

Supreme Court, Inc.: Supremely Pro-Business

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Pro-business Supreme Court rulings are nothing new, and it's likely most damaging one ever occurred in 1886. In *Santa Clara County v. Southern Pacific Railway*, the High Court granted corporations legal personhood. Ever since, they've had the same rights as people but not the responsibilities. Their limited liability status exempts them. They've profited hugely as a result and have continued to win favorable rulings since. Today more than ever from the Roberts Court. One observer described its first full (2006-07) term as a "blockbuster" with the Court's conservative wing prevailing in most key cases. It's much the same in 2007-08, and it shows in its pro-business rulings.

Take its June 21, 2007 *Tellabs, Inc. v. Makor Issues & Rights, Ltd* decision for example. In fraud cases, the Court set strict investor suit guidelines in ruling for Tellabs against its shareholders. This and similar rulings got Robin Conrad, executive vice-president of the US Chamber of Commerce and head of its litigation team, to describe the 2006-07 Court term "our best (one) ever" with business winning 12 of 14 cases and another at the time to be decided. When it was, business won that one, too.

One was the Court's \$80 million punitive damage award reversal in *Philip Morris USA v. Williams*, a lung cancer victim widow. But that paled compared to the DOJ's June 2005 turnaround. It pertained to its landmark tobacco industry civil racketeering settlement. Instead of the original \$130 billion agreed on, it sought just 8% (or \$10 billion) in spite of a government expert's testimony. He stated that the larger sum was essential to fund meaningful smoking-cessation programs to counter a "decades-long (industry) pattern of material misrepresentations, half-truths, deceptions and lies that continue to this day."

The June 2006 *Bell Atlantic v. Twombly* decision was another for business. It henceforth raised the bar for plaintiffs in alleged antitrust conspiracies. And the (April 17, 2007) *Watters v. Wachovia* one prevented states from regulating subsidiaries of national banks' just as the subprime crisis was emerging. Stripped of that power, consumers remain vulnerable to predatory lending practices any time.

It's no different for business in the current term, and it showed up prominently in three late June decisions and two notable January ones. In *Regents of the University of California v. Merrill Lynch* (on January 22), the Court threw out a huge lawsuit - for restitution from Enron's collusion and fraud against investors. In dismissing the case, it effectively immunized Enron's bankers from any liability in the company's malfeasance.

Earlier (on May 31, 2005), it did the same thing for Enron's accountant, Arthur Andersen. In unanimously overturning its obstruction of justice conviction, it found jury instructions were inappropriate. They "failed to convey the requisite consciousness of wrongdoing" because jurors were told to convict Andersen if it had an "improper purpose" even if it thought it was

acting legally.

On January 15, 2008, it issued a similar ruling in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* It dismissed charges against cable TV set-top box makers in a scheme with Charter Communications. It involved over-charging customers for equipment, then rebating revenue to Charter in purchased advertising.

In *Davis v. Federal Elections Commission*, the Court (on June 26) struck down the "Millionaire's Amendment" McCain-Feingold Act provision. It let candidates accept larger than normal contributions against wealthy opponents with enough resources to outspend them. They have no restrictions and may self-finance as "robustly" as they wish.

Then on June 26, the Court distorted the Second Amendment in siding with the gun lobby. In *District of Columbia v. Heller*, Antonin Scalia and four other Justices said they were well "aware of the problem of handgun violence in this country." However, "constitutional rights necessarily (take) certain policy choices off the table." The Court will not "pronounce the Second Amendment extinct." Justices Stevens, Souter, Ginsburg and Breyer had a different view. They called the decision "law-changing (and) a dramatic upheaval in the law."

A day earlier on June 25, another far-reaching decision came down. After 19 years, the Exxon Valdez matter was settled with implications far beyond this one case. In *Exxon Shipping v. Baker*, the Court reduced an original \$5 billion in punitive damages to \$500 million and ended the lengthy litigation process. It began on March 24, 1989 when the Exxon Valdez spilled 11 million gallons of crude into Prince William Sound, Alaska and changed the lives of its people forever. They're now denied meaningful restitution and worse.

