

EXXON HAS USED THE LEGAL SYSTEM TO AVOID PAYING DAMAGES FOR THE VALDEZ SPILL.

Whatever It Takes

ASHLEY SHELBY

Shortly after the catastrophic 1989 Valdez oil spill in Prince William Sound, Exxon sent Don Cornett, the company's top official in Alaska at the time, to the fishing port of Cordova to reassure the fishers that the company would make things right. "You have my word," Cornett told them then. "I said it, Don Cornett. We will do whatever it takes to keep you whole. We do business straight."

No one in Cordova's Masonic Lodge tonight, where attorney Brian O'Neill has called a town meeting, has forgotten that promise, and no one has failed to notice that things haven't exactly worked out that way. O'Neill, a lawyer with the Minneapolis firm Faegre & Benson and the head of the legal team on this case, has, for ten years, returned to Cordova regularly to update his clients on the progress of the civil case against Exxon.

At this meeting, a man walks in late. He pours himself a cup of coffee and stands back near the kitchen, listening to his neighbors talk about how they now consider their wives' health insurance plans dowries and how the new definition of a high-liner is a fisherman whose wife has a good job. He listens to as much as he seems able, then turns to O'Neill and says, "Where in the hell is my money? That's what I want to focus on. If any of us knew we'd be having this meeting fourteen years later, we'd have liquidated and moved out. Maybe we should have."

The man's name is Phil Lian, and in 1988 he was one of the most successful fishers and businessmen in Cordova, fishing the sound and selling supplies to Cordova's fleet. His business was growing at 80 percent a year, and grossing \$2 million a year. But after the spill, no one needed supplies because no one was going fishing. Today, his empty fishing-supply superstore, across the



road from the Cordova Fisherman's Memorial, is a symbol of loss and matters left unresolved.

"We're going to get the award," O'Neill says. "In regards to your anger—"

"I don't like to call it anger," Lian says sharply. "I like to call it frustration."

"Well hell, I'm angry!" O'Neill shouts.

The story of Cordova is not just a sad tale of a few bad fishing seasons. It is the story of how corporations can use the legal system and the seeming apathy of the federal government to avoid responsibility for their actions. It's been ten years since a federal jury awarded the fishers and Natives on the sound \$5.2 billion in punitive damages from Exxon, but not a single check from that award has been cut. Instead, Exxon has been fighting the verdict, employing hundreds of lawyers, filing countless appeals and effectively buying science that supports its claims. And even when ordinary people think they've finally won—that the final appeal has been denied—they haven't. Perhaps they never will. Says O'Neill, "They see me as part of a system that's failed them."

In March 23, 1989, Captain Joseph Hazelwood stepped onto the oil tanker Exxon Valdez having consumed, according to him, three vodkas on the rocks at various bars in the port city of Valdez. Affidavits from bartenders in the port, however, claimed the captain drank the equivalent of five doubles, or, in the words of the Court of Appeals for the Ninth Circuit, enough to make most people unconscious. The 11-million-gallon spill that occurred while he was in command eventually spread down 1,200 miles of coastline. The environmental damage was catastrophic. Cleanup crews watched in horror as otters scratched out their own eyes to rid them of oil. Justice Department teams recovered the carcasses of more than 36,000 migratory birds and a thousand sea otters, and believe they represent only a fraction of the actual numbers.

Ashley Shelby's Red River Rising: Anatomy of a Flood and the Survival of an American City will be published by Borealis Books in April.

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For a few months, the disaster was imprinted on the national consciousness. But as time passed, it was reduced to a few stubborn media images: an oiled otter, a tar-covered seagull, men in haz-mat suits spraying boulders with boiling water. An out-of-work commercial fisherman was never among the emblems. But the fishermen were long-term victims too. Cordova, once an exuberant fishing port of 2,600 where high-liners—a term reserved for the most successful commercial fishers—might bring in a couple of hundred thousand dollars or more a year, is depressed and Dickensian. Today, there isn't a single fisher in town who would be considered a high-liner by pre-spill standards; instead, former high-liners mend nets in cannery warehouses, and bartenders fill and refill beer glasses. If the herring fishery had been closed one or maybe even two seasons, fishers say, they might have been able to bounce back; but there hasn't been a herring season for more than ten years.

