

[begin Oral Argument_1_27_2006]

JUDGE SCHROEDER: -- pass the time for argument in *Baker v. Exxon*. This is a very senior distinguished panel consisting of the Chief Judge of this Court, the Chief Judge Emeritus of this Court and our distinguished colleague from the state of Alaska. And we have all been here before, so we will proceed to hear the case and we will not be rigid in the time limit given, which is only 20 minutes per side. We will not interrupt you in the middle of a one-syllable word, so -- but we are very familiar with both the law and the facts of this particular case and want to concentrate on exactly what this panel needs to decide now. With that, we'll hear from the appellant.

MR. DELLINGER: Good morning. Good morning, Chief Judge Schroeder, may it please the court, I'll try to save five minutes for rebuttal, and since, as you've said that you have been over this before, it's probably best that I start with what's new since you last heard argument in this case. And by far the most important new development is the Supreme Court's decision in *State Farm v. Campbell*. In *State Farm* in one key respect the Supreme Court turned an important element of punitive damages law right side up. The Court rejected the notion, an understandable but mistaken notion, that somehow the largest compensatory judgments necessarily call for the largest punitive damages. The Court said that's not right. In fact, if you focus on the necessity of punishment and deterrence, the Court recognized that large compensatory costs may already accomplish both of those objectives: punishment and deterrence. And just let me read you the sentence where the Court precisely says that "it should be presumed that a plaintiff has been made whole for his injury by compensatory damages. So punitive damages should be awarded -- should only be awarded if the defendant's culpability after having paid compensatory damages is so reprehensible as to warrant the imposition of further sanctions necessary to achieve punishment and deterrence." That very new way of looking at it was actually foreshadowed by this Court's November 2001

1 Opinion in which you noted that it was a close question whether punitive damages were
2 simply barred in this case that there was -- you said force of logic and policy to the argument
3 that punishment and deterrence had already been satisfied when over three thousand -- million
4 dollars had been imposed in costs and voluntary clean-up on the defendant in this case. The
5 only thing that was missing was precedent. And I think the Supreme Court's decision in *State*
6 *Farm* supplies that precedent. Now, we're not asking this panel to revisit the decision not to
7 strike the punitive damages claim, but we certainly believe that the considerations that
8 strongly suggested that under this approach of *State Farm* no punitive damage award is
9 permissible suggests a fortiori that no such award should exceed \$25 million. Surely, the
10 payment of \$3.5 billion is one of the greatest deterrents we've ever seen in the civil law, and
11 that leads to the question of whether there is an amount necessary for punishment. And here,
12 unusually in this case, we don't have to speculate.

13 JUDGE KLEINFELD: Counsel?

14 MR. DELLINGER: Yes, Judge Kleinfeld.

15 JUDGE KLEINFELD: I'm puzzled by something here. In our previous Opinion, we
16 spent about 13 pages going over what the amount should be after first trudging through all the
17 issues that led up to whether there could be punitive damages at all. We rejected the
18 arguments acknowledging that some were close on whether there should be punitive damages
19 and said it was allowable. Then in the 13 or so pages of F.3d going over the amount, we went
20 at it every -- every which way and we kept coming up to a number around 1.1, 1.2 billion
21 dollars. Your brief says the District Court ignored the mandate of this Court, and you cited a
22 lot of authority that a lower court is bound by the mandate of the higher court, and it doesn't
23 matter that the lower court thinks the higher court was wrong or didn't have good enough
24 authority for it. But it sounds like you're doing the same thing. You're saying we shouldn't
25 do -- what we said before was the right thing to do; instead we should basically erase the

1 punitives award. I don't get it. How could we do that without applying that rarely-applied
2 branch of law of the case doctrine that allows a court to erase its prior decision on account of
3 its being plainly wrong.

4 MR. DELLINGER: Judge Kleinfeld, two responses. One, I don't think we have to
5 fight the Court's prior opinion. I recognize that there were places where you mentioned
6 among the numbers twice the amount of the loss under one statute, etc., that produced a
7 number of a billion dollars, but you -- by no means did I read your opinion as suggesting that
8 that is the answer, and we do have indeed, I think, a powerful --

9 JUDGE KLEINFELD: Nevertheless, we said at the end of it that our mandate was
10 that the District Court should recalculate consistently with this opinion.

11 MR. DELLINGER: That is correct, but I think consistent with the opinion that you
12 wrote you did say what was necessary for punishment and deterrence, and my -- I'll go
13 through the Opinion. The second answer is I do think that *State Farm* is a very major
14 development since you wrote that Opinion. That is to say the part of the thing that says it's a
15 close -- your analysis about --

16 JUDGE KLEINFELD: How does *State Farm* change our opinion as opposed to
17 showing that where there was no clear authority before now we have the Supreme Court
18 saying we were right? Your previous argument is basically where there was no clear authority
19 before on one of the issues we tackled, the Supreme Court said we were right.