The case is significant in its precedent-setting implications. Yet they began showing up earlier in High Court rulings involving lesser punitive damage award amounts. In *BMW of North America, Inc. v. Gore* (May 20, 1996), the Supreme Court said \$2 million in punitive damages was excessive in a case involving \$4000 in compensatory ones. It declined to define what's constitutionally acceptable, but noted that the maximum penalty under Alabama's Deceptive Trade Practices Act (where BMW's plant is located) is \$2000.

In *State Farm Mutual Automobile Insurance Co. v. Campbell* (April 7, 2003), the Supreme Court called a \$145 million punitive award excessive in a case involving \$1 million in compensatory damages. It didn't impose a "bright line" rule on the permissible amount but cautioned that any ratio greater than nine-to-one is unreasonable. It further suggested that this case "would likely justify" a one-to-one ratio.

These and similar cases lower the bar for future malfeasance settlements. They give business more latitude to be reckless and make it easier than ever to be negligent and get away with it. After *Exxon Shipping v. Baker*, the price is even lower so business is freer to endanger the public and know right wing courts are supportive. Even worse are the constitutional implications, the protections it no longer affords, and government's failure to fulfill its minimum function.

When it works, it's to ensure the public welfare. It's so stated in the Preamble and Article I, Section 8 that "The Congress shall have power to....provide for....(the) 'general welfare' of the United States" - the so-called "welfare clause." It long ago eroded. They're mere words on parchment paper because governments lie, connive, misinterpret and discharge their

duties in their own self-interest and for society's privileged class. The public is denied. Now more than ever as the people of Alaska can attest.

The Exxon Valdez Case

At 12:04AM on March 24, 1989, the BBC reported that "An oil tanker has run aground on a reef off the Alaskan coast, releasing gallons of crude oil into the sea. The Exxon Valdez got into trouble in Prince William Sound when it hit Bligh Reef, splitting its side open and releasing oil, with reports of an eight-mile slick. High winds are affecting attempts to suck (it) from the sea's surface and residents have reported poor air quality as emergency crews try to burn off its top layer."

The report continued that booms were ineffective. Environmentalists battled to save 10 million sea ducks. Seals and other fauna as well. The Coast Guard used chemicals to break up the slick, but local officials said Exxon responded too slowly. The tanker was a mile off course. The captain was in his quarters at the time, and businessmen said tourism would be affected. What about local fishermen and Native Alaskans. BBC didn't say even though they were most affected. It later reported that the Exxon Valdez was repaired, remained a single-hulled tanker, was renamed the Sea River Mediterranean, and was banned from Alaskan waters.

In its final March 25, 1989 edition, the Anchorage Daily News reported the following:

- a hasty debate began on how to prevent a disaster "in one of America's most sensitive coastal zones;"
- never before was so much oil spilled into such a "rich and confined northern coastal environment;"
- the area (then) represented a "\$100 million commercial fish(ing industry) and its abundance of birds and marine mammals;"
- immediate concerns focused mainly on three wildlife species: sea otters, immature salmon, and spawning herring; sea birds, ducks, and other fauna as well;
- fishermen in Cordova and Valdez "were just getting ready to fish" when it happened; they were furious about the accident; in 1971, they sued to stop the transAlaskan pipeline because they feared spills in the Sound; they settled out of court and got an oil industry commitment (reneged on) for state-of-the-art spill equipment and trained personnel on site to operate it;
- the area is ecologically rich in flora and fauna;
- the slick was spreading, expected to hit the beaches, and threatened one of the state's "most ambitious ocean ranching programs;" its long-term effects were feared, and a state Department of Fish and Game biologist said "the potential for serious problems is just staggering;" the Cordova District Fisherman's United vice-president said it was "like getting hit with a 25-ton sledge hammer."