On the sound, a commercial fishing permit is like a home—it is a fisher's greatest investment, something that stays in the family, an asset that accrues value. In 1988 there were fishers in Cordova whose permits were worth nearly a million dollars. Today, their permits—fishers often call them their "nest eggs"—have depreciated in value by a staggering 90 percent.

One day during Brian O'Neill's visit to Cordova, Jack Babic takes the lawyer on a ride around the sound in the purse seiner he once used during herring season. Jack and his wife, Heidi, are two of O'Neill's 32,000 clients. Babic made out well after the spill; Exxon hired local fishers to help with the cleanup, and the company paid well. The Babics took the money they made and bought a boat they hoped to pass on to their children. Then the herring seasons were canceled and the salmon prices dried up, and suddenly the Babics had no viable fishery and had to start thinking about how to manage their finances until the Exxon payments came through. Those payments always seemed just around the corner, and people planned their lives around them.

"I was born in this," Jack says. "I never wanted to do anything else. I think of the last fourteen years as a lost opportunity. You can't quantify it in terms of dollars." O'Neill asks Jack if he's angry. Jack keeps his eyes on the horizon, one hand draped over the steering wheel.

"I'm still angry," he finally says, "but how long can you be angry? I see people in this community living their lives in anger, and I don't want to live my life that way." He adds, "It's not a guaranteed thing that we'll be compensated. You just try to pick up the pieces and move on. Isn't that what we have a responsibility to do?"

"Eighteen to twenty-four months, and the final and whole settlement will be distributed," O'Neill says. It's clear Jack is doubtful. Does he believe O'Neill?

"I believe he believes it. I believe that damn company will find a way to put the skids on it. I can't say I totally believe him," Jack says. Heidi smiles at O'Neill and adds, "But I'm glad you believe it."

Later in the day, O'Neill pulls up to an old warehouse on Cordova's Cannery Row. Upstairs, two redheaded brothers, Robbie and Mike Maxwell, are mending nets. As local kids, fishing was the only thing they'd ever wanted to do; when they got older, they raised families on the good money they made during the season.

Nowadays they still fish, but they don't make a living out of it, so they repair nets during the off-season.

"Let me ask you a question," Mike says to O'Neill. "'Punitive' means to punish, right?"

"You're right."

"So how does \$5 billion hurt Exxon?"

"Five billion is more punitive than nothing," O'Neill says.

But is it? The *Anchorage Daily News* reported that while awaiting a final judicial decision, Exxon has earned enough in interest alone to pay the initial \$5 billion award. "Each year Exxon delays payment of its obligation," the National Association of Attorneys General wrote in a 1999 letter to Exxon CEO Lee Raymond, "it earns an estimated \$400 million from the difference between the statutory interest rate on judgments of 6 percent and the company's internal rate of return of about 14 percent."

When Exxon and Mobil presented a merger proposal to the Federal Trade Commission in 1999, many saw an opportunity for the federal government to put pressure on Exxon to pay the punitive fine. Yet few in Washington—and no one from Alaska's Congressional delegation—even tried. One legislator who did, Senator Slade Gorton, a Republican from Washington State, said in 1999, "We have an opportunity to make an indelible impression on what would be the largest corporation on Earth—that an oil spill like this must never happen again." The FTC approved the Exxon/Mobil merger in November of 1999.

"Who's being punished here?" Mike Maxwell asks O'Neill. "We are. Looking into the future, is my son going into fishing? Absolutely not."

"The best I can do," O'Neill says, "is to get the \$5 billion. I can't put the sound back together."

"I would just love to collect the Exxon oil that is on our beaches," Mike says, "and dump those gallons of oil on the front yard of its corporate headquarters. It's been in my front yard for fourteen years."

Dr. Steven Picou, a professor of sociology from the University of South Alabama, has spent the past fifteen years studying the effect the Exxon spill has had on the towns of the sound, specifically Cordova. Over the years, his focus has slowly shifted from the effects of the environmental devastation on the fishermen to the sociological and psychological damage inflicted by the legal battle.

