenge Judge Holland's decisions cannot claim that the rulings were contrary to established precedent. Rather, their real criticism must lie in the fact that neither Judge Holland nor the Ninth Circuit took it upon itself to engage in judicial activism. As one author wrote, "[a]lthough these outcomes were ostensibly warranted in the law, they signified a lost opportunity to aid the evolution of public nuisance law by eliminating the arguably arcane special injury rule."<sup>128</sup>

The court's function is to adjudicate the case before it using existing law, not to make new law. Bearing in mind the concerns of separation of powers and the fact that it is the role of the legislature and not the courts to make new law, Judge Holland acted appropriately in keeping within his role as a member of the judiciary and leaving the lawmaking to the legislature. Thus, the question is not whether the courts were unjustified in eliminating so many cases and claims, but whether the law itself is conducive to achieving a fair and equitable result in mass environmental torts. A comprehensive analysis requires discussion of policy and history that go beyond the bounds of this comment. However, it is fair to say that these laws and the applicable judicial precedent were established to strike a balance between the interests of more than just the plaintiffs and defendants but also between the various plaintiffs who suffered various types of damages to various degrees. As such, courts, particularly lower courts, are quite justifiably reluctant to change the established rules, thus affecting the balance of interests which the courts and Congress developed over the years. Taking this into account, those desiring change in

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126. *In re the Exxon Valdez*, 1994 WL 182856, at \*3 (Order No. 189).

127. *In re the Exxon Valdez*, 1994 WL 182856, at \*5.

128. Panoff, *supra* note 102, at 731.

these rules, to allow recovery in more types of claims, should look to Congress and not to the courts to make changes in these laws.

#### 4. Exxon Removes Cases to Federal Court Seeking a “Friendlier” Atmosphere

In 1991, the federal courts held that federal maritime law preempted state law remedies for the spill.<sup>129</sup> However, at the same time in similar proceedings in state court, Judge Shortell ruled that state law remedies were not preempted, thus allowing cases to go to trial despite failure to meet the federal maritime law requirements such as the Robins Dry Dock Rule.<sup>130</sup> In response to this negative ruling, Exxon implemented another procedural strategy.

In February of 1992, Exxon made a motion to remove 339 cases filed in the Alaska state court to federal court.<sup>131</sup> Judge Holland granted these motions and later, in December of 1993, granted Exxon’s motions for summary judgment because these actions did not satisfy the Robins Dry Dock Rule. The court reasoned that “because the substantive law to be applied in the state claims is federal maritime law, which includes Robins Dry Dock, these claims must be dismissed.”<sup>132</sup> Judge Holland acknowledged that previously, a state court had ruled that Alaskan state law established strict liability broader than that allowed by the federal courts. Under these state court rulings, Exxon would be held strictly liable for all relevant damages.<sup>133</sup> However, Judge Holland felt the court erred in this ruling. “State law may supplement federal maritime law . . . but state law may not conflict with federal maritime law, as it would by redefining the requirements or limits of a remedy available at admiralty.”<sup>134</sup>

More than 200 plaintiffs appealed Judge Holland’s removal order, claiming that the motion to remove the cases was untimely. In 1994, the Ninth Circuit reversed Judge Holland’s decision.<sup>135</sup>

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129. *Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166 (9th Cir. 1997).

130. *Id.*

131. *Allen v. Exxon Corp.*, 102 F.3d 429, 430 (*citing* *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 782 (9th Cir. 1994)).

132. *In re Exxon Valdez*, 1994 WL 830647, at \*9-10. *See also In re Exxon Valdez*, 767 F. Supp. at 1514.

133. *Id.* at 11.

134. *In re Exxon Valdez*, 1994 WL 830647, at \*1 (Order No. 174).

135. *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773

The appeals court sent the cases back to Judge Holland's court with instructions to remand the cases back to state court for further proceedings.<sup>136</sup>

In 1995, Judge Holland received the ruling of the Ninth Circuit. However, before Judge Holland acted on this order to remand these cases back to state court, Exxon filed a motion for summary judgment. The plaintiffs argued that their cases should be sent back to state court where proceedings had begun prior to the improper removal.<sup>137</sup> Judge Holland decided that "retaining jurisdiction over these cases will promote judicial economy and efficiency . . . and . . . will prevent the state and federal courts from dealing separately with identically situated plaintiffs."<sup>138</sup> However, the most important reason for Judge Holland appeared to be his desire to ensure that federal maritime law was applied "properly" to these cases. In the order, Judge Holland wrote "both this court and the state court are bound to follow federal admiralty law."<sup>139</sup> Once again, the plaintiffs appealed.

On review, the Ninth Circuit agreed that the court "has a duty to protect the uniformity of federal maritime law."<sup>140</sup> The Ninth Circuit, however, held that the district court abused its discretion by maintaining jurisdiction of these cases. The Ninth Circuit stated: "If that [state] court erroneously determines a federal question, recourse does not lie to the United States District Court or to the United States Courts of Appeals. Jurisdiction to review the judgments of state courts lies exclusively in the U.S. Supreme Court."<sup>141</sup> As a result of this holding, the cases were remanded back to state court. Several of these cases are still pending in state court. Many others, however, were remanded only to have the state court agree with the district court's granting of summary judgment.

Here, Judge Holland overstepped the power of his robe and attempted to impose his legal opinions and interpretations on the

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136. *In re Exxon Valdez*, No. A89-0095-CV (HRH), 1995 WL 328493, at \*2 (D. Alaska, May 16, 1995) (Order No. 289).

137. *9th Circuit: Declaratory Relief in Valdez Case Was Abuse of Discretion*, 6 NO. 9 MEALEY'S EMERGING TOXIC TORTS 16. See also, *In re Exxon Valdez*, No. A89-0095-CV (HRH), 1995 WL 328493, at \*1 (D. Alaska, May 16, 1995) (Order No. 289). If the cases were remanded, Exxon faced the possibility that the district court's motions for summary judgment would no longer be binding.

138. *Id.*

139. *In re the Exxon Valdez*, 767 F.Supp. 1509, 1518 (D. Alaska 1991).

140. *Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d at 167 (citing district court decision in Case No. A-91-222, order dated Nov. 13, 1992).

141. *Id.*

improperly removed state court cases. He did this by preventing their remand to a state court that obviously disagreed with him. However, the conclusion by some critics that Judge Holland did this because of his bias toward protecting Exxon and shielding the big company from having to pay for the environmental damage it caused must be rejected. Instead, Judge Holland was likely motivated by the desire to ensure the law was applied *correctly* in all cases. Although the accuracy of his legal opinions or his motives in wishing to promote judicial economy and consistency are not questioned by the authors, the propriety of Judge Holland's methods can be criticized. In his zeal to handle the cases efficiently and to ensure the *correct* standards of law were applied evenly to all plaintiffs, he refused to remand cases that were improperly removed, even after the Ninth Circuit ruled on their improper removal.

B. *Settlements: Cleaning Up Their Mess While Trying to Avoid a Dangerous Future*

Just as any good defense lawyer will attempt to eliminate as many frivolous claims as quickly as possible, good defense lawyers will also attempt to settle cases where plaintiffs have valid claims and good chances of prevailing at trial. Environmental litigation is no different. Within weeks of the accident, Exxon established a Claims Program to which fishermen and others who suffered damages could submit claims.<sup>142</sup> In the months following the accident, Exxon began making payments to fishermen, paying out \$86 million in the first six months alone.<sup>143</sup> These were claims by persons and businesses with provable losses and were considered to have solid cases against Exxon.<sup>144</sup> By 1995, Exxon had paid more than \$304 million in settlement of private claims through the Claims Program.<sup>145</sup>

It is not surprising that the Claims Program rejected claims by individuals and businesses it believed were invalid. However, even if Exxon did not initially believe the plaintiffs had a sound

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142. *In re the Exxon Valdez*, No. A89-0095-CV (HRH), 1995 WL 527988, at \*8 (D. Alaska Jan. 27, 1995) (Order No. 267). Exxon's Claims Program administrators handled these claims as well as the subsequent settlement offers.

143. Amoroso & Keenan, *supra* note 70. Exxon based the amount of compensation for each fisherman upon their average net income for the previous three fishing seasons.

144. Kerin, *supra* note 15, at 904.

145. *In re the Exxon Valdez*, No. A89-0095-CV (HRH), 1995 WL 527988, at \*98 (D. Alaska Jan. 27, 1995) (Order No. 267).

case, Exxon's Claims Program appeared eager to settle the matter after the court indicated otherwise. The best example of this can be seen in the case filed by the Alaska Natives. The Alaska Natives claimed damages for the commercial value of the lost fishing harvests. Exxon filed a motion for summary judgment contending that these claims failed to meet the standards of the Robins Dry Dock Rule.<sup>146</sup> The district court, however, disagreed and denied Exxon's motion, ruling that these were direct, physical injuries caused by the spill. In response, Exxon immediately made an offer to settle these class claims.<sup>147</sup> The offer was accepted and the claim officially settled.<sup>148</sup>

Interestingly, many of the initial settlement offers taken by those injured in the spill were made with minimal Exxon involvement. Under the TAPLF, those injured as a result of the oil spill could simply submit a claim detailing their injuries and the TAPLF administrators would accept or reject the claim. Thousands settled their claims with the TAPLF within the first year after the spill. The problem was that the fund only covers damages resulting from one spill for up to \$100 million. Because the alleged damages in this case far exceeded \$100 million, the fund took the total amount from all the accepted claims and then paid out the \$100 million in damages proportionately. As a result of the inability of the fund to pay the entire amount, plaintiffs had to settle with or file suit against Exxon for the remaining damages.<sup>149</sup>

The TAPLF and Exxon's active efforts to settle claims through its Claims Program created a benefit to all parties. Plaintiffs were able to receive a check for their losses without the delay or expense of a trial. Exxon was able to settle cases with minimal litigation or administrative expenses. The Claims Program was also used as a public relations tool for Exxon to show that it was willing and able to pay those harmed by the spill. In addition, the settlements benefited the courts by reducing the amount of time and resources on the already overburdened judicial system. Even the settlements made after a denial of a motion for summary judgment saved time and energy of the courts by not requiring further proceedings on those claims.

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146. Alaska Native Class, 104 F.3d at 1197-98.

147. Panoff, *supra* note 102.

148. *Id.*

149. Quam, *supra* note 103, at 185-86.

One result of a settlement is that it effectively prevents the same plaintiff from litigating the same claim against the same defendant at a later time. Normally, this is not a problem. However, when an entity seeks to settle claims on behalf of a great number of people through representative litigation, certain members of the represented group may not feel the entity did an adequate job of representing their interests or that they should have had the opportunity to settle or litigate the case for themselves. Generally, such representative litigation is done through class actions where the adequacy of representation becomes an issue for the court to consider prior to certification. However, what happens if there are no class action suits but the government acts as the representative of the public? This became a source of controversy with the settlement between Exxon and the governments of the United States and the State of Alaska.