20 MR. DELLINGER: Well -- and -- in two respects. First of all, *State Farm* says you all
21 said there's logic in policy to the notion that this kind of cost might simply rule out punitives
22 because there's no predicate for punishment deterrence. The Court said for the first time that
23 only if a defendant's culpability after having paid compensatories is so reprehensible as to
24 warrant further sanctions; really endorsing that. Secondly, your Opinion noted a number of
25 numbers, some of which are that the comparable penalty -- you noted there was an agreement

1 of \$150 million which was reduced to \$25 million for reasons that are directly germane. It
2 seems to us to be the correct number. You also said in the Opinion that it is generally not
3 proper to count in the -- what you call the numerator for ratio purposes amounts that have
4 been paid in settlement. And that makes all the sense in the world because here what you had
5 was often efforts at a solution where you have purely economic injury, and there is prompt
6 payment. \$300 million paid out within two years. I think the chart starts on the excerpts of
7 record at page 456. When those payments were made, \$300 million paid out, the bulk of it
8 that chart will show in the Fall of 1989. You -- in many cases, before the economic loss has
9 been suffered it makes sense to look at the fact, as you've said in your Opinion, that the
10 judgment was for -- we know precisely what the judgment was for: it was \$19,500,000, and
11 that doesn't -- you know, the ratio never binds you, but it also is a case in which the other
12 things the Supreme Court says at *State Farm* I believe for the first time is that where
13 compensatory damages are substantial and that was a million dollars in *State Farm*. Where
14 compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory
15 damages, can reach the outer-most limits of the due process guarantee. If that's not this case, I
16 don't know what case it would be. If three thousand million dollars isn't substantial --

17 JUDGE SCHROEDER: But what do you understand the numerator to be in this case,
18 the measure of it?

19 MR. DELLINGER: The measure in this case -- the numerator would be \$20.3 million,
20 and that consists of the judgment in the case. It's -- the usefulness of the ratio is it does give
21 you a real number. It's not binding, if there are other considerations, if there are other factors,
22 the Court says there's no magic ceiling. But it does give you a fixed number to start with. In
23 this case, at page 404 --

1 JUDGE SCHROEDER: But what do you -- I don't want to know the fixed number, I
2 just -- how do you calculate it? What -- in your mind, what is it in any case? Looking at *State*
3 *Farm* and then extrapolating, because I may have a different idea.

4 MR. DELLINGER: In any case, I think the numerator is the compensatory damages
5 paid as a result of the judgment.

6 JUDGE SCHROEDER: Paid? See, I read that it's the harm that basically is suffered
7 by the plaintiffs, which is compensatory damages. But -- formally, but *State Farm* talks about
8 punishing for its actions against this -- the Campbells.

9 MR. DELLINGER: Well, as this Court noted, the harm was largely avoided,
10 economic injury, by prompt early payment. It's the reason that -- and I don't otherwise know
11 if Judge --

12 JUDGE SCHROEDER: That -- the prompt recovery avoided further harm, it seems to
13 me.

14 MR. DELLINGER: Well, if --

15 JUDGE SCHROEDER: It doesn't reduce the number of -- the harm that you caused
16 as a result of the accident. May have been -- it may have been reduced further compensatorily
17 --

18 MR. DELLINGER: Well, let me just give you one example, Judge Schroeder, why I
19 think that is -- it is clearly that that takes into account, and it accounts for a lot of the
20 \$303 million that was paid out. Where you're paying people who anticipate an economic loss
21 for the next season and you make a payment, you set up claims offices and make a payment in
22 advance of the loss having suffered. That's what makes sense of what this Court said. I mean,
23 Judge Kleinfeld asked me about the mandate of the holding, and this Court says that the
24 amount that a defendant voluntarily pays before judgment should generally not be used as part
25 of the numerator in punitive damages review because that would deter settlements prior to

1 judgment. That was a considered judgment. This Court noted that the net compensatory
2 damages were \$19,590,000.

3 JUDGE SCHROEDER: I understand your argument with respect to that language, and
4 it cites opinions with which I am quite familiar. And I have a pretty good idea of what I
5 thought we meant by that. But I'm just asking in terms of the *State Farm* analysis, which is
6 what's new; we haven't seen it before, and that's really as you started your argument. It seems
7 to be the focus of the *State Farm* argument of that case is that the Utah Supreme Court was
8 way off base in looking at the damages - focusing on overall damage caused to -- around the
9 country to these -- by this policy as opposed to the harm that was caused to these plaintiffs.
10 And so I'm just suggesting to you that as I read *State Farm* the numerator should be the harm
11 that was caused to these plaintiffs.