Picou's findings in Cordova were damning: A third of fishers were clinically depressed; approximately 37 percent exhibited symptoms of post-traumatic stress disorder. Sixty percent of Cordova commercial fishers have had to take second jobs to make ends meet. Toxins, Picou was finding, had contaminated more than just the water; they had contaminated the town of Cordova.

"I think the vast majority of people in Cordova believed the reps from Exxon," Picou said. "But once the issue was transformed from how-to-get-out-of-the-media-limelight to how-to-get-in-a-position-to-protect-our-profit-margin-and-stock-value, then it changed overnight. They zipped up their purse strings, got out of town, and said, 'You'll find us in the courtroom.'"

In a keynote address presented at the Earth Charter Summit in 2002, Picou outlined what he considered Exxon's legal strategy for avoiding payment of the punitive-damage decision. "Hire the best attorneys money can buy, and aggressively attack plaintiffs in every manner possible, while also delaying court proceedings

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by any legal means necessary for as long as possible, no matter how frivolous the challenge. Hire your own scientists to evaluate ecological damages and pervert the process of science by hiding behind any degree of uncertainty that may and will always characterize independent scientific damage assessments." In other words, Picou believes that litigation in the cases of big business versus communities devastated by "collateral damage" provide those corporations with a kind of insurance policy against future disasters, a policy underwritten by the US court system.

The Exxon civil case began in 1990, when hundreds of fishers and natives filed lawsuits against the company. That same year, Exxon attorneys filed motions to dismiss the charges in the federal government's five-count criminal indictment resulting from the spill. Perhaps the most memorable brief from this first round was the one in which Exxon claimed that crude oil was not a pollutant under the federal Clean Water Act, which it had violated. "The crude oil on board the Exxon Valdez was not a waste," Exxon Shipping attorney Edward Bruce said. "It was a commodity."

In October of 1991, the State of Alaska, the US Justice Department and Exxon brokered a deal that would allow Exxon to plead guilty to four misdemeanor environmental crimes, put \$100 million on the table for criminal penalties and pay \$900 million in civil damages. By this time, Exxon had already spent nearly \$2 billion in its cleanup efforts. However, environmentalists condemned the deal, complaining that the Justice Department had backpedaled from its earlier censures of Exxon; the criminal case had been initiated by then US Attorney General Dick Thornburgh, who indicted Exxon and promised that the federal government was "throwing the environmental book" at the company. Thornburgh initially promised to seek more than six times the amount he settled for from Exxon. On April 24, 1991, Federal Judge Russel Holland rejected the deal. "These fines send the wrong message, and suggest that spills are a cost of business that can be absorbed," he said.

In May of 1994, the Exxon trial began in the federal courthouse in Anchorage. The case was conducted in three exhausting phases. Phases one and two dealt with questions of recklessness (a finding of recklessness against Exxon was necessary for recovering punitive damages) and actual damages caused by the spill. Phase three determined whether punitive damages would be awarded, and if so, how much. Exxon's lawyers pointed to the cleanup of the sound's beaches, which pumped huge amounts of money into the local economy. Did the jury want to punish a corporation that accepted responsibility for its mistakes? Would that not set a dangerous precedent?

"Accept responsibility?" O'Neill asked in his closing arguments. "They didn't have any choice but to accept responsibility. It's on a reef, the state authorities are coming out; what are you going to do, paint the smokestack and put Sea River on it? Exxon has no place to hide."

On September 16, 1994, a federal jury ordered Exxon to pay \$5.2 billion in punitive damages to Alaska natives, property owners and commercial fishermen on the sound. Immediately, Exxon

filed more than two dozen post-trial motions, which would take more than a year to resolve. In the meantime, the pollution of a world-class salmon fishery had affected the market, diminishing demand for the sound's catch at a crucial time, when there was already a glut of pink salmon. Salmon farms in Chile and Norway had begun taking up a larger share of the market, squeezing fishers of Prince William Sound out of the game. As O'Neill tells it, "These guys just lost shelf space permanently."