In March 1991, the United States and the State of Alaska filed suit against Exxon in their capacities as trustees for the public.<sup>150</sup> The suit sought to recover damages for restoration of the environment as well as for losses sustained by the public regarding the use of natural resources. Under the doctrine of *parens patriae*, a state has the "authority to bring actions on behalf of state residents" in cases involving the general public interest.<sup>151</sup> Because the interests of the general public include the use of natural resources and protection of the environment, the government can act as a representative for its citizens in order to recover damages for injury to those natural resources and the environment.<sup>152</sup> In recent years, *parens patriae* actions have been increasingly brought in cases involving certain environmental disasters resulting from hazardous waste releases, such as oil spills.<sup>153</sup>

In December 1990, prior to the formal filing of the suit, the governments and Exxon entered into negotiations regarding resolution of the civil and criminal disputes between the parties. The parties decided not to include other plaintiffs or interested parties in these negotiations. Despite efforts to keep the negotiations secret, on January 28, 1991, the Alaska Natives learned

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150. *Alaska Sport Fishing Assoc. v. Exxon Corp.*, 34 F.3d 769, 771 (1994).

151. BLACK LAW DICTIONARY 1114 (6th ed. 1990).

152. *State of Maine v. M/V Tamano*, 357 F. Supp. 1097, 1100 (D.Me. 1973). See also *In re Exxon Valdez*, No. A89-095-CIV, 1993 WL 735037, at \*15 (D. Alaska, July 8, 1993) (Order No. 125).

153. Kerin, *supra* note 15, at 989



about the negotiations from a radio broadcast and immediately sent letters to relevant state and federal officials requesting that they be allowed to participate.<sup>154</sup> The Natives wanted to be involved in the negotiations because they feared the government would attempt to settle claims affecting Native property or other Native interests without their input. The Natives believed that they, not the government, could best represent their own interests. Despite numerous attempts to communicate, government officials did not respond to any of the Natives' letters or phone calls.<sup>155</sup>

On March 5, 1991, a group of Native villages, known as the Chenega Bay plaintiffs, filed suit in the U.S. District Court in the District of Columbia to enjoin the officials representing the U.S. and Alaska from entering into any agreement that would prevent the Natives from pursuing their own claims against Exxon and the other defendants.<sup>156</sup> The suit also sought injunctive relief against the U.S. and Alaska in order to preserve the Natives' right to recover damages to their own land. Additionally, the Natives argued that they had a right to participate in any aspect of the negotiations that could "potentially compromise or encumber their claims against Exxon."<sup>157</sup>

On March 7, Judge Stanley Sporking of the District of Columbia District Court issued a 10-day restraining order against the U.S. and Alaska.<sup>158</sup> Exxon and the governments responded by arguing that the Natives' rights would not be affected by the settlement. With these good faith representations, Judge Sporkin dissolved the order on March 12, 1991.<sup>159</sup> In that order, Judge Sporkin stated that he believed that the governments' assurances meant that plaintiffs could recover damages for loss of natural resources and other injuries even if Exxon later claimed that "the

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154. Quam, *supra* note 103, at 181, 198.

155. Kerin, *supra* note 15, at 989.

156. Quam, *supra* note 103, at 182.

157. *Id.* at 183. The Natives filed in Washington D.C. rather than Alaska for several reasons. First, the negotiations between the governments and Exxon were being conducted in Washington D.C., thus making jurisdiction easy to obtain. Second, the Chenega plaintiffs believed they would receive greater publicity in the country's capital than they would if they filed in Alaska. Finally, the Natives felt they would have a better chance of succeeding if they filed before a judge other than Judge Holland who had denied all of their motions up to that time. *Id.* at 209.

158. See Keith Schneider, *Exxon Valdez Settlement is Block, For Now*, N.Y. TIMES, Mar. 8, 1991, at A12.

159. Chenega Bay, Civ. Nos. 91-0484, (D. Alaska 1991)(order dissolving temporary restraining order) (on file with author).

same resources and/or lands are covered by the settlement agreement between [the governments] and Exxon.”<sup>160</sup> No other group was as effective as the Natives in delaying the settlement.<sup>161</sup>

That same day in Alaska, after fifty-eight days of formal negotiations, Exxon and the governments reached an agreement<sup>162</sup> and jointly proposed the consent decree to the court.<sup>163</sup> This agreement called for Exxon to plead guilty to four misdemeanor charges and pay a criminal penalty of \$100 million, which up to that time was the highest penalty ever imposed for violations of environmental laws.<sup>164</sup> The civil cases would be settled for \$1 billion. In addition, there was language in the consent decree that the settlement would not affect civil suits filed by private parties.<sup>165</sup>

The Natives immediately spoke out against the proposed consent decree. On April 16, the Natives filed another brief with the District of Columbia District Court alleging that the proposed settlement would directly affect Natives’ rights and thus violated the orders of Judge Sporkin.<sup>166</sup> The Natives were not the only ones to disapprove of the proposed settlement. Environmental groups claimed the amount of \$1 billion for civil damages was insufficient to restore the environment, while other plaintiffs’ groups were concerned about how this settlement could impact their claims. The Alaska House of Representatives also rejected this first settlement proposal.<sup>167</sup>

On April 24, 1991, Judge Holland rejected the criminal portion of the settlement because the fine was inadequate and would “send the wrong message, suggesting that spills are a cost of business that can be absorbed.”<sup>168</sup> On April 29, Judge Sporkin ruled that the proposed settlement may adversely affect the rights of the Natives and ordered discovery to determine if Exxon planned to use the settlement with the government to hinder the claims of the Natives.<sup>169</sup> As part of this discovery process, several

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160. *Id.*

161. Quam, *supra* note 103, at 181.

162. CARTWRIGHT, *supra* note 13, at 454.

163. Kerin, *supra* note 15, at 905.

164. Cartwright, *supra* note 13.

165. *Id.* at 455.

166. Quam, *supra* note 103, at 183 n.48 (citing Plaintiff’s Motion for Reformation and Stay of Implementation of Settlement).

167. *Id.*

168. Keith Schneider, *Judge Rejects \$100 Million Fine for Exxon in Oil Spill as Too Low*, N.Y. TIMES, Apr. 25, 1991, at A1.

169. Quam, *supra* note 103, at 184.

depositions of Exxon officials were taken. In one deposition, Exxon Corporation Chairman Lawrence G. Rawl claimed that Exxon had not even considered the claims of the Alaska Natives while negotiating with the governments.<sup>170</sup>

The governments were displeased with these rulings and wished to avoid further delay. Thousands of attorney-hours had been spent negotiating the settlement agreement.<sup>171</sup> The State of Alaska spent an estimated \$25 million a year in legal fees related to the spill. Governor Hickel of Alaska argued that a billion-dollar settlement with Exxon was in the best interest of the state because any trial would likely be lengthy, costly and risky because it might yield a lesser amount.<sup>172</sup> To resolve these disputes, the governments began negotiating with the Chenega plaintiffs and other Native groups. They struck a deal on September 24, 1991.<sup>173</sup> The settlement between the Alaska Natives and the governments gave the governments the exclusive right to recover for damages to natural resources on public lands, including those used for subsistence living by the Natives. In exchange, the Natives maintained their right to pursue all other private claims against Exxon, including those for damage to tribal lands and harm to Native Alaskan culture and well-being.<sup>174</sup>

On September 25, 1991, Exxon and the governments, who had been involved in informal negotiations since Judge Holland rejected the initial proposal, signed a new settlement agreement that made only slight changes to the initial proposal. The most significant of these changes was an additional \$25 million to the criminal penalties, for a total of \$125 million.<sup>175</sup> The Alaska legislature approved this settlement.

Despite some opposition by certain plaintiffs and environmental groups, on October 8, 1991, Judge Holland approved the settlement and Consent Decree between Exxon and the state and federal governments.<sup>176</sup> In the Consent Decree, the governments

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170. *Id.*, (citing Deposition of Lawrence G. Rawl, Chairman, Exxon Corporation).

171. *Id.* at 192.

172. Michael Parrish, *Exxon Reaches \$1.1 Billion Spill Settlement Deal*, L.A. TIMES, Oct. 1, 1991, at A1.

173. Keith Schneider, *Judge Accepts Exxon Pact, Ending Suits on Valdez Spill*, N.Y. TIMES, Oct. 9, 1991, at A14.

174. Quam, *supra* note 103, at 184 (citing Agreement and Consent Decree, Exxon Corp).

175. Kerin, *supra* note 15, at 906.

176. *Judge Accepts Exxon Pact, Ending Suits on Valdez Spill*, N.Y. TIMES, Oct. 9, 1991, at A14. Exxon Shipping Company President Augustus Elmer pled guilty to

received damages for the loss of all public uses of the land affected by the oil spill in exchange for a release of all their claims against Exxon.<sup>177</sup> Exxon agreed to pay the governments \$900 million over a ten year period for the damages to natural resources as well as an additional \$100 million if the clean-up costs exceeded the \$900 million.<sup>178</sup> Over the next ten years, Exxon's payments of this \$900 million in civil damages would be placed in a trust fund administered jointly by the U.S. and Alaska. Money from the fund would be used to help repair natural resources damaged by the oil spill.<sup>179</sup> The Consent Decree specifically states that the governments are recovering compensatory and remedial relief "in their capacity as trustees of Natural Resources on behalf of the public for injury."<sup>180</sup> The Consent Decree also provided that "[n]othing in this agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this agreement."<sup>181</sup>

#### 1. Exxon Uses the Settlement to Eliminate "Public Claims" by Private Parties

According to the principle of *res judicata*, "a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the right of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action."<sup>182</sup> The Consent Decree specifically provided that the governments were acting in all capacities for their citizens. The presumption in law is that the state will "adequately represent the position of its citizens."<sup>183</sup> Therefore, any claims filed by plaintiffs claiming damages for the destruction of natural resources or other losses

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three of the misdemeanors. The Chairman of Exxon Corporation, Lawrence G. Rawl, pled guilty on Exxon's behalf to the final misdemeanor of killing migratory waterfowl.

177. *In re Exxon Valdez*, No. A89-095 CIV, 1993 WL 735036. at \*6 (D.Alaska Aug. 6, 1993) (Order No. 146).

178. *Alaska Sport Fishing Assoc.*, 34 F.3d at 771.

179. *Under Exxon Settlement, U.S. and Alaska Agree To Oversee a \$900M Fund for Oil Spill Repairs*, in 9 ALTERNATIVES TO HIGH COST LITIG. 180.

180. *State of Alaska v. Exxon Corp.*, Case No. A91-083 Civil, at 3, para. 6(d) (1991)(consent decree); See also *United States v. Exxon Corp.*, Case No. A91-082 at 3 (D. Alaska 1991) (consent decree).

181. *Settlement Agreement Concerning the Exxon Valdez Oil Spill Between the United States, the State of Alaska and the Exxon Corp., Exxon Shipping Co., and Exxon Pipeline Co.*, 56 FED. REG. 11,636 (Mar. 19, 1991).