12 MR. DELLINGER: Well, precisely what *State Farm* used for the numerator was the
13 actual amount of the judgment of \$1 million. They used that as the numerator even though in
14 some ways that may have -- they noted that that included both some amounts that could be
15 seen as punitive --

16 JUDGE SCHROEDER: Right.

17 MR. DELLINGER: -- but in any event -- it seem to me that once you start trying to
18 move away from --

19 JUDGE SCHROEDER: And then the punitives in that case became -- wound up being
20 hundreds of times --

21 MR. DELLINGER: Yeah, it was.

22 JUDGE SCHROEDER: -- greater than that.

23 MR. DELLINGER: It was. And the Court has noted -- it seems useful to me to start
24 with -- the ratio is useful to start with as a comparison of what was the compensatory
25 judgment actually paid and what was the punitive judgment actually paid; it gives you a

1 number that's not -- doesn't determine your outcome. In this case, it may be that that is
2 principally about deterrence in any event, and in this case I think -- this is a case in which
3 deterrence has been so fully satisfied by the amount that we look to penalties. And if you look
4 --

5 JUDGE SCHROEDER: Go ahead.

6 MR. DELLINGER: Yeah, if you look to the criminal and civil penalties as the
7 comparison, they too bring you very much in line with this number. I mean, usually courts are
8 in the position of saying what might a criminal fine realistically be expected to be. And here
9 the senior law enforcement officials of both the United States and the State of Alaska agree
10 that the appropriate amount of punishment under the Alternative Fines Act, 3571D, would be
11 \$25 million. I mean, you did mention that -- the sum of \$150 million --

12 JUDGE SCHROEDER: What is the basis for calculating the fine?

13 MR. DELLINGER: The basis for calculating the fine by those two officials was the
14 amount that they thought appropriate as punishment and at the sentencing hearing --

15 JUDGE SCHROEDER: The reg -- under the criminal regulatory --

16 MR. DELLINGER: Under those regulations, and they --

17 JUDGE SCHROEDER: Why should that be determinative here after *State Farm*
18 where *State Farm* says that you're supposed to look at the actions that were -- that affected
19 these plaintiffs and the harm that was caused them?

20 MR. DELLINGER: Well, because it -- I understand that to ascertain, yes. To ascertain
21 the harm component you're looking at the harm to these plaintiffs, not to the environment, etc.
22 And to be sure, the \$25 million that was one of the largest fines -- might be the largest ever
23 imposed -- that \$25 million was for all of the harm including the harm to economic interest. It
24 was --

25 JUDGE SCHROEDER: That -- in order to compensate these plaintiffs?

1 MR. DELLINGER: No, but --

2 JUDGE SCHROEDER: No.

3 MR. DELLINGER: No -- it -- well, it covered -- it was a fine for that injury. Of
4 course, punitive damage is not to compensate the plaintiffs in any case. Punitive damages --

5 JUDGE SCHROEDER: I understand that. I'm asking about the numerator -- the
6 proper calculation of the compensation that is appropriate to compensate these plaintiffs --

7 MR. DELLINGER: All right.

8 JUDGE SCHROEDER: -- for the economic harm. And it seems to me that is the
9 economic harm that was suffered by these plaintiffs. That's -- and I'm just telling you why is
10 that wrong; why should we jump over and talk about fines under a criminal system?

11 MR. DELLINGER: Oh, I'm sorry. I thought I had answered your question. Let me be
12 precise about the numerator. It seems to me that under what this Court said in its prior
13 opinion about generally not taking into account the amounts that a defendant has voluntarily
14 paid before the judgment taking into account the fact that if you want to have a useful ratio it's
15 useful to have objective numbers. And the objective number here is the judgment that was
16 paid that that number makes sense. I don't know where else I could go with that answer
17 except to say that it seems to me that the proper calculation of what the compensatory
18 judgment was is nineteen five, plus 700,000 from the state court judgment which is what
19 comes to 20.3, and the amount of punitives. The other factor in the ratio would be whatever
20 punitive damage amount is appropriate, will constitute that ratio. Again, that's not binding.
21 And it doesn't, in my view, lead to an absurd result in this incident. It takes account, as did
22 the state and federal officials, of the amelioration brought about by the efforts of the company
23 in spending \$2 billion.

1 JUDGE SCHROEDER: In other words, we take into account what the company has
2 done in preventing more damage in reducing the amount that these plaintiffs should be
3 regarded as needing to compensate them for that -- their harm?

4 MR. DELLINGER: I would not see it as reduction. I would see it as you start with
5 the compensatory judgment, which was \$19.5 million.