In 1998, four years after the initial verdict, the fully briefed Exxon appeals finally went to the Ninth Circuit Court—and sat there. The next year, 1999, *60 Minutes* broadcast a segment on the ten-year anniversary of the spill; it focused, in part, on the Ninth's inaction. The day after the segment aired, the court scheduled arguments. But the briefed case sat in the Court of Appeals through 2000. Then, in November 2001, the Ninth Circuit overturned the \$5.2 billion award against Exxon, calling it excessive, and sent it back to Judge Holland's district court

'These fines send the wrong message, and suggest that spills are a cost of business that can be absorbed.' —Judge Russel Holland

so it could set a lower amount.

By this time, a thousand or so claimants in the case had died. The mayor of Cordova had committed suicide—his ashes were scattered over Bligh Reef. The debt load in Cordova was, according to some people in town, about to exceed the award. In December of 2002, Judge Holland reduced the award by nearly a billion dollars. Exxon appealed.

After fifteen years of bad press, it's not surprising that Exxon's chief spokesman, Tom Cirigliano, doesn't want to talk about Cordova anymore. Since 1989, Exxon has spent more than \$2 billion attempting to clean up the sound. The company also paid about \$300 million to more than 32,000 fishers on the sound for losses suffered in 1989, when the entire fishing season had to be canceled. Divided equally (and the payments were not equal), that is roughly \$9,500 a person. Fishers in Cordova could often bring home \$100,000 a season.

"I don't want to waste any more time talking about it with you," Cirigliano said when I asked him to react to claims of the company's foot-dragging. "When they say we're dragging our feet, they've appealed a number of issues with regard to this and dragged their feet when it was to their advantage considerably. And as far as Brian O'Neill, we don't want to give an opinion on him. He's talking out of both sides of his mouth."

Much of Exxon's PR energies are directed toward refuting claims made by government scientists like Jeff Short. Short, a federal chemist from Auke Bay Labs in Juneau, has been studying the environmental effects of the spill for years, and in January of 2002 he reported that there was still Exxon oil in the sound. Short's research found more than 200 times more oil than Exxon had claimed; on the beaches hardest hit by the spill, he reported that the chances of finding oil on those same beaches twelve years later was better than 1 in 2.

The National Marine Fisheries Service Lab in Juneau found that weathered oil was affecting young salmon and herring; among the results of one investigation were eggs that died before hatching, grossly deformed spines and jaws in those that managed to hatch and a considerable decrease in returns of salmon from the

sea. However, Short was careful to be fair. He has always maintained that Exxon's claims that natural variability is the reason for the fluctuating salmon and herring catch levels could turn out to be true.

Exxon struck back with David Page. A professor of chemistry and biochemistry at Bowdoin College in Maine, Page called Short's study bad science even before reviewing all of Short's research. "Prince William Sound today is as healthy as it would have been if the spill hadn't happened," he wrote in the *Anchorage Daily News*. If this claim sounds unusual, it helps to know that Page is on ExxonMobil's payroll; his research is underwritten by the company. (Although Tom Cirigliano encouraged me to contact Page regarding the state of the sound, Page did not respond to my requests for an interview.)

As a result of Page's charges, the sponsor of Short's research, the Exxon Valdez Oil Spill Trustee Council, commissioned a review of Short's methods by a National Marine Fisheries Service panel that was independent of Auke Bay Labs. The panel found that if there was any bias in Short's sampling, it was that he left out sites that were more likely to show oil. Short's estimate of the amount of oil remaining in the sound was likely conservative.

On a beach on Eleanor Island in Northwest Bay, Short turns over a few barnacle-covered rocks with the edge of a garden spade. Once he reaches sand, he plunges the spade in and removes a handful. He removes one more shovelful, and viscous oil slowly begins to fill the new pit. The fishy smell of the bay is instantly replaced by the toxic smell of petroleum. Short, unsurprised but not complacent, shakes his head. "It's really an insidious poison. The fact that we can find this much oil fourteen years later—and oil in this toxic condition—means

the oil did a lot more damage than we think."