182. BLACK LAW DICTIONARY 1114 (6th ed. 1990).

183. *Alaska Sport Fishing Association*, 34 F.3d at 776.

incurred by the general public due to the spill, would be barred on the theory of *res judicata*.<sup>184</sup> The only losses for which the governments did not settle and receive damages were those in which individuals suffered damages different in kind, and not just degree, from those suffered by the public.<sup>185</sup> For example, if certain plaintiffs merely claimed that they suffered more deeply than other members of the general public because they are nature lovers and were truly devastated by there being fewer sea birds to watch, this damage differs only in degree and not in kind. The courts would dismiss such cases because the governments already represented these interests in the settlement with Exxon. The effect of the Consent Decree on plaintiffs' claims is best demonstrated by the class action brought by Alaska Sport Fishermen Association (ASFA).

On June 21, 1989, the ASFA filed a suit claiming that they suffered a harm distinct from that suffered by the general public.<sup>186</sup> The district court rejected the argument and found that the sport fishermen were in privity with the governments as members of the general public. Therefore, their claims would be dismissed unless these plaintiffs demonstrated that they suffered damages unique in kind from the general public.

When Judge Holland found that the initial complaint was insufficient to allege a uniquely private claim, the court gave the plaintiffs an opportunity to amend their complaint.<sup>187</sup> Judge Holland stated that he wanted to ensure that the plaintiffs had a full opportunity to adequately state their claim.<sup>188</sup> However, after reviewing the amended complaint, Judge Holland dismissed the claim filed by the ASFA because they failed to show that their claims were different from those suffered by the general public.<sup>189</sup> In his opinion, Judge Holland wrote:

The sport fishermen do not allege that the spill caused harm to their boats, fishing tackle, or other equipment. The sport fishermen do not allege that they incurred expenses because a specific fishing or camping trip had to be cancelled . . . The court is convinced that the sport fishermen were unable to allege private claims because

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184. Kerin, *supra* note 15, at 897.

185. *In re Exxon Valdez*, No. A89-0095-CIV, 1993 WL 735037 at \*2. (D. Alaska Dec. 23, 1993) (Order No. 153, denying motion for reconsideration).

186. Kerin, *supra* note 15, at 907; Alaska Sport Fishing Assoc., 34 F.3d at 771.

187. *In re Exxon Valdez*, No. A89-095-CIV, 1993 WL 735037, at \*5, 12 (D. Alaska, July 8, 1993) (Order No. 125).

188. *Id.* at \*11.

189. *In re Exxon Valdez*, 1993 WL 735036. at \*1 (Order No. 146).

these plaintiffs suffered no private injury. As a result, the court granted summary judgement against the sportfishers and their co-plaintiffs, the NWF.<sup>190</sup>

The sports fishermen argued that the unique injury they suffered was for lost recreational use of the once pristine waters and land of Prince William Sound. The court rejected this argument holding that the government had settled those claims in the Consent Decree.<sup>191</sup> "What the sport fishermen desire is to act as trustees," said Judge Holland. "This position has already been filled [by the government]."<sup>192</sup> The Ninth Circuit agreed, affirming that the government was in privity with the sports fishermen and thus *res judicata* precluded the their claims.<sup>193</sup>

The ASFA also argued that the amount of damages collected by the governments was insufficient to clean-up the "mess" caused by the spill. Judge Holland also rejected this argument saying: "The fact that the governments may have settled for less than the state's own studies estimate the damage at does not change the result."<sup>194</sup> Judge Holland granted Exxon's motion to dismiss with prejudice.

## 2. Who Should Take the Blame: The Courts or the Governments?

Today, oil can still be found under rocks on the shores of Prince William Sound.<sup>195</sup> Many environmentalists say it is obvious that the \$2.5 billion paid by Exxon for the clean-up effort,<sup>196</sup> and the additional \$1 billion in settlement to the government has been insufficient to restore the natural beauty of the area affected by the spill.<sup>197</sup> In addition, thousands of recreational fishermen, Natives, tourists, nature lovers and others who were

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190. *Id.* at \*6.

191. *Id.*, at \*15 (Order No. 125).

192. *In re Exxon Valdez*, 1993 WL 735037 at \*3-4.

193. *Alaska Sport Fishing Assoc.*, 34 F.3d at 773.

194. *In re Exxon Valdez*, 1993 WL 735036. at \*6 (Order No. 146).

195. Bill Monroe, *10 Years After Exxon Valdez, Region Struggles to Recover*, 3/7/99 GRAND RAPIDS PRESS, A12. See *60 Minutes: Ten Years Later* (CBS television broadcast, Mar. 21, 1999).

196. See Monroe, *supra* note 195.

197. It should be noted that the government has spent a relatively small amount of the money available to it under the settlement agreement. Several environmental groups have criticized the administrators of the Trust Fund for not investing in more programs that would provide additional clean-up of the shores or assist the many species of fish, bird and other wildlife that have yet to recover from the environmental harm caused by the spill. *Id.*

adversely affected by the spill were unable to recover because of the governments' settlement. There are some who blame this on the court for approving the Consent Decree when many scientists and experts on the environment warned the district court that the amount was insufficient. There are two lingering questions. First, should the court have approved the settlement? Second, should the court have given *res judicata* effect to those claims brought by the sport fishermen and other similarly situated plaintiffs?

To answer the first question, the court should not be used as the scapegoat for any error in judgment by the governments. After the Chenega plaintiffs blocked the initial settlement agreement, "the governments could have demanded more money from Exxon, but they did not."<sup>198</sup> Days later, the court rejected the first proposal saying the criminal penalty was insufficient for the harm done. Instead of heeding the words of the court and taking advantage of the situation, the government lawyers came back with a virtually identical proposal. Should we blame the court? The United States and the State of Alaska were not unrepresented plaintiffs who needed the protection of the courts. The governments were represented by trained attorneys knowledgeable in the law.

Some people referred to the governments' settlement with Exxon as a "sell-out."<sup>199</sup> Certain environmental groups called the settlement a "drop in the bucket compared to Exxon's \$5.01 billion annual profits," and still others claimed it was not even comparable to a "parking ticket."<sup>200</sup> On the other hand, others believed the governments made the best decision they could in settling the case for more than a billion dollars.<sup>201</sup>

If the settlement was insufficient, and the governments continue to argue that it was not, then shouldn't the blame be placed on the governments rather than courts?. Courts have neither the time nor the judicial resources to carefully analyze every aspect of a settlement agreement between two sophisticated parties. Such a role would be too great of a drain on already overburdened judicial resources as well as an invasion by the

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198. Quam, *supra* note 103, at 209.

199. *Alaska: Hickie in a Pickle*, THE ECONOMIST, Jan. 4, 1992, at 22.

200. *Environment*, USA TODAY, Oct. 9, 1991. The head of the Alaska Coalition spoke out against the settlement claiming it was the wrong decision for Alaska and a horrible precedent for the government to make. See also Linda Kanamine, *Judge OKs Exxon Settlement*, USA TODAY, Oct. 9, 1991, at A5.

201. *\$1.125 Billion Oil Spill Settlement*, L.A. TIMES, Oct. 9, 1991.

courts into the consensual agreements of sophisticated parties. If this were a case of Exxon versus an uneducated factory worker unable to afford his own attorney, that would be a different matter. But here, a large corporation and the state and national governments have the knowledge and expertise to determine what is in their best interest. No one can say that the governments of Alaska and the U.S. do not have environmental experts in their employ whom they could easily have relied upon in these negotiations. Whether or not the governments even listened to their own environmental experts is an error on the part of the governments. The authors believe the court should not be held responsible when one or more of the parties makes an error in judgment. The responsibility should be that of the parties.

The second question is a bit more complicated due to the environmental and policy ramifications. Should the court have considered the agreement to have *res judicata* effect against the claims of the sport fishermen and certain other plaintiffs? Interestingly, the ASFA filed their suit several months before the governments filed suits against Exxon.

One author wrote “[t]he court’s use of *res judicata* to usurp private claims is disturbing.”<sup>202</sup> Still another author felt the court’s interpretation of the power of the government under *parens patriae* was overly broad.<sup>203</sup> Few object to the government’s ability to settle claims for damage to its own lands and resources, but many take the view that the government should not use the doctrine of *parens patriae* to settle claims on behalf of citizens who are fully able to litigate these claims themselves.<sup>204</sup> “With the use of class actions and joinder devices, it is feasible for groups of citizens to adequately represent themselves against a corporation giant such as Exxon.”<sup>205</sup> Because the plaintiffs in this case had full ability to adequately represent themselves, there was little need for the government to use the doctrine of *parens patriae*. In addition, the threat from private, individual and class action litigants would provide a greater incentive for companies such as Exxon to prevent these accidents than the threat of having to negotiate and pay criminal and civil penalties to the government.<sup>206</sup>

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202. Kerin, *supra* note 15, at 899.

203. Panoff, *supra* note 102, at 720.

204. *Id.*

205. Kerin, *supra* note 15, at 924.

206. Panoff, *supra* note 102, at 719.



Additionally, in this case, the governments were less than ideal plaintiffs. Before and after the court accepted the settlement between the governments and Exxon, plaintiffs claimed that the State of Alaska could not adequately represent the public interest for several reasons. One of the key reasons was that a number of plaintiffs, as well as Exxon itself, was suing Alaska for actions it took and/or failed to take before, during, and after the spill.<sup>207</sup> How could the government of Alaska adequately represent its interests as well as that of the general public when it was being sued by the very people it was supposedly representing?

Usually, in representative litigation, the judge is required to assess the fairness of any settlement independently. However, this applies to class actions where the court "plays a vital role in assuring and constantly reassessing whether the class members' interests are being represented adequately."<sup>208</sup> This was not a class action. Although the government represents the public, there was not a class to certify under the relevant rules of procedure. Instead, under the theory of *parens patriae*, the court must presume that the government will adequately represent its citizens. *Parens patriae* is an accepted principle of law. Although there are those who argue that the court used an overly broad interpretation of the concept and that the doctrine itself is outdated and should be eliminated, no one suggests that the doctrine is not the law of the land in the Ninth Circuit. Thus, although the authors support elimination of *parens patriae*, the court clearly followed precedent in applying the doctrine and not requiring an extensive analysis into the adequacy of representation. Judge Holland applied the law as he believed it should be applied. The Ninth Circuit affirmed this decision. Once again, the real criticism in this case is that the courts decided to apply the law rather than modify it in order to reach some social goal. As one scholar wrote: "It is not the function of courts to create new aims for society or to impose on society new basic directives."<sup>209</sup> That is the role of the legislature and not that of the judiciary.

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207. Kerin, *supra* note 15, at 918. See generally *First Lawsuits Filed Over Effects of Spill*, 19 ENV'T REP. 2566 (Apr. 7, 1989).

208. *The Class Action*, in CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 828 (Richard D. Freer and Windy Collins Perdue eds., 2d ed. 1997).

209. Lon L. Fuller, *The Forms and Limits of Adjudication*, in PERSPECTIVE ON PROCEDURE 35 (Geoffrey C. Hazard and Jan Vetter eds. 1987).