Station KTUU Anchorage reported key oil spill timeline events:

- June 20, 1977: oil first enters the Prudhoe Bay Pump Station One pipeline;
- July 28, 1977: oil reaches Valdez;
- August 1, 1977: the first tanker, Arco Juneau, sails out of Valdez; many thousands more followed;
- 9:12PM, March 23, 1989: the Exxon Valdez leaves Valdez carrying 53 million gallons of crude;
- 12:04AM, March 24, 1989: the ship strikes Bligh Reef spilling 10.8 million gallons of its cargo;
- 7:27AM, March 24, 1989: the oil slick is about 100 feet wide and four to five miles long;
- 10AM, March 24, 1989: a urine sample shows Capt Joe Hazelwood with a blood alcohol content of 0.10%;
- 12PM, March 24, 1989: the Exxon Baton Rouge arrives to take oil from the damaged tanker; the slick is now three miles wide and five miles long;
- 6PM, March 24, 1989: cleanup crews use dispersant but it's ineffective;
- 8:15PM, March 25, 1989: 15,000 gallons are burned; it's the only time "in situ" burning was allowed;
- 11:59PM, March 25, 1989: the slick's leading edge is 16.5 miles southwest of Bligh Reef;
- March 29, 1989: In Anchorage Superior Court, two Prince William Sound fishermen file the first lawsuits against Exxon, the Alyeska Pipeline Service Company (TAPS), and the state Department of Environmental Conservation for damages from the accident and botched cleanup efforts;
- by August 15, 1989, 140 lawsuits were filed against Exxon; the same day, the state of Alaska sues the company charging gross deception about its ability to transport crude safely and clean it up when it failed;
- on October 23, 1989: Exxon sues the state of Alaska for interfering in and slowing the cleanup process;
- on February 27, 1990: an Anchorage federal grand jury indicts Exxon and other oil defendants on five counts - two felony and three misdemeanor charges;
- on March 13, 1991: in Juneau, Exxon settles claims with the state and federal government for \$1 billion;
- on September 30, 1991: state and federal authorities reach a second deal with Exxon; it's similar to the first except that Alaska intended to share scientific and legal data with other potential plaintiffs;
- on July 13, 1993: Alyeska agrees to pay \$98 million to settle claims with Native corporations, fishermen, business owners and others;

— on September 16, 1994: in Exxon Shipping v. Baker, an Anchorage jury awards \$287 million in compensatory damages and \$5 billion in punitive ones to 32,677 fishermen, Native Alaskans, landowners and other aggrieved parties;

— on December 6, 2002: the Ninth US Circuit Court of Appeals orders punitive damages reduced to \$4 billion;

— Exxon appeals and on January 28, 2004: District Court Judge H. Russell Holland raised the amount to \$4.5 billion plus \$2.25 billion in interest; his ruling referred to Exxon's "recklessness....(that) did not cause only economic harm....(it) caused harm beyond the purely economic; the social fabric of Prince William Sound and Lower Cook Inlet was torn apart;" so were the lives of the aggrieved who "suffered from severe depression, post-traumatic stress disorder, generalized anxiety disorder, or a combination of all three;"

— on December 22, 2006: following more appeals, the Ninth US Circuit Court of Appeals reduced punitive damages to \$2.5 billion;

— on May 23, 2007: Exxon appeals to the Supreme Court; and

— on June 25, 2008: the High Court reduced the amount to \$500 million - the equivalent of about 1.5 days profit from its 2008 first quarter operations or hardly enough to matter; ExxonMobil is the world's largest corporation; it had 2007 sales of \$404 billion and \$40.6 billion in profits; in nominal GDP terms, it ranks 23rd in size ahead of Norway, Austria, Saudi Arabia, Iran and Venezuela; with rising oil prices, Exxon's sales now run at an annualized rate of nearly \$470 billion; in nominal 2007 GDP terms, it ranks 18th ahead of Sweden, Indonesia, Belgium and Switzerland.

The True Exxon Valdez Story

When the Exxon Valdez ran aground, Capt. Joe Hazelwood was off duty. He was drunk and below deck sleeping it off. The first and second mates weren't around either. The third mate was in charge and might have avoided a problem had the ship's radar been on. It wasn't because it's complicated, expensive to operate, was broken, and Exxon hadn't repaired it for a year prior to the accident. Why not? To save money with no regard for the consequences if it were needed.