6 JUDGE SCHROEDER: Yeah, I guess that takes into account all this --

7 MR. DELLINGER: Yeah.

8 JUDGE SCHROEDER: -- mitigating --

9 MR. DELLINGER: Yeah, and they would have you add to that --

10 JUDGE SCHROEDER: Well, I'm asking you to look at it the other way. Can't you
11 also argue that you're asking that we take away all these things and that in *State Farm* they
12 were saying no, you look at what was the harm suffered by these plaintiffs. You don't look at
13 what was suffered by other plaintiffs that may be compensable in other suits, but you look at
14 these plaintiffs in this suit and what harm they --

15 MR. DELLINGER: Yes, I understand that. And for purposes of harm --

16 JUDGE SCHROEDER: Yep.

17 MR. DELLINGER: -- for purposes of harm, for the ratio you look at that. Now, the
18 other guide -- the other guidepost it seems to me the civil penalty, the -- in our view the
19 potential fine was \$28 million. They started at 80 but they realized it doesn't take account of
20 the clean-up which reduces it to \$64 million. At -- you know, in our brief we set out, starting
21 at page 44, why we think that's \$28 million, but the debate is really between \$28 million and
22 \$64 million. And we've never had a better guide on criminal penalties in any punitive damage
23 case I look at because the governments actually went through and resolved that issue and
24 decided that it should not be \$150 million but \$25 million in account of all the activity. So
25 those are both relevant data. And when you look at -- and the reason is, of course, that when

1 you look at reprehensibility, when you ask whether this should be an exception to the
2 statement in *State Farm* that one-to-one is the appropriate ratio in cases of substantial
3 compensatories, this has to be the case with the size of the compensatories and the absence of
4 reprehensibility since this was -- this accident was an accident.

5 JUDGE KLEINFELD: Counsel, I wonder if your colloquy with Judge Schroeder is
6 mixing two issues together that need to be separated. When we said, held, according to
7 *Baines v. Arco* it was holding (?-inaudible) in our previous decision in this case that the
8 amount that a defendant voluntarily pays before judgment should generally not be used as part
9 of the numerator. That holding was in the context of analyzing the ratio.

10 MR. DELLINGER: Yes, . . .

11 JUDGE KLEINFELD: However, as I understand the thrust of Judge Schroeder's
12 inquiries to you, they go not only to ratio, but to reprehensibility. We did not suggest in the
13 reprehensibility analysis that that \$300 million of harm should not be considered, so what I'm
14 thinking is that the proper analysis is in terms of considering how reprehensible the conduct is,
15 look at the money that was voluntarily paid after the harm was done; in terms of the ratio
16 don't. Am I getting that right?

17 MR. DELLINGER: Yes, I do think we should separate those out and with respect to
18 reprehensibility, the early payments has been recognized by this court's opinion and by the
19 officials should reduce at least, or mitigate, any reprehensibility. But, if you look at
20 reprehensibility itself what you see is what this court said that there was no violence, there
21 was no intentional spilling, no trickery, that all goes . . . what is missing from this case . . .

22 JUDGE SCHROEDER: How does what they do later, to pay claims to reduce their
23 compensatory damages, how does that affect the reprehensibility of the original conduct?

24 MR. DELLINGER: It doesn't - It cannot affect the reprehensibility of the original
25 conduct but it can overall assessing what is necessary for punishment or deterrents.

1 JUDGE KLEINFELD: [interposing] that's where I am hanging . . .

2 MR. DELLINGER: But, let's look at the original . . .

3 JUDGE KLEINFELD: That's where I am hanging up too . . . I don't see how it
4 mitigates reprehensibility. It seems to me it affects the ratio only. I mean, suppose, to take a
5 hypothetical case, you had a company that engaged in a practice that was dangerous to its
6 workers, and it knew perfectly well that from time-to-time there would be accidents that killed
7 workers, so whenever one of them was killed, the company went to the widow, gave her \$25
8 million, and it kept a lot of the widows quiet. It's reprehensible as can be, even if the ratio
9 was reduced.

10 MR. DELLINGER: Yes, I fully understand that and that's why I want to, if I may,
11 address reprehensibility directly.

12 JUDGE SCHROEDER: Yeah, it seems to me, let me just give you where I am coming
13 from and then we will give the other side equal time. But, it seems to me that the . . . what
14 they pay out in cleanup and early claims does reduce their compensatory liability, but I don't
15 see why you should . . . so that we get compensation . . . that the compensatory damages are
16 reduced, but I don't see why we have to use that . . . as the - the reduced figure as the
17 numerator figure for the ratio. Because *State Farm* says you look at what happened to these
18 plaintiffs by the conduct, the original conduct, not the, not all - everything they do after the
19 conduct to mitigate compensatory damages.