In addition, the type of claims which the court ruled had *res judicata* effect were for life changing injuries. A large group claimed substantial damages because Exxon had oiled a favorite place to do recreational fishing. These were not people whose livelihoods were affected by the oil spill. These were not people whose boats or fishing equipment were damaged or who became ill after eating an oiled fish. None of these individual types of claims would have been affected by the governments' settlement with Exxon. Instead, those claims adversely affected involved damages to recreational activities or ascetic pleasure derived from the natural resources—resources for which the governments already collected up to \$1 Billion in civil injuries. Should these people be able to recover additional funds just to make certain the environment actually returns to its pre-spill beauty? To allow such recovery would be the same as allowing two owners of the same property to collect damages twice for the same injury. Clearly, the courts should not allow this double-recovery to take place.

Unfortunately, the question remains as to how to most effectively ensure that companies are required to clean up their mess and restore the environment to its pre-spill condition. Private parties, such as environmental groups, would be best suited to litigating against a corporate giant for general environmental damage, so long as the court applied the adequate representation rules of a class action and ensured that all damage awards and/or settlements would be placed in trust to be administered by trustees whose fiduciary duty was to clean up the environment.<sup>210</sup> Basically, a suit for general environmental damages (those not dealing with specific damages to public or private land) should not be handled by the government but by people whose only interest is to restore the natural environment of the affected areas. As with the changes discussed above, this could only be done through litigation. Thus, environmentalists who would like to make a difference must focus their efforts on changing the laws themselves and not on criticizing judges who apply the current law.

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210. In other words, the court must ensure that the attorneys wishing to represent the class action will, in deed, represent the views of ALL concerned with the environment and also ensure that all awards go to the clean-up effort and not into private pockets (taking into account the need to pay for appropriate attorney fees).

## IV.

EXXON APPEALS: THE WHEELS OF JUSTICE COME TO  
A SCREECHING HALT

At regular intervals, juries award large verdicts, the headlines slam them into public awareness and editorials crackle with approval or condemnation. But it rarely ends there. The jurors go back to their lives, but very often the lawyers fight on-and during this often long, drawn-out process, nobody pays much attention.<sup>211</sup>

It was an anxious courtroom on September 16, 1994. The plaintiffs and the defendants waited nervously as the jury finally delivered its verdict on the punitive award.<sup>212</sup> The Alaskan jury of eight women and three men awarded the largest punitive judgement ever suffered by a U.S. Corporation: \$5 billion.<sup>213</sup> After the verdict was announced, plaintiffs' lawyer, Brian O'Neill turned around and hugged his 3-year-old son who was sitting behind him in the courtroom. Just then, Mr. O'Neill recalls, a lawyer from [Exxon] leaned over and whispered: "He'll be in college before you get any of that money."<sup>214</sup>

O'Neill's son is now nine years old, and the words of the Exxon attorney have held true thus far. After the jury rendered its verdict, Exxon vowed to "fight the decision all the way to the Supreme Court."<sup>215</sup> To begin this long process, Exxon made dozens of post-trial motions and appeals.<sup>216</sup> By the close of the post-trial briefing period on November 4, 1994, Exxon had already filed 22 motions with the district court.<sup>217</sup>

211. *Verdicts Revisited*, NAT'L L.J., Sept. 28, 1998, at C2.

212. On May 2, 1994, the federal trial began. Both Exxon and Captain Hazelwood were the defendants. The court trifurcated the trial. In phase I of the three-part trial, the court charged the jury with deciding whether Hazelwood and/or Exxon were reckless as well as a legal cause of the grounding of the Exxon Valdez. The jury unanimously found that both Hazelwood and Exxon recklessly caused the accident. In phase II, the jury was to decide upon the amount of compensatory damages to award those injured by the spill. The jury returned a verdict of \$286.7 million for losses resulting from the oil spill. In Phase III, the jury had to decide whether punitive damages were appropriate and if so, how much. LEBEDOFF, *supra* note 2, at 292.

213. Curriden, *supra* note 44.

214. *Id.*

215. Natalie Phillips, *Exxon Hearing Nears Appeal, Arguments Scheduled in May*, ANCHORAGE DAILY NEWS, Mar. 31, 1999, at B1.

216. *The Exxon Corp. is Fighting to Reverse the Huge Punitive Judgement Handed Down in Alaska*, NAT'L L.J., Dec. 26, 1994, at C4.

217. Amy Edwards Wood, *In re the Exxon Valdez: The Danger of Deception in a Novel Mary Carter Agreement*, 21 SEATTLE U.L. REV. 413, 416 (1997).

When Judge Holland upheld the 1994 jury verdict, Exxon responded by telling its shareholders to “brace for years” of legal battles over the punitive damage verdict.<sup>218</sup> In February of 1995, Lee Raymond, chairman of Exxon Corporation told a reporter that “[Exxon] will use every legal means available to overturn this unjust verdict.”<sup>219</sup> Indeed, the legal battle continues. By March 1999, Exxon had filed “more than 60 petitions and appeals, sought 23 time extensions and filed more than 1,000 motions, briefs, requests and demands.”<sup>220</sup> As a result of these numerous motions and appeals, lawsuits stemming from the oil spill continue to this day.<sup>221</sup>

Despite the fact that eleven years have passed since the Exxon Valdez ran aground, five years have passed since the trial, and more than 15 million pages of documents have been filed by the parties, the case only reached an appeals court in May of 1999.<sup>222</sup> There appears to be no sign that the litigation will end any time soon.

One of the plaintiffs’ attorneys expressed his frustration at the delay in a letter dated March 17, 1992 to the editor of the Pittsburgh Post Gazette:

This devastating spill took place on March 24, 1989, Good Friday. . . . The people whom I represent have litigated this now for 10 years. We have won a \$5 billion verdict against Exxon that is [still] on appeal in the federal courts. . . . When this case is finally finished with God’s help and justice received by the people, the thousands of fishermen shall receive the money they need to try and get their lives back together. This is impossible after 10 years, but at least it will help them in some way.<sup>223</sup>

It is not only the plaintiffs who are frustrated by the continuation of this litigation. In September 1990, Judge Holland told a packed Anchorage courtroom: “Some have suggested, quite seriously I believe, that I might retire before this litigation is com-

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218. *Society and Politics Exxon Valdez: Annual Report Reveals Unlikely Appeal Strategy*, AM. POL. NETWORK, Apr. 13, 1995.

219. *Judge Upholds Jury Verdict in Exxon Valdez Case*, OIL SPILL INTELLIGENCE REPORT, Feb. 2, 1995.

220. Curriden, *supra* note 44.

221. Panoff, *supra* note 102.

222. Curriden, *supra* note 44.

223. Louis M. Tarasi Jr., *Fishermen Seek Justice: Letter to the Editor*, PITTSBURGH POST-GAZETTE, Mar. 17, 1999. See also *Looking at the Legacy of the Exxon Valdez*, PITTSBURGH POST-GAZETTE, Mar. 1, 1999. Mr. Tarasi is a member of the Tarasi Law Firm in downtown Pittsburgh who represented a number of commercial fishermen in the suit against Exxon.

pleted. I am 11 years from retirement.” Judge Holland said he had no intention of allowing payment of claims to take that long.<sup>224</sup> In 1998, a older and grayer Judge Holland told another group gathered in his courtroom: “Sometimes I think this litigation will never end.”<sup>225</sup> There are many who believe that Judge Holland will have many years of golf, fishing, and other relaxing activities to do during his retirement before the litigation in this case ends.<sup>226</sup>

A. *Motion After Motion; Appeal After Appeal: Will it Ever End?*

Immediately after the jury returned its \$5 billion verdict, Exxon made several motions and appeals claiming the court had erred, the verdict was excessive and a new trial must be granted. In the first motion, Exxon’s main argument was that \$5 billion punitive damage award was “totally unwarranted, failing every legal or logical test of reasonableness and purpose.”<sup>227</sup> Exxon also argued that the court erred in four of the jury instructions.<sup>228</sup> Exxon claimed that the jury instructions were written in a way that made it easier for the jury to find Exxon liable for Hazelwood’s mistakes and to award punitive damages.<sup>229</sup> Finally, defendants argued that there was insufficient evidence for the jury to find that Exxon was reckless in causing the spill.<sup>230</sup>

On January 27, 1995, Judge Holland upheld the 1994 jury verdict that found Exxon guilty of recklessness.<sup>231</sup> The trial court denied Exxon’s motions, ruling no errors were made in the jury instructions and sufficient evidence existed for the jury to find Exxon reckless.<sup>232</sup> Judge Holland also upheld the punitive damage award.<sup>233</sup> The court concluded that “the \$5 billion punitive

224. Keeva, *supra* note 19.

225. Curriden, *supra* note 44.

226. *Exxon’s \$5.3 Billion Oil Spill Appeal Will be Heard May 3*, SEATTLE POST-INTELLIGENCER, Apr. 1, 1999, at B6.

227. Monroe, *supra* note 195.

228. *In re Exxon Valdez*, No. A89-0095-CIV, 1993 WL 527990 (D. Alaska Jan. 27, 1995) (Order No. 264 denying motion for a new trial on plaintiff’s Punitive Damage Claims).

229. *In re Exxon Valdez*, 1993 WL 527990, at \*4 (Order No. 264).

230. *Environmental Litigation Roundup*, WEST’S LEGAL NEWS, Sept. 12, 1995, at 1843.

231. *Judge Upholds Jury Verdict in Exxon Valdez Case*, OIL SPILL INTELLIGENCE REPORT, Feb. 2, 1995.

232. *In re Exxon Valdez*, 1993 WL 527990, at \*11 (Order No. 264).

233. Wood, *supra* note 217, at 416.

verdict was not disproportionate to the harm.”<sup>234</sup> The court also reasoned that “to grant Exxon’s motion would deprive plaintiffs of the jury’s determination of the facts.”<sup>235</sup> Exxon immediately appealed the decision.<sup>236</sup> These initial motions and appeals are not the only ones filed by Exxon.

#### B. *Fishy Allegations of Juror Coercion and News of Possible Juror Misconduct*

On January 22, 1995, the Anchorage Daily News printed an article focused on the jury and its deliberations.<sup>237</sup> In the article, several jurors admitted to reading and/or listening to news coverage of the trial.<sup>238</sup> Some jurors said they discussed the case with relatives.<sup>239</sup> Other jurors talked about dead fish being placed on their lawns prior to deliberations. During the trial, the court did not sequester the jury.<sup>240</sup>

When Exxon learned of this article, it immediately requested that the court look into the matter. Exxon claimed that the jurors had disobeyed Judge Holland’s orders about not discussing the case outside the court and also contended that the jurors were coerced into finding for the plaintiffs and reaching a \$5 billion punitive damage verdict.<sup>241</sup> Exxon further alleged that the placement of dead fish on the juror’s lawn was “akin to the scene in *The Godfather* in which the Mafia left a horse’s head . . . as a message.”<sup>242</sup>

After reading the newspaper article and Exxon’s brief, Judge Holland concluded, “Exxon had raised so many questions about the jury proceedings [that] it was necessary to call the jurors in for questioning.”<sup>243</sup> Judge Holland said, “[s]ome of the allegations are serious enough to warrant further investigation.”<sup>244</sup> Ex-

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234. *In re the Exxon Valdez*, No. A89-0095-CV (HRH), 1995 WL 527988, at \*8 (D. Alaska Jan. 27, 1995) (Order No. 267 denying motion for new trial).