Greg Palast's investigative work uncovered a trail of company fraud and coverup - of "doctored safety records, illicit deals between oil company chiefs, and programmatic harassment of witnesses." It was also "brilliant(ly) success(ful in) cheating the natives." He amassed four volumes of evidence. Almost none of it was reported. Here are some highlights:

— 10 months in advance, a six company Alyeska Owners Committee internal memo warned that containing an oil spill "at the mid-point of Prince William Sound (wasn't) possible with present equipment;" that's where the Exxon Valdez ran aground; proper equipment would cost millions of dollars; the law required it; the companies promised to install it, but never did;

— another memo said dispersants alone would be used against spills, and the committee decided that Alyeska would respond only "to oil spills in Valdez Arm and Valdez Narrows;"

— previous small spills were hidden as "oil-in-water" events;

— a confidential 1984 letter from Capt. James Woodle, Alyeska's Valdez Port commander, warned that "Due to a reduction in manning, age of equipment, limited training and lack of personnel, serious doubt exists that (we) would be able to contain and clean up effectively a medium or large size oil spill;" Woodle reported a previous Valdez spill coverup; "his supervisor forced him to take back (the report saying), 'You made a mistake. This was not an oil spill;'" "

— the law requires shippers to maintain "round-the-clock oil spill response teams;" Alyeska hired specially qualified Natives for the job, trained them with "special equipment to contain an oil slick at a moments notice;" then in 1979 they were fired; sham teams were created; names of untrained workers were listed on them; and equipment "was missing, broken or existed only on paper;" when the 1989 spill occurred, "there was no Native response team, only chaos."

Exxon drew fire, but British Petroleum (now BP) is just as culpable as Alyeska's major shareholder (46% at the time). "Exxon is a junior partner, and four other oil companies are just along for the ride." Capt. Woodle and other key people worked for BP, yet the company stayed well out of the spotlight. It also had "scandalous" evidence about the Valdez problem. Capt. Woodle personally "delivered his list of missing equipment and 'phantom' personnel (letter) directly (to) BP's Alaska chief, George Nelson."

The company hid the evidence, trumped up bogus marital infidelity charges against Woodle, bought him off to leave the state and not return, and also went after Charles Hamel, an independent oil shipper. He discovered the Valdez problems, reported them to BP, and then was spied on and hounded to silence him.

The Exxon Valdez story is clear. Profit considerations trump all others. Alyeska promised safety, but delivered betrayal, and Palast explained the problem this way: In shipping oil, "the name of the game is 'containment' because, radar or not, some tanker somewhere (will) hit the rocks. Stopping an oil spill catastrophe is a no-brainer....if a ship (hits) a reef (it's only necessary) to surround (it) with a big rubber curtain (a 'boom') and suck up the corralled oil. In signed letters to the state and Coast Guard, BP, ExxonMobil and partners promised that no oil would move unless the equipment was (available) and the oil-sucker ship (the 'containment barge') was close by....The oil majors fulfilled their promise the cheapest way: They lied."

When the Exxon Valdez hit Bligh Reef, no equipment was there. If it had been as promised, they'd have been no disaster and no need for the Supreme Court to reward Exxon and cheat Native Alaskans and fishermen.

The oil industry was well-served by "the fable of the drunken skipper." It turned Alyeska's lawlessness into a "one-time accident" because of "human frailty." It "made the spill an inevitability, not an accident" and assures future ones are coming and not just in Alaska.

In the late 1990s, an Exxon Prince William Sound brochure pronounced the water "clean and plant, animal and sea life are healthy and abundant." In fact, it's mirror opposite. Palast revisited Alaska in 1999. On Chenega, rocks were still being scrubbed with 20 tons of sludge removed from beaches that one summer. At Nanwalek village, the state declared clams poisoned from "persistent hydrocarbons" and inedible. The Montague Island sea lion rookery is empty. The herring never returned, and salmon still have abscesses and tumors. All along the beaches it's the same. "Kick over a rock and you'll get a whiff of an Exxon gas station."

Since 1989 on a positive note, Clarkson Research Services reports that 77% of oil tankers are double-hulled compared to 6% in 1989. On the other hand, spills and shoddy industry practices remain common, and oil now tops \$140 a barrel. Back then, it was \$13.58 in January. What about the Exxon Valdez? It's still single-hulled, and this year a Hong Kong company bought it to carry bulk ore. It's now called the Dong Fang Ocean.

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