20 MR. DELLINGER: Let me respond to that and just briefly address reprehensibility
21 itself, which is . . . I read *State Farm* to say you exclude from consideration harm done to
22 other people who are not plaintiffs before you.

23 JUDGE SCHROEDER: Um huh.

1 MR. DELLINGER: So you limit it to looking at the harm of the plaintiffs before you
2 and what they looked at is *State Farm* and you should look, I think it's compensatory damage
3 that was actually [interposing]

4 JUDGE SCHROEDER: [interposing]

5 MR. DELLINGER: paid as part of the ratio. Now, on reprehensibility, what is
6 missing from this case that you see in punitive damages cases are one of two things: you
7 either see generally an unintentional malice targeted against a victim, where punitives are
8 clearly called for. Probably more commonly what you see in punitive cases is a circumstance
9 where someone is trying to save money by taking known safety risks to save money on a
10 product because they are going to make another \$35 per car if they put the gas tank in one
11 place rather than another. That's missing from both of these . . . from this case. This was an
12 accident. No company would ever want to incur \$3.5 billion in liability. This wasn't
13 something where you had a plan, a harm that you hoped to achieve, what they hoped for was
14 safe passage. So, the accidental nature of this, which has been recognized by this court we
15 think is really what reduces reprehensibility and I think that . . . when you look at the . . . if the
16 ratio . . . if the numerator is anything other than \$20 million, where we think that already
17 triggers a one-to-one ratio, then I would think that the proper ratio could be substantially less
18 than one-to-one in a case where . . . and that's the central message of *State Farm* and I would
19 like to save a little bit of time for . . . [interposing]

20 JUDGE SCHROEDER: We will give you two minutes for rebuttal. You've more than
21 used your time but we will give the other . . . set the clock for 25 minutes and we will let you
22 talk on.

23 MR. O'NEILL: In these circumstances, that is, a tanker spill that hurt tens of
24 thousands of people and caused hundreds of millions of dollars of damage, the district court's
25 award is not grossly excessive for a variety of reasons. If you consider only the quantified

1 harm, the award is presumptively within the presumptively constitutional single-digit
2 guideline. If you take into account uncompensated harm and potential harm as *TXO* teaches,
3 the real ratio falls to less than four-to-one . . .

4 JUDGE KLEINFELD: Counsel

5 MR. O'NEILL: Yes, sir.

6 JUDGE KLEINFELD: This reminds me . . . this argument would appear to start from
7 scratch and it seems to me you have to start from the previous decision because that was the
8 result of very considerable consideration and it has since been followed in other decisions of
9 this court and absorbed in this court's precedence, so I don't quite see how you start from
10 scratch.

11 MR. O'NEILL: Let me address the proposition that I am starting from scratch. Since
12 this court's decision, we've had a number of decisions in this circuit, *Cooper* being the best
13 example, in which the actual practice of the courts with regard to punitive damage awards is
14 an affirming . . .

15 JUDGE KLEINFELD: Before the Supreme Court reversed us in *Cooper*?

16 MR. O'NEILL: After the Supreme Court reversed you in *Cooper*. Which is why I
17 think it's significant. That pass on punitive damage awards where the single digit ratios,
18 where there are single ratios, is okay and there is case, after case, after case that does it. The
19 list of the cases is *Planned Parenthood*, *Baines*, *Hangarter*, *Zang* and *Cooper*, and then let's
20 take a look at the Supreme Court trilogy *State Farm*, *TXO* and *Cooper* all on remand were
21 single digit ratios. So, there is discussion of one-to-one and four-to-one; however, the court's
22 in action uphold single digit ratio cases. *Cooper* is the best example because in *Cooper* you
23 essentially have a company that has a bad photograph at a trade show and the court describes
24 the actions in *Cooper* as foolish more than reprehensible and upholds a nine-to-one award in
25 *Cooper*. That is . . .

1 JUDGE KLEINFELD: That was a very . . . that was something where if you didn't
2 have punitives you wouldn't have much of a deterrent at all. One of the things that *State*
3 *Farm* makes clear is if a lot of money is awarded against a defendant, the reluctance of people
4 generally to pay a lot of money acts as a deterrent by itself so a lower ratio is appropriate,
5 ordinarily not greater than four-to-one.

6 MR. O'NEILL: Okay, let me address that directly, and I want to address it in two
7 ways. First, of all, in this particular situation you have 32,000 plaintiffs who were forced
8 together in a mandatory punitive damage class as a result of action by Exxon Corporation.