235. *Id.* at \*4.

236. Monroe, *supra* note 195.

237. Andrew Blum, *Will Fish Sink Valdez Verdict: Exxon Alleges Juror Misconduct and Intimidation*, NAT’L L.J., July, 3, 1995, at A6.

238. *In re Exxon Valdez*, 1993 WL 527990, at \*11.

239. *Exxon Alleges Juror Misconduct, Asks for New Valdez Spill Trial*, SALT LAKE TRIB., Sept. 10, 1995, at A4.

240. Rosanne Pagano, *Exxon Claims Juror Misconduct in Asking for New Trial*, ANCHORAGE DAILY NEWS, Sept. 12, 1995, at B1.

241. *Exxon Alleges Juror Coercion*, Nat’l L.J., Sept. 25, 1995, at B3.

242. Blum, *supra* note 237.

243. *Exxon Valdez Jurors Questioned by Judge*, NAT’L L.J., June 26, 1995, at B2.

244. Blum, *supra* note 237.

xon also requested that the proceedings be sealed and the hearing not be listed on the court's docket. Judge Holland granted the request, in part, because he did not want the jurors to be the subject of further media scrutiny before he had a chance to discuss the matter with them.<sup>245</sup>

On June 13 and 14, 1995, Judge Holland questioned jurors about any potential coercion that may have occurred during the trial.<sup>246</sup> An attorney for Exxon and an attorney representing the plaintiffs asked follow-up questions. Judge Holland and the two attorneys questioned ten jurors individually in chambers.<sup>247</sup> Judge Holland emphasized that the very "integrity of the judicial process is involved" as he questioned jurors about whether anyone had tried to influence their decision.<sup>248</sup>

During the questioning, the jurors denied the allegations that they had disobeyed the order not to discuss the case outside the jury room. These jurors also denied seeing or reading any media involving the Exxon Valdez oil spill once the trial had begun.<sup>249</sup> As for the juror who had the dead fish placed on her lawn, she said she took the fish incident with a grain of salt: "[i]t didn't scare me."<sup>250</sup> Another juror said she found fish lying on her lawn on two separate occasions. She stated that she wasn't sure "from what side the pressure was coming from," whether it was a message to find for Exxon or for the fishermen.<sup>251</sup>

On September 7, four months after the closed hearings, Exxon filed a 25-page motion requesting a new trial based on alleged juror misconduct and coercion.<sup>252</sup> At the time, Exxon did not contest the \$287 million compensatory damages verdict rendered in Phase II of the trial.<sup>253</sup> Exxon did, however, use the testimony given by the former jurors during the closed interviews to argue that several jurors were swayed by acts of intimidation directed at them during the trial. Exxon also claimed that one juror in particular was coerced into "abandoning her convictions."<sup>254</sup> Af-

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245. *Exxon Alleges Juror Coercion*, *supra* note 241.

246. Pagano, *supra* note 241.

247. *Exxon Alleges Juror Misconduct*, *supra* note 239.

248. *Exxon Valdez Jurors Questioned by Judge*, *supra* note 243.

249. *Exxon Alleges Juror Misconduct*, *supra* note 239.

250. Blum, *supra* note 237.

251. *Id.* See also, *Exxon Alleges Juror Coercion*, *supra* note 241.

252. Pagano, *supra* note 240.

253. *Exxon Alleges Juror Coercion*, *supra* note 241.

254. *Juror Coercion, Misconduct Arguments Rejected by Exxon Valdez Judge*, 8 No. 12 MEALEY'S LITIG. REP.: TOXIC PROP. DAMAGE 8 (Mar. 25, 1996).

ter four days of jury deliberations without reaching a verdict, this juror openly sobbed outside the deliberation room.<sup>255</sup> The judge responded by instructing the jurors “to be nice to one another.”<sup>256</sup>

Exxon further claimed that Judge Holland exacerbated the situation by refusing to end the trial after the panel announced it was deadlocked.<sup>257</sup> After five days of deliberations, the jury sent a note to the judge saying they had reached an impasse.<sup>258</sup> Judge Holland told the jurors to keep working. The next day, jurors sent a note saying the recalcitrant juror was “emotionally unable to deliberate.”<sup>259</sup> The court then looked into the allegations, but after an investigation concluded that she could proceed. The judge asked the juror if she wanted him to take her off the jury. She said no. Within the hour, however, she sent a note back to the judge asking to be let off the jury. He refused.<sup>260</sup>

Nine days later, on September 16, the jury returned its verdict.<sup>261</sup> All twelve jurors agreed to the verdict when polled in court.<sup>262</sup> According to Exxon, the evidence shows that the juror was coerced into accepting the punitive damages verdict. Exxon alleged that the juror felt “boxed in” and that her only means of escape was to sacrifice her convictions.<sup>263</sup> “In the court’s view, it was more important for jurors to avoid an impasse than to treat each other properly or hold onto their honest convictions,” said a lawyer for Exxon.<sup>264</sup> The Court rejected this argument and said, “[n]othing in the totality of the circumstances establishes that [the juror] was the victim of coercion.”<sup>265</sup>

One of the most disturbing accusations of coercion stemmed from an alleged incident where a court security officer removed a bullet from his handgun and, referring to the recalcitrant juror, said “[m]aybe if you put her out of her misery or something.”<sup>266</sup>

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255. Pagano, *supra* note 240.

256. Barker, *supra* note 45, at 73.

257. Pagano, *supra* note 240.

258. Barker, *supra* note 45, at 73.

259. *Juror Coercion*, *supra* note 254.

260. Barker, *supra* note 45, at 73.

261. Phillips, *supra* note 215.

262. Barker, *supra* note 45, at 76.

263. *Juror Coercion*, *supra* note 254.

264. Pagano, *supra* note 240.

265. *Juror Coercion*, *supra* note 254.

266. Pagano, *supra* note 240.



A different juror who heard the statement said he was "really shook up" by the gun display.<sup>267</sup>

On February 19, 1996, the court denied Exxon's motion for a new trial based on the allegations of juror coercion and misconduct.<sup>268</sup> The judge rejected the various arguments of juror misconduct saying either it did not actually occur, or, if it did, the actions were harmless and did not affect the outcome of the case. As for the allegations of juror coercion regarding the dead fish, the security guard, or the sobbing juror, the court found these and other occurrences, whether considered individually or cumulatively, "to be harmless and not prejudicial."<sup>269</sup>

Exxon appealed several of these rulings, including all the juror coercion allegations. As a result, Exxon has been able to delay the payment of the \$5 billion punitive damage award. Some critics have argued that these motions were frivolous and merely attempts by Exxon to further delay the litigation process.<sup>270</sup> Indeed, several of Exxon's motions seemed quite unlikely to succeed, but the motions were not frivolous. In fact, Exxon actually raised several legitimate arguments, including the allegations of juror coercion. The fact that more than one juror witnessed a courtroom security officer remove a bullet from his gun and joke about shooting a resistant juror is disturbing to say the least. Exxon's request that the court look into the claims made in the newspaper article was also justifiable. Although it is very important to finish this environmental litigation so that those injured can receive their final payments, this should not be done at the expense of justice. If fishermen, environmentalists, or other interested groups were trying to intimidate jurors by placing dead

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267. *Id.*

268. Another accusation of juror misconduct arose when Exxon learned that a juror falsely answered a question about drug abuse. *Id.* According to Exxon, the juror failed to disclose a drug arrest and "many years" of marijuana use. *Juror Coercion, supra* note 254. While filling out a pretrial questionnaire, the juror failed to disclose that he had been charged with criminal possession of more than a pound of marijuana. Exxon argued that Hazelwood's substance abuse and Exxon's reaction to Hazelwood's drinking problem was a key element in the trial as well as in the award of punitive damages. Phillips, *supra* note 215. In addition, the court rejected Exxon's arguments that a new trial was warranted because the jury was "exposed to extraneous prejudicial evidence of Capt. Hazelwood's convictions for driving under the influence and revocations of his driver's license." *Juror Coercion, supra* note 254. Exxon had alleged that a juror was improperly approached by a commercial fisherman during the trial and that by not reporting the incident earlier, this juror engaged in misconduct. *Id.*

269. *Juror Coercion, supra* note 254.

270. Phillips, *supra* note 215.

fish on their lawns, this should also be looked into in order to prevent such appalling and childish behavior in future environmental or other litigation.

Judge Holland made the right decision in interviewing the jurors in chambers to determine if the stories of misconduct and possible coercion discussed in the newspaper were accurate. One of the most important components of our adversarial system of justice is an impartial finder of fact who will make the final decision based upon the evidence presented by the parties, and not by some outside or improper influence. This is as important in environmental litigation as it is in any other type of litigation. It is the court's duty to ensure the case was properly adjudicated in front of an impartial finder of fact free from any coercive influences. To ignore Exxon's request for the interviews would have been unjust and a failure of judicial responsibility.

In addition, Judge Holland effectively and efficiently conducted the interviews, facilitating discovery on whether improper conduct or coercion had occurred. By questioning the jurors individually and emphasizing the importance of honest answers, Judge Holland acted responsibly in order to address the concerns of improper juror conduct or coercion.

The authors disagree on the propriety of Judge Holland's handling of the recalcitrant juror. Kastner believes that it was within Judge Holland's discretion to keep her on the jury. After a long conversation, Judge Holland asked the juror if she wanted to be let off. She said no and explained that if she was not on the jury "no one would be there to make the other jurors listen to my side." Only after the long talk with the juror did Judge Holland decide to keep the juror on. The fact that less than an hour later the juror again requested to be let off the jury is not a convincing reason. Kastner believes Judge Holland was right in deciding to not let the juror change her mind after having talked with the juror personally and gaining a better understanding of the situation.

Jenkins, on the other hand, is troubled by Judge Holland's withdrawal of his offer to remove the troubled juror following the discovery of her position in the deliberations. Judge Holland listened to the disturbed juror's story and invited her to be removed from the jury based on the information he received. After turning down his offer, the juror told Judge Holland her motivation for staying was that she was the only one keeping the others from awarding punitive damages against Exxon. Less

than one hour later, the troubled juror returned to Judge Holland and informed him that she wanted to be taken of the jury. However, Judge Holland refused to honor his previous offer to remove her. What happened during that hour that caused Judge Holland to withdraw his offer to take her off the jury? Jenkins is concerned that Judge Holland withdrew his offer after learning that the juror was the only one preventing a punitive damages award against Exxon. Jenkins recognizes that perhaps this appears more sinister than it actually was. However, the constant claims of bias rulings toward Exxon on the part of Judge Holland only added suspicion to this questionable change in position.