In fact, the journal *Science* published a study in late December 2003 that found residual oil harmed pink salmon eggs for at least four years following the spill, and that significant amounts of crude remains on the sea bed, where it poisons mussels and clams—and by extension the animals that feed on these creatures, like otters and ducks. And, like Short, the study's researchers easily found pockets of oil on the beaches.

The last visit Brian O'Neill makes on this trip to Cordova is to Virgil Carroll. Like most of the commercial fishers in Cordova who bought their permits before the spill, Carroll spent hundreds of thousands of dollars on his. Now he'll be lucky if he gets \$60,000 for it. O'Neill tells Carroll that although he believes the Exxon payments are forthcoming, many claimants have died while waiting for them.

"Three of 'em in my family," Carroll says. His sons grew up fishing with their father, and were fishers themselves before the spill. Now the youngest has put his boat up for sale and moved to Anchorage, while the oldest, "never anything but a fisherman," went back to school to become a teacher in Valdez, so he can fish during the summer and still be able to buy groceries.

"What if you get money from the settlement?" O'Neill asks Carroll.

"Young guys can start fishing; for me, I could help my boys," says Carroll. "But it won't bring the fish back."

At the end of January, Judge Holland increased the punitive damage award against Exxon from \$4.2 billion to \$4.5 billion, plus the \$2 billion of interest that has accrued on the award since 1994. O'Neill expects Exxon will appeal. ■

LETTERS

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know he may come home in a box, or maimed for life, or psychologically damaged beyond comprehension.

You cannot imagine the anger we feel as we watch the laughing, tittering talking heads on corporate TV run puff pieces as news and ignore the horrors of wondering where a child is in Iraq: Will he come home? Is he OK? What's it like for him to endure 120-degree heat? Is he afraid? Will someone be with him if he dies or is wounded? Will someone hold his hand and tell him we love him?

That child is ours. He does not belong to the neocons. They don't care who these kids are. They demand warm bodies to send into this black hole they created. I will spend every breath of my life working to get that lowlife fratboy dragged out of the White House in chains. This is too much to bear. MARIANNE BROWN

CHOICE: TONE IT DOWN

Cambridge, Mass.

■ Jennifer Baumgardner's "We're Not Sorry, Charlie" [Feb. 2] is leading the pro-choice movement in the wrong direction. If we are going to keep abortions safe and legal, we have

to appeal to the voters in the middle.

Choice is not like the civil rights movement. There is no equivalent of "I'm black and I'm proud," no place for in-your-face T-shirts saying "I had an Abortion." There is no high ground to take; we just want to keep the government out of our bedrooms and our medical decisions. Pro-choice has to find common ground to appeal to the people in the center. That should start with the goal of fewer abortions. How to *avoid* a pregnancy should be the top priority of the pro-choice education package, which should give young people an escalating list of choices—no sex, sex using condoms, sex using birth control like the Pill, the morning-after pill, RU-486 and, last, a surgical procedure.

When people stop arguing and sit down to compromise, they usually find that they agree on more points than they disagree on. Anyone who supports the right to choice in cases of rape, incest or when the woman's health is in danger should be on our side. Terminating a pregnancy is a difficult, emotional experience for many. Women who are facing abortion should have access to support groups of others who have been through it. There is no shame in having an abortion, but you're not going to keep the major-

ity support for *Roe v. Wade* with "I had an abortion" T-shirts or a celebratory "I'm Not Sorry Day." HARRY IRWIN

BAUMGARDNER REPLIES

New York City

■ I don't know how to respond to a person who argues that there is no shame in having an abortion and yet advocates no space to openly say one has had one without the caveat "of course, it was a terrible choice to *have* to make!" The hundreds of women who have reached out to me with their stories since my piece was published lead me to believe that women—at least some women—crave a space where they can be open about their procedures. The campaign isn't calling for people to have unambiguously triumphant responses to their abortions, as I clearly stated. It is to encourage them to tell the truth about their abortions—good, bad and everything in between. The political point is to make visible the millions of women who have had abortions and thus the need for safe and legal procedures. As for the advice about where the movement needs to go, pro-choice activism has *always* been concerned with reducing the need for abortions. JENNIFER BAUMGARDNER