9 JUDGE KLEINFELD: I don't see the relevance of that argument, that for each
10 plaintiff it's not that much because when you are looking at deterrence and punishment, the
11 impact of deterrence and punishment fall on the defendant that's punished and deterred.

12 MR. O'NEILL: Let me . . .

13 JUDGE KLEINFELD: You can have a class action where everybody in the class gets
14 \$1.50 and a coupon for a discount on their next car or something. The lawyers get \$100
15 million and the defendant is put out of business. That will sure deter.

16 MR. O'NEILL: It does. Let me address it . . . first of all from the proposition from a
17 legal standpoint. I didn't make it up. I got it from *Planned Parenthood*. The holding in
18 *Planned Parenthood* is . . . in looking at the size of the awards, you do look at it on a plaintiff
19 by plaintiff basis, and here we have a collection of 15 - of 32,000 plaintiffs . . .

20 JUDGE KLEINFELD: That was in the context of knocking it down, not building it
21 up. We knocked the award way down in *Planned Parenthood*.

22 MR. O'NEILL: That's correct, but the proposition is clearly made in *Planned*
23 *Parenthood* and it relies on *State Farm*, which says that you are supposed to take a look at the
24 harm to the individual plaintiff. Now, let me address it from a different perspective. The
25 *Amchem* case, which we cite in our briefs, stands for the proposition that the imposition of the

1 class structure on a variety of different plaintiffs is . . . should not affect the substance of the
2 claims of those individual plaintiffs. The class structure is to facilitate getting all of the cases
3 through the courts, so that's a proposition and that's a Supreme Court case, but that's an
4 important proposition that supports . . . that you should look at these on an individual . . .

5 JUDGE KLEINFELD: [interposing] your argument mean that in a class action the
6 punitive damages should be higher because the individual class members don't get that much?

7 MR. O'NEILL: In some cases yes, and in some cases no. It strikes me as a basic
8 proposition that if you have a case in which you have two people involved in a commercial
9 transaction and the reprehensibility is low and there is a large financial reward against one,
10 that's one situation. But here, the fact that *Exxon* took chances with the livelihoods of 32,000
11 people, knowingly took chances with the livelihoods of 32,000 people, makes the conduct, at
12 least from a common sense perspective, worse.

13 JUDGE SCHROEDER: Here, may I ask you this, because I have a little problem with
14 this case . . . things keep changing from phase to phase. What is the conduct here that you
15 think is involved?

16 MR. O'NEILL: It is taking an individual who you know is an alcoholic, and you know
17 is drinking again, and you know is drinking and driving, and you know is drinking and driving
18 and leaving the bridge, and over a period of three years, despite warning after warning, and
19 despite knowledge from the top of the chain of command to the bottom of the chain of
20 command, and not doing anything about it. That's the reprehensible conduct. Everybody
21 knew the good Captain Hazelwood had gone through rehab, everybody knew he was drinking
22 again, I mean, . . . in this day and age where drunk driving, and indeed drunk driving in safety
23 sensitive positions, is such a huge, huge problem . . . ahh . . . allowing that to happen, and in a
24 situation in which you know you are going to hurt 32,000 people, is a very bad thing.

1 JUDGE KLEINFELD: How do you respond to the defendant's argument that under
2 the ADA companies that just fire people for being alcoholics even when they get treatment,
3 companies that won't let people blind in one eye drive big trucks, can run afoul of ADA
4 requirements.

5 MR. O'NEILL: I want to respond to it directly. That issue was tried. That was an
6 *Exxon* defense. The *Exxon* defense was put forward by a fellow named of Iarossi who was the
7 president of the shipping company. Mr. Iarossi said that was a concern of his, and he talked it
8 over with the Human Resources director who told him that there was an issue there. Mr.
9 Iarossi later on testifies that he wasn't involved at all in the decision and didn't learn about the
10 decision until afterwards. The Human Resources director says that conversation never took
11 place. So the issue of why, in fact, Hazelwood was put on the vessel was tried to the jury in
12 this particular case, and it's clear that that wasn't the reason, and there are facts supporting an
13 inference that that wasn't the reason, and if you take those facts most favorable to the jury
14 verdict that isn't the reason. It appears from the trial proof, and it was day after day, if you
15 read the transcript, the transcript reeks of alcohol. It was clear from the trial proof that Exxon
16 Corporation, at least in the shipping company, had an alcoholic culture, that they were
17 enablers, and that they were enablers from the top of the company to the bottom of the
18 company, and they weren't going to do anything about Captain Hazelwood. That's the
19 transcript, and this ADA defense was tried and argued to the jury and the evidence . . .