Although the authors disagree on Judge Holland's handling of the upset juror, Jenkins and Kastner both find it extremely ironic and quite outrageous that Exxon claims that this decision prejudiced Exxon in any way. After all, Judge Holland knew that this was the only juror who did not want to impose punitive damages. Also, Judge Holland's decision to encourage the jurors to continue deliberations after they sent a note claiming to have reached an impasse was justified. The jurors had only deliberated for five days. Evidently, Judge Holland was right because nine days later, the jurors announced their verdict.

C. *Novel Idea or Deception Upon the Court: Exxon's Less Than Perfect Deal With the Seattle Seven*

After the court upheld the jury's \$5 billion punitive damages verdict, the next task for the plaintiffs' lawyers was to determine the most fair and effective manner of distributing the money among the numerous class members. After months of negotiations, the group of plaintiffs' lawyers decided upon a plan of allocation which would basically divide the award proportionally according to the harm suffered, which was generally determined by the amount of compensatory damages received. On January 12, 1996, the plaintiffs sought court approval of their Plan of Allocation.<sup>271</sup> On January 19, 1996, the district court granted preliminary approval and allowed the plaintiffs to mail notice of the Plan of Allocation to the almost 30,000 potential claimants.<sup>272</sup>

One group of potential plaintiffs who learned of this plan, but was not included in it, was the seafood processors, known as the

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271. Wood, *supra* note 217, at 416.

272. *In re Exxon Valdez*, No. A89-0095-CIV, 1996 WL 384623 (D. Alaska June 11, 1996) (Order No. 317, motion granting Final Approval of the Plan of Allocation).

“Seattle Seven.”<sup>273</sup> The Seattle Seven claimed that because they settled with Exxon for a sum totaling 15% of the damages, they were entitled to 15% of the \$5 billion punitive damage award: that’s roughly \$745 million.<sup>274</sup> On March 18, 1996, the Seattle Seven formally objected to the Plan of Allocation.<sup>275</sup>

Out of the 29,681 notices sent out, the court received only 26 objections to the Plan of Allocation, and four of these rejections were later withdrawn.<sup>276</sup> The court considered these objections as well as the objection raised by the Seattle Seven. Before ruling on the matter, however, Judge Holland wanted to learn the exact details of the agreement between the Seattle Seven and Exxon. Judge Holland originally wanted this information to ensure that the Seattle Seven had not already settled their punitive damage claims and were thus not entitled to receive any part of the \$5 billion award.<sup>277</sup> What Judge Holland found both surprised and shocked him.<sup>278</sup>

On January 8, 1991, the Seattle Seven entered into a settlement agreement with Exxon for damages caused by the oil spill.<sup>279</sup> In this confidential agreement, Exxon agreed to pay the Seattle Seven approximately \$70 million in exchange for a release of all claims and certain other provisions including an agreement that the Seattle Seven “take all reasonable, lawful and ethical . . . actions to assist Exxon so that Exxon may recapture or obtain a credit or offset for any punitive damages, awards, set-

273. Natalie Phillips, *The Spillionaires: Exxon Valdez Case Winners Stand to Make Millions, But They Aren't All Happy*, DALLAS MORNING NEWS, Sept. 29, 1996, at H1 [hereinafter *Spillionaires*]. See generally *In re Exxon Valdez*, No. A89-0095-CIV, 1996 WL 384623, at \*2 (D. Alaska June 11, 1996) (Order No. 317).

274. James Cahoy, *Federal Judge Criticizes Exxon For Secret Agreement With Seafood Processors Over Punitive Damages in Exxon Valdez Case*, WEST'S LEGAL NEWS 5720, June 17, 1996.

275. Wood, *supra* note 217, at 416.

276. *In re Exxon Valdez*, No. A89-0095-CIV, 1996 WL 384623, at \*6 (D. Alaska June 11, 1996).

277. Stanley Holmes, *Exxon, Fish Processor's Secret Deal Backfires*, SEATTLE TIMES, July 1, 1996, at A1.

278. Rosanne Pagano, *Judge Takes Another Swing at Exxon Secret Settlement*, ANCHORAGE DAILY NEWS, Sept. 13, 1996 at B2 [hereinafter *Secret Settlement*].

279. James Cahoy, *Federal Judge Criticizes Exxon For Secret Agreement With Seafood Processors Over Punitive Damages in Exxon Valdez Case*, WEST'S LEGAL NEWS, June 17, 1996. See also *In re Exxon Valdez*, No. A89-0095-CIV, 1996 WL 384623, at \*8 (D. Alaska June 11, 1996) (Order No. 317). The Seattle Seven filed its complaint against Exxon in June of 1989 seeking both compensatory and punitive damages.

tlements, and claims.”<sup>280</sup> In other words, if the Seattle Seven were to receive part of any punitive damage award, they would return the money to Exxon minus a small percentage that they could keep.<sup>281</sup>

Then, on January 11, 1996, only one day before the plaintiffs submitted their Plan of Allocation to the court for approval, Exxon and the Seattle Seven entered into a second agreement for an additional \$6 million. This agreement contained clauses clarifying the prior settlement.<sup>282</sup> In it, the Seattle Seven agreed to challenge the Plan of Allocation, attempt to get a portion of the \$5 billion in punitive damages, and reimburse Exxon for their share of the award. The agreement would have placed about \$733 million in punitive damages awarded to the victims back into the pockets of Exxon. In exchange, the Seattle Seven could keep about \$12 million for itself.<sup>283</sup>

The plaintiffs argued that the agreement was unethical, illegal and a misrepresentation. During closing arguments, the defendants told the jury that Exxon had voluntarily made payments to the seafood processors and sought nothing in return.<sup>284</sup> The court appeared equally displeased with Exxon’s actions. After learning the specifics of the deal, the court quickly rejected the arguments and held that the Seattle Seven was not entitled to any of the punitive damage award.<sup>285</sup> Judge Holland called the agreement a deception on the court.<sup>286</sup>

“What is really pernicious about the Seattle Seven issue, is that Exxon sought to reduce its exposure to punitive damages twice: once by informing the jury of its voluntary payments to the seafood processors, and a second time through its secret agreement with the Seattle Seven.”<sup>287</sup> Judge Holland emphasized that “in

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280. *In re Exxon Valdez*, No. A89-0095-CIV, 1996 WL 384623, at \*8 (D. Alaska June 11, 1996) (Order No. 317) (citing paragraph 4.b. of the settlement between Exxon and the Seattle Seven).

281. *Secret Pact Helps Spike Exxon’s Plea/Firm to Appeal As Judge Denies Bid to Slice Valdez Judgement*, HOUS. CHRON., Sept. 14, 1996, at 2.

282. *In re Exxon Valdez*, No. A89-0095-CIV, 1996 WL 384623, at \*6 (D. Alaska June 11, 1996) (Order No. 317).

283. Natalie Phillips, *Exxon Battles for Deal Lawyers Defend Spill-Award Strategy*, ANCHORAGE DAILY NEWS, June 20, 1996, at B1.

284. *Secret Settlement*, *supra* note 278.

285. Wood, *supra* note 217, at 416.

286. Stanley Holmes, *Exxon, Fish Processors’ Secret Deal Backfires*, SEATTLE TIMES, July 1, 1996, at A1.

287. *In re Exxon Valdez*, No. A89-0095-CIV, 1996 WL 384623, at \*13 (D. Alaska June 11, 1996) (Order No. 317).

this instance, Exxon has acted as a Jekyll and Hyde, behaving laudably in public and deplorably in private. The court is shocked and disappointed that Exxon entered into such a repugnant agreement.”<sup>288</sup>

The court held the agreement unconscionable and unenforceable. Judge Holland said he had no doubt that the jurors “would be outraged if Exxon rather than the claimants were to wind up with almost 15% of the punitive damage award.”<sup>289</sup> In addition, the court found that none of the other objections raised provided sufficient reason for the court to object to the Plan of Allocation.<sup>290</sup> As such, the court granted final approval to the Plan.

Exxon objected to the court’s decision. In its 35-page motion to reconsider, Exxon argued that the court’s analysis was legally incorrect and that the contract with the Seattle Seven constituted a “proper method of making a partial settlement of punitive damages in a class action.”<sup>291</sup> Exxon characterized the agreement as a “novel” legal approach to a novel issue.<sup>292</sup> In addition, Exxon argued that the court’s ruling would discourage settlement agreements in mass tort litigation.<sup>293</sup>

In various articles and comments written about the secret deal, “[l]egal ethicists and other experts agreed that the bold tactic was novel, saying they had never come across such an agreement.”<sup>294</sup> Although they agree it is unique, many denounced the secret agreement. One professor of ethics said the agreement “appeared designed to vitiate the legal effect of the jury’s expression.”<sup>295</sup>

Obviously, the court does not want to discourage settlements in general, much less in mass environmental tort situations where the vast number of plaintiffs can fill the court’s docket for many years. However, does the court’s decision in any way discourage settlements? Laurie Levenson, a professor of ethics at Loyola

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288. Cahoy, *supra* note 279, at 5720.

289. *Secret Pact Helps Spike Exxon’s Plea/Firm to Appeal As Judge Denies Bid to Slice Valdez Judgement*, Hous. CHRON., Sept. 14, 1996, at 2.

290. *In re Exxon Valdez*, No. A89-0095-CIV, 1996 WL 384623, at \*7 (D. Alaska June 11, 1996) (Order No. 317).

291. Phillips, *supra* note 283. Spokesman Ed Burwell said this to reporters after the decision was rendered.

292. Charles McCoy & Peter Fritsch, *Exxon Defends It’s ‘Novel’ Approach to Reducing Valdez Punitive Damages*, WALL ST. J., June 14, 1996, at B3.

293. Cahoy, *supra* note 279, at 5720.

294. McCoy & Fritsch, *supra* note 291.

295. Professor Hazard is a legal-ethics expert at the University of Pennsylvania who helped to write the American Bar Association’s Model Code of ethics. *Id.*

University Law School in Los Angeles, believes the court's decision will not discourage settlements. "What the court is saying here is you can have agreements, but be honest about them. Backdoor settlements that amount to misrepresentation to the court are not going to be tolerated."<sup>296</sup>

The authors strongly agree with Ms. Levenson. Exxon represented to the jury that it paid the Seattle Seven without asking for anything in return. This agreement for a kickback of punitive damages is certainly something—\$733 million for Exxon. Exxon cannot later claim that it is entitled to this money. Attorneys are officers of the court and, as such, they have a duty to avoid any misrepresentations of the truth in their zealous representation of their clients.

Instinctively, Exxon's misrepresentation to the jury and the secret kickback deal seems so wrong that the conclusion appears crystal clear even before any analysis of the rules governing this area of law. In this case, Exxon's misrepresentations alone make a strong argument for denying their motion. Part of the jury's considerations in awarding the damages *could* have included discussion on what Exxon had already paid out to other potential plaintiffs. Indeed, Exxon argued that because they had spent so much to make up for the spill, over \$3.6 billion in cleanup and settlements, it had already been punished and punitive damages were not necessary.<sup>297</sup> However, because we cannot delve into the thought processes of the jury, we will never know for certain. It was Exxon, however, who created this situation, and the court should not allow Exxon to now ask "what ifs" so that it can get this kickback. This ruling is also an important precedent for future mass environmental tort litigation in that future defendants are put on notice that such deals will not help them avoid liability in future spills or other mass tort situations.

#### D. *Finally, The Next Level of Appeals Will Begin*

Once Exxon exhausted most of its available motions under Judge Holland, it was time to move on to the next level: the Ninth Circuit Court of Appeals. In June 1997, Exxon submitted a brief to the Ninth Circuit to appeal the 1994 jury verdict. In the brief, Exxon listed 11 legal issues that demonstrate why a new

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296. Cahoy, *supra* note 279, at 5720.

297. Andrew Blum, *Threat of Punies is a Sword Over Exxon*, NAT'L L. J., June 27, 1994, at A6.

trial should be granted.<sup>298</sup> For this appeal alone, 600 pages of briefs and a four-foot high stack of court records and transcripts have been filed by Exxon and the plaintiffs.<sup>299</sup> Exxon's brief specifies three basic categories of appeal. The first concerns Exxon's deal with the Seattle Seven.<sup>300</sup> Second, the "main appeal" includes allegations of incorrect calculation of compensatory damages and the issue of punitive damages. In this section, Exxon noted that the "verdict was 200 times more than the largest punitive damage award ever upheld by a federal appellate court."<sup>301</sup> Exxon continues to argue that it was "punished enough by the \$3.5 billion cost of cleaning up the oil spill."<sup>302</sup> Lastly, Exxon believes a new trial should be granted because of juror coercion.<sup>303</sup>

Oral arguments for the appeal were heard by the Ninth Circuit Court of Appeals in Seattle on May 3, 1999.<sup>304</sup> As of the time this comment was written, the Ninth Circuit had not yet released its final ruling. Regardless of the ruling, the losing party will likely appeal to the next and final level—the United States Supreme Court.<sup>305</sup> Thus, it may be many more years before this case is finally over.

#### E. *Seeking Justice or Delaying the Inevitable: Will Exxon Turn Its Defeat Into Victory*

Exxon appears to have done everything possible in order to keep its costs as low as possible and to make the best of an otherwise bad situation. For example, Exxon structured its settlement with the U.S. and the State of Alaska so that it could deduct the money paid toward its criminal settlement from its taxes.<sup>306</sup> In addition, Exxon wrote off more than \$2.8 billion for the clean up.<sup>307</sup> These appear to be legal tax deductions.

298. *Exxon Appeals Valdez Judgement*, OIL DAILY, June 20, 1997, at 7.

299. *Exxon's \$5.3 Billion Oil Spill Appeal Will Be Heard May 3*, SEATTLE POST-INTELLIGENCER, Apr. 1, 1999, at B6.

300. Phillips, *supra* note 215.

301. *Exxon Appeals Valdez Judgement*, *supra* note 298.

302. *Exxon: Appeals \$5 Billion Judgement*, DES MOINES REG., June 20, 1997, at 9.

303. *The Exxon Corp. is Fighting to Reverse the Huge Punitive Judgement Handed Down in Alaska*, NAT'L L.J., Dec. 26, 1994, at C4. *Exxon's \$5.3 Billion Oil Spill Appeal Will Be Heard May 3*, SEATTLE POST-INTELLIGENCER, Apr. 1, 1999, at B6.

304. *Date Set for Exxon Spill Appeals*, OIL DAILY, Apr. 1, 1999.

305. Phillips, *supra* note 215.

306. Curriden, *supra* note 44.

307. *Id.*



Now, Exxon is strenuously fighting the punitive damages award with motion after motion and multiple appeals. The plaintiffs' attorneys have been quoted as saying that Exxon's motions are "frivolous" and simply an attempt "to delay payment of its penalties."<sup>308</sup> But, if Exxon's arguments have little chance of succeeding, why would Exxon, who wishes to keep costs down, be trying to delay payment? After all, these motions and appeals are costing Exxon millions in legal fees. Although Exxon has not disclosed its legal bills, some estimate that during the 10 years of litigation, Exxon has spent about \$300 million on attorneys' fees.<sup>309</sup>

Others, however, believe that Exxon's true motivation for filing motion after motion is more sinister. According to O'Neill, one of the plaintiffs' attorneys, "Exxon is saying whatever it has to say, as it has since 1989, with a total and utter disregard for the truth to get out of its moral obligation."<sup>310</sup> O'Neill and others believe Exxon's delay tactics will actually "reduce" its liability, because while the verdict is on appeal Exxon does not have to pay out the award. As such, the money still belongs to Exxon who can invest it at a high rate of interest.

Usually, courts require the appealing defendant to post a bond or place the funds in an escrow account to ensure that the plaintiffs get their money if the defendant cannot overturn the verdict on appeal. However, this was not the case with the Exxon award. Exxon proposed an alternative to the \$5 billion appeals bond.<sup>311</sup> The Defendant's attorneys argued that Exxon is so big and wealthy that there was no risk that it would later be unable to pay the fine. It could even pay the more than \$5 billion award with operating cash.<sup>312</sup> Exxon's alternative plan provided for the Bank of America and 32 other financial institutes to guarantee a \$6.75 billion credit line that the court could tap automatically if Exxon's appeals failed and it could not or would not pay the penalty.<sup>313</sup> This ensured that the plaintiffs would receive their full award after the litigation ended.

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308. *Judge to Weigh Exxon's Plaintiff's Proposals*, NAT'L L.J., Sept. 23, 1996, at B2; *The Exxon Corp. is Fighting to Reverse the Huge Punitive Judgement Handed Down in Alaska*, NAT'L L.J., Dec. 26, 1994, at C4.

309. Curriden, *supra* note 44.

310. Pagano, *supra* note 240.

311. *Judge to Weigh Exxon's Plaintiff's Proposals*, NAT'L L.J., Sept. 23, 1996, at B2.

312. Curriden, *supra* note 44.

313. *Id.* See also, *Exxon: Appeals \$5 Billion Judgement*, *supra* note 302

The plaintiffs objected to this proposal. On September 6, 1996, they responded by requesting the court to order Exxon to post a letter of credit or create a \$5.1 billion escrow through a subsidiary insulated from potential bankruptcy.<sup>314</sup> The court considered the options and found Exxon's arguments to be convincing. Judge Holland accepted the alternative plan.<sup>315</sup>

By federal mandate, all verdicts are to accrue interest at a rate of 5.9 percent. Thus, the punitive damage award collects more than \$38,000 an hour or \$300 million a year. As such, the amount now owed to the plaintiffs is closer to \$6 billion. This fact is not in dispute. What is controversial, is the fact that because Exxon was able to maintain control of this large amount of money, it was able to invest the money in such a way as to obtain a much higher rate of return than 5.9 percent.<sup>316</sup> It is estimated that the return through 1998 alone was more than \$3 billion.<sup>317</sup>

"[T]hat kind of math only encourages Exxon to keep the litigation going and not seek a resolution," said O'Neill.<sup>318</sup> "Three or four more years of appeals, and Exxon will not only have earned enough to pay the entire judgment but also will have manipulated the court system in such a way that they actually make money on this whole deal."<sup>319</sup> Indeed, the \$3 billion return far exceeds the speculated \$300 million for Exxon's legal fees.

Exxon denies allegations that they are stalling and instead contend that they are only seeking justice. "This is an extraordinarily complex class action that started with more than 30,000 people. . . . Throw in the largest spill in U.S. history and the highest punitive damages ever, and 10 years of litigation really isn't so long," said a spokesperson for Exxon.<sup>320</sup> Legal analysts seem to agree that Exxon's tactics have been legal, ethical and fully allowed by federal court procedures.<sup>321</sup> James Neal, an attorney for Exxon, commented: "For people to criticize Exxon for exercising

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314. Curriden, *supra* note 44.

315. See *Society and Politics: Exxon Valdez: Annual Report Reveals Unlikely Appeal Strategy*, AM. POL. NETWORK, Apr. 13, 1995.

316. *The Exxon Valdez: Stains that Remain*, ECONOMIST, Mar. 20, 1999, at 35.

317. *Id.* See also Gregory Nathan Hoole, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?* 22 J. CONTEMP. L. 459 (1996).

318. Curriden, *supra* note 44.

319. *Id.* See also Sam Howe Verhovek, *Across 10 years, Exxon Valdez Casts a Shadow*, N.Y. TIMES, Mar. 6, 1999, at A1.

320. Curriden, *supra* note 44.

321. *Id.*

their legal rights to appeal an unjust verdict is ludicrous."<sup>322</sup> Exxon contends that its motions and appeals raise valid arguments and believes the punitive damage award will be overturned or at least significantly reduced.<sup>323</sup> For example, Exxon firmly believes that the \$98 million paid by another defendant in the case should be deducted from the total damages.<sup>324</sup>

Clearly, every defendant has the right to bring an appeal that is reasonably believed to have legal merit. Moreover, several of Exxon's arguments have merit and could succeed in obtaining a new trial or in eliminating or reducing the punitive damages award. Those who would criticize the court for considering this multitude of motions and appeals forget that the proper role of the courts is to thoroughly consider the arguments raised by the parties and to make determinations based on the rule of law. However, it does raise a question for future plaintiffs in environmental tort litigation: do you want to settle and get a lesser amount or do you want to risk going up against a big company knowing you probably won't see a penny for a decade or more? The Exxon Valdez litigation may have the effect of discouraging plaintiffs from going to trial rather than taking a smaller settlement offer. Correspondingly, this precedent may encourage future environmental polluters to make only minimal settlement offers and push toward litigation knowing they can delay payment for a number of years.

Some critics do not simply blame Exxon for filing its numerous motions; some blame the judge for the slow pace of the proceedings. "Federal Judges have sweeping powers to speed cases along, and Judge Holland has sometimes taken months to make decisions."<sup>325</sup> These people seem to forget that the Exxon Valdez litigation was not the only thing on this judge's docket. Should Judge Holland have put those other cases on the back burner so that the court could deal with the Exxon motions with greater haste? Absolutely not. Even if the Exxon Valdez case was the largest case Judge Holland was dealing with in terms of size of award and number of plaintiffs, it would be wrong for Judge Hol-

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322. Mark Curriden, *Case Out of Control, Some Litigants Say*, DALLAS MORNING NEWS, March 14, 1999, at A33.

323. Curriden, *supra* note 44.

324. *In re the Exxon Valdez*, No. A89-0095-CV (HRH), 1995 WL 527988, at \*5 (D. Alaska Jan. 27, 1995) (Order No. 267). Alyeska settled the claims filed against them for \$98 million. If deducted, this would reduce Exxon's compensatory damages claim by approximately 23%. *Id.*

325. Curriden, *supra* note 322.

land to let the Exxon Valdez case move to the front of the line past all the other smaller cases every time a motion was filed. The court's job is to adjudicate cases. That means all cases that come before it are of equal importance in the eyes of the court. In a perfect world, a court's docket would not be overcrowded and courts would not have months if not years of backlog. Unfortunately, we do not live in a perfect world. The courts have too many cases and not enough resources to properly address all the legal issues as quickly as some would like. In addition, many of the issues raised in the Exxon Valdez litigation were complicated and required additional research and analysis by the court. For example, it would be difficult for Judge Holland to have ruled on the juror coercion issue if he had not first interviewed the jurors in order to obtain facts. Yet, this took the time and resources of the court to make an informed ruling. The time used was a proper allocation of judicial resources and was truly necessary for the court's determinations.