20 JUDGE SCHROEDER: You're saying the jury took that into account when it
21 concluded what?

22 MR. O'NEILL: That the conduct was reprehensible. The jury, the evidence was such
23 that the jury could have rejected it as a total fabrication. We cite in our briefs, we cite to the
24 Iarossi testimony and the testimony of a fellow named Ben Graves. That's clear. We also cite
25 in our briefs just to the ton of evidence that shows that this company was sick.

1 JUDGE SCHROEDER: I guess I am just trying to understand. Did that go to the jury,
2 did the jury take that into account with respect to the compensatory damages or what?

3 MR. O'NEILL: It was tried as part of the punitive damages.

4 JUDGE SCHROEDER: Punitive damages. Okay.

5 MR. O'NEILL: Yes, ma'am. I do want to address your concern, and it was next in my
6 outline, about the ratio. The Supreme Court cases clearly talk about the totality of the harm.
7 And, indeed, they talk about more than the totality of the harm, and *TXO* the judgment in
8 *TXO*, if you take into account just the quantified harm was 385 to 1. So, the cases uniformly
9 talk about harm, they don't talk about the net punitive damage award. The reason for that is
10 kind of interesting.

11 JUDGE SCHROEDER: The net compensatory damage award.

12 MR. O'NEILL: The net compensatory damage award. Yeah. If that was the regime
13 then you would stand the system on its head for a variety of reasons. The first is, anytime you
14 did something wrong, you could get out of it by paying compensatory damages. There would
15 never be any punishment. You make that judgment, you go out and settle. The second aspect
16 of that is it takes the punishment decision away from society and away from the courts, and
17 places it in the hand of the wrongdoer, because the wrongdoer can always buy itself out quite
18 simply by settling. The third reason it doesn't work is . . .

19 JUDGE SCHROEDER: It can buy itself out of a good deal of compensatory damages.

20 MR. O'NEILL: Well it can, and it should be able to do that.

21 JUDGE SCHROEDER: And it did here.

22 MR. O'NEILL: It did, and you know, to answer your question . . .

23 JUDGE KLEINFELD: What if *Exxon* had paid \$5 billion in advance of any lawsuit
24 being filed by anyone. It had gone around and said, we feel terrible about what we did, we
25 don't want you to feel you have to sue us in order to get a sting, and had handed out \$5 billion,

1 the total amount that the jury found was due. Would you say that they should nevertheless be
2 liable for another \$5 billion?

3 MR. O'NEILL: Probably not.

4 JUDGE SCHROEDER: If they would have paid out what . . . the compensatory plus
5 \$5 billion in . . .

6 MR. O'NEILL: Probably not, but you asked early on with regard to these payments
7 where in the analysis do you place the payments? *Exxon* made a decision here as to how it
8 wanted to do it when it tried the case, and it resulted in two things. The first was, *Exxon*
9 argued to the jury that its payments made it less reprehensible and they got a jury instruction, I
10 think the jury instruction number is 37, which allowed them to argue the voluntary payments
11 in the context of everything that went on before and went on after, so it was part of the
12 discussion with the jury about how bad it was, and it was argued that way. That, also though,
13 at the same time led to the damage stipulation. You know, we stipulated to what the harm was
14 in the case, and the trial court's finding of \$513 million takes that stipulation as the basis and
15 it resolves a couple of the open issues that were left in the trial stipulation.

16 JUDGE SCHROEDER: One of the things that I find difficult here is that, as I
17 understand it, you are arguing that this was tried, this was found, this was taken into account.
18 As I understand it, our standard with respect to due process review, which is what we are
19 supposed to be talking about is de novo. So, what is it in your view that we're supposed to be
20 looking at de novo?

21 MR. O'NEILL: I am going to answer the question honestly, and not how I planned to
22 answer it.

23 JUDGE SCHROEDER: [laughter] Well, that's refreshing.

1 JUDGE KLEINFELD: I realize that there are some who don't think that Ninth Circuit
2 precedent is binding, but Supreme Court Precedent is and *Cooper* says that we do just what
3 Judge Schroeder said.

4 MR. O'NEILL: That's right, but I mean you go down different levels and I think her
5 question says, at what level does the jury and the district court play a role, and at what level do
6 we play a role. The ultimate decision of whether the award is grossly excessive is a de novo
7 question. That's absolutely clear.

8 JUDGE SCHROEDER: What do we look at de novo in deciding that? We don't just
9 say, what side of the bed did I get up on this morning.

10 MR. O'NEILL: No, you don't. You take a look at the three *BMW* factors, and looking
11 at reprehensibility, you take a look at the five reprehensibility factors. Now, that's a good
12 example with regard to the question that you're asking. Are the findings with regard to each
13 of the reprehensibility factors findings of fact, and do we get favorable jury inferences when
14 you find out about something being repeated, or purposeful, or are those questions a factor, are
15 those reviewed de novo, and that is right where it breaks down. The fact that *Exxon* knew
16 about Hazelwood's drinking, and all of the other facts that the district court made with regard
17 to that, are obviously findings of fact by the district court.