Are the authors proposing that Judge Holland could not have made some of his decisions more quickly or that he could not have pushed harder to move this litigation along? Of course not. If one analyzes every detail of every decision and every ruling, one could find numerous times in which Judge Holland could have expedited the process. What seems clear to the authors is that armchair quarterbacking (particularly with the advantage of hindsight) is easier than actually being out on the field.

F. *The \$5 Billion Award: Should Exxon Have Been Allowed to Keep the Money During Appeals?*

One decision made by the court does require some additional comment. Plaintiffs argued that the court should not have allowed Exxon to keep control of the \$5 billion awarded in the verdict while the case was on appeal. For obvious legal and practical reasons, the award should not have been given to the individual plaintiffs. Generally, however, courts will order defendants to post a bond or place the funds in an escrow account. If this had been done, Exxon would not have been able to invest the money or make a profit from it.

The purpose of having a defendant post a bond or place money in an escrow account is to ensure that once the appeals are over, plaintiffs will receive all of their money if they prevail. In the literally hundreds of articles and comments regarding the Exxon Valdez case, no author has doubted Exxon's ability to pay this

award once the litigation has concluded. Also, Congress set the amount of interest to be earned on settlement at the federally mandated level of 5.9%. Therefore, even if the letter of credit or escrow account had been established, the plaintiffs would be getting the exact same amount of money at the end of the day: no more, no less.

Although the decision will not prevent the plaintiffs from getting their 'full' award amount, some argue that Exxon designed its delay tactics because it realized it could earn money by investing rather than paying out the damages. Thus, the question is, would Exxon be using the same tactics and strategies if it weren't making money by investing what would otherwise be set aside for the award? One can only speculate. However, Exxon has several strong arguments that could lead to a new trial or a reduction/elimination of the punitive damage award. Thus, it is likely that Exxon still would have filed many of its motions and appeals. As such, the fishermen still would not have received a penny of their award. In addition, delaying the conclusion of the litigation process can be beneficial to a wealthy defendant because it can wear down the plaintiffs and encourage them to settle for less than the full amount in order to avoid further delay.

Does this mean that Exxon would have filed as many motions if there were no opportunity to earn money? It's hard to know; possibly not. The authors disagree with the decision to allow Exxon to keep its money during the appeals process. Although deciding otherwise would probably not have changed the current state of affairs, it did give Exxon one more incentive for a long drawn-out process. More importantly, it looks bad in the eyes of the public. There could appear to be a form of rich man's justice which can impugn the legitimacy of the judiciary. If justice is blind, then the court should not look at the size of the defendant's bank account to determine if certain rules apply to a particular party in the litigation.

In the future, courts should pay close attention to this problem and require the defendant to place the money in escrow so as to eliminate any question of impropriety and also to ensure that defendants cannot profit from their money in the meantime. If the plaintiffs cannot receive more than 5.9% of interest than the defendants should not be allowed to receive more than the federally mandated amount. Although this may not be legally required, it does seem within the best interest of public policy. It

is simply inappropriate for an environmental polluter to appear to profit in this way.

In an episode of 60 Minutes which aired in the spring of 1999, Ed Bradley interviewed several plaintiffs who were damaged by the oil spill that still had not received a penny of the money they were awarded by the jury. Many plaintiffs do not believe it is fair that five years after the jury announced its verdict Exxon still has not been forced to pay.<sup>326</sup> But, what is the answer? What would be the better alternative: have Exxon pay the money to the plaintiffs right away and then have the plaintiffs pay back the money if Exxon prevails on appeal? That seems rather unreasonable. Should the appeals process be eliminated and the final determination left to the jury and trial judge? This over-simplistic *solution* would create more problems than it would solve. Whenever you have adversarial proceedings, things will take time. That is the nature of the beast. This is particularly true of mass environmental torts with thousands of plaintiffs and considerable amounts of environmental damage. Our current judicial system simply does not have the resources and is not set up for a speedy resolution of the litigation, particularly where one or more of the parties benefits from dragging their feet and causing delays.

## V.

### CONCLUSION

*In the law . . . technical virtuosity has never been a guarantee of acceptable performance*<sup>327</sup>

In the previous Sections of this paper, we analyzed different stages of the Exxon Valdez litigation in order to answer the important question of whether the court system and the current laws can fairly and effectively handle such mass environmental litigation. While acknowledging that the judicial system has yet to give its final *imprimatur* on the case due to appeals, we can still address many of the criticisms made against the court system during this case. This was a case dealing with one of the worst environmental tragedies, with extensive daily publicity, and hundreds of thousands of claims by tens of thousands of plaintiffs. The courts had to handle this case with limited resources and overburdened court calendars. Bearing this in mind, we believe

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326. Phillips, *supra* note 273, at H1.

327. Abram Chayes, *The Role of the Judge in Public Law Litigation*, in *PERSPECTIVES ON PROCEDURE* 41, 57 (Geoffrey C. Hazard, Jr. & Jan Vetter eds. 1987).

that, on balance, the judicial system did the best it could under these demanding circumstances and performed adequately.

The main criticisms of the court system in this case stem from the fact that those injured by the oil spill have not been made whole because the plaintiffs have not received a penny of the verdict rendered more than five years ago and the goal of restoring the natural resources of Prince William Sound has yet to be realized. Simply put, the courts are not equipped to provide finality to litigation in a short amount of time. Nor are members of the public able to avail themselves of the court system to repair such massive environmental damage when the government has appointed itself as trustee of the environment. The courts are set up to compensate people for tangible damages such as for their property or for lost wages. This oil spill did not simply damage property or profits but also harmed the natural beauty of the Prince William Sound and the lifestyles of many Alaskan inhabitants.

Exxon would argue, and many would agree, that those directly injured by the spill were compensated for the tangible damages, either through the TAPLF, settlements or lawsuits. Unfortunately, the question remains as to how courts can compensate someone for other, intangible types of damages, such as to the peace of mind one gets from watching the birds and otters or from the joy of recreational fishing in the pristine waters. The courts cannot make persons suffering these types of injuries whole. The courts can be very efficient at ensuring the injured party receives monetary damages. However, monetary awards alone cannot make these plaintiffs whole. The only thing the court can do is make the defendant pay to clean up the damage (which it did through the settlement between the governments and Exxon), and allow a jury to impose punitive damages to punish the defendants (which the court did through the \$5 billion punitive damage award).

The other main criticism of the court is that after more than 10 years, many of those injured, particularly those who chose to litigate their case as opposed to settle their claims, have not received any money from the defendant to compensate them for their injuries. The plaintiffs' significant courtroom victory has been undermined by the continuing pursuit of finality in the appellate process. It is important to reiterate that the appeals process is a vital part of our justice system. Exxon has several valid

arguments for appeal and should be able to exhaust its legal remedies, even if the process takes years.

Can we blame the courts for the fact that reaching finality in litigation takes years rather than months, particularly in a case dealing with such horrific environmental damage? Ideally, the courts would have open calendars and be able to hear motions and try cases when the parties are ready. However, this is unrealistic in our litigious society. The courts are sorely overburdened with months, if not years, of backlogged cases. Sufficient staff, resources and space needed to handle the large volume of cases simply does not exist. Because the legislature and not the judiciary determines budget allocations, we can only judge the court system on how well it does with the resources it has. Bearing this in mind, 10 years is not an unreasonable amount of time for an environmental disaster of this size and magnitude. The court is not sitting on its hands, but rather it is doing the best it can to balance the need of bringing finality to litigation with the need to ensure that fair and equitable decisions are reached.

Another factor some look at to determine if the court performed well is to decide whether one party got more than they deserved. The authors see no clear winner in this case. Getting what one deserves through the judicial system is not winning—it is justice—which is merely what one is entitled to. If you ask the plaintiffs who won, they would argue the clear winner was Exxon. Not only did the jury award the plaintiffs less than one-third of the amount they sought in compensatory damages, but more than 5 years later, Exxon still has not paid out any money stemming from the damages awarded in the trial. Instead, Exxon makes money by investing the awarded amount while the appeals process continues. However, if you ask the defendant, it would argue Exxon is not the winner. Despite the fact that Exxon willingly paid many of those injured for the direct and tangible damages suffered as well as billions to restore the environment, the jury awarded the plaintiffs an unjust punitive damage verdict. Now, Exxon must pay millions in legal fees to fight this unjust verdict.

Others who criticize the court point to the fact that 10 years after the spill, Exxon remains a strong and profitable company and does not appear to have suffered the kind of devastation it caused to the environment of the Prince William Sound. In several mass tort cases in the past, other companies found to be at



fault either went bankrupt or at least seemed to have suffered significant financial problems resulting from the litigation against them.<sup>328</sup> Yet, the measure of the court's success should not be whether or not the defendant is able to financially survive the litigation. If the defendant can pay compensatory damages, as in this case, there is no reason why punitive damages should bankrupt the company. After all, the purpose of punitive damages is not to destroy but only to punish. Thus, Jenkins and Kastner strongly disagree with any who assert that Exxon is the clear winner because it survived this litigation. As one author wrote: "It is incumbent upon the judge to maintain an open mind and to render a decision based on a sense of the community, and not on any one particular group."<sup>329</sup> Because no clear winner exists in this case, this suggests that the court performed adequately and impartially.

Another significant factor was that the court decided this case without creating any new or unique mechanisms to handle its size or complexity. Notwithstanding Lon L. Fuller's article to the contrary,<sup>330</sup> the Exxon Valdez litigation demonstrates that our judicial system is quite capable of handling mass environmental torts. Here, the court, through strong leadership by a district court judge who generally respected the confines of his role, handled this case with relative efficiency through existing judicial mechanisms. Although one author commented that "it is the role of every individual court to provide what is essentially an ad hoc solution to disasters that quite often have social consequences and repercussions on a national scale,"<sup>331</sup> Jenkins and Kastner disagree. The court's role is to apply the rule of law, as it exists, and to use limited judicial discretion to move the case forward in a fair and efficient manner. This acknowledged limitation on judicial discretion further advances the legitimacy of the judiciary in the eyes of the public. As argued above, if one believes the decisions of the courts are unfair, the perceived unfairness likely stems from the law itself. The rule of law limits the type of damages for which a plaintiff can recover; it allows the government to recover for environmental damages on behalf of the public. Thus, environmentalists and others who want to

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328. Two examples of this are seen in the Dow Corning litigation concerning silicon breast implants and in the A.H. Robins litigation over the Dalkon Shield.

329. Panoff, *supra* note 102, at 720.

330. Fuller, *supra* note 209, at 38-39.

331. Panoff, *supra* note 102, at 719.

change these and other rules of law must focus their attention on changing the laws themselves and not on criticizing the courts and individual judges for applying the rules of law.