18 JUDGE KLEINFELD: I think you're . . . if I'm understanding you right, your
19 intention with this sentence in the Supreme Court's decision in *State Farm*. They said, we
20 reiterated the importance of these three guideposts in *Cooper Industries* and mandated
21 appellate courts to conduct de novo review of a trial court's application of them to a jury's
22 award. I had understood that to mean we don't just decide whether the award is excessive or
23 not, we do de novo review of application of each of the three guideposts.

24 MR. O'NEILL: At the top level, but in order to do that review you need facts. The
25 facts that go into that review are taken most favorably to the winner. You say that in the first

1 sentence in Baines, I mean you do say it in the first sentence in Baines. It gets mushy in the
2 middle, I mean when I said I was going to talk about it honestly, it gets mushy in the middle.
3 But, you do have findings of fact with regard to harm, and the amount of harm, you have
4 findings of fact with regard to the specifics of the reprehensibility, and you have findings of
5 fact with the maximum nature of the fines . . .

6 JUDGE KLEINFELD: I don't understand, we don't have a special verdict, what do
7 you mean findings of fact?

8 MR. O'NEILL: The District Court, this again gets mushy.

9 JUDGE KLEINFELD: You mean you want us to defer to what the District Court said
10 factually . . . in his last decision . . .

11 MR. O'NEILL: In it's last decision.

12 JUDGE KLEINFELD: When he was analyzing application of the three factors?

13 MR. O'NEILL: That's correct. On the factual issues that's correct. And I think the
14 Supreme Court makes that clear in *State Farm*.

15 JUDGE KLEINFELD: He didn't say he was making findings of fact.

16 MR. O'NEILL: If you read . . .

17 JUDGE KLEINFELD: I don't know if we could defer to him anyway under that
18 sentence.

19 MR. O'NEILL: Well, I think *Cooper* indicates that you do defer to his findings of fact.
20 *Cooper* was a jury case. The District Court in *Cooper* did exactly the same thing that you
21 asked Judge Holland to do here, and *Cooper* talks about deferring to his findings of fact in a
22 jury case. Another way to answer the same question is, you've had three or four opinions in
23 this case from Judge Holland. The first opinion was in the old context of reviewing the jury
24 award. If you go back to the last opinion, the one that you are reviewing here, he talks in

1 terms of finding facts. He thought that was your charge to him to find facts. He takes into
2 consideration the jury verdict, but the syntax in his opinion is a fact finding syntax.

3 JUDGE SCHROEDER: Well, the Supreme Court keeps kind of changing the . . .

4 MR. O'NEILL: Oh, I would say another thing on that. The way you phrased the
5 question to me, Judge Kleinfeld, I think to some extent overstated what the nature of the
6 inquiry is. The inquiry is, "is the award grossly excessive?" It isn't whether it's the proper
7 award or near a proper award, the inquiry is, "is this so far out of bounds that it violates the
8 Constitution?" And in this particular case, because of the number of people that were hurt,
9 because of the amount of damage that was done, and because of the exceptional notice that
10 Exxon Corporation had with regard to the ballpark that it was playing in, the punishment is
11 fair. It's large, but it is fair.

12 JUDGE SCHROEDER: Well,

13 MR. O'NEILL: We covered a lot of territory and I'm attempting to find where I am in
14 my outline. I did want to talk for a minute about what is a basic issue, and Mr. Dellinger
15 raised it, and I want to raise it, and you raised it, that is deterrents with regard to what
16 happened here and the sufficiency of the deterrents with regard to what happened here. I have
17 a couple of observations on that. The first is, we know that prior to the grounding, *Exxon*
18 knew both the dangers of putting Hazelwood in charge of the vessel and the dangers of having
19 that vessel under his command in Prince William Sound and that didn't deter them. I think
20 because of the fact that they were not rational decision makers, as the District Court found,
21 and that they were operating in the context of this alcoholic culture, but we know that the
22 scope of this damage which happened pretty well as envisioned was known to the company
23 and every aspect of this risk was known to the company almost to a certainty. They had
24 perfect knowledge with regard to Joe, they had perfect knowledge with regard to the Sound,
25 they had perfect knowledge with regard to the fishermen, and they did it anyway and they

1 weren't deterred. My second observation on just the question of deterrence, and then I will
2 get to punishment. The District Court at some point in time . . .

3 JUDGE KLEINFELD: I don't really get the deterrence. It seems to me like even if
4 they were totally unmindful of the harm to the environment, and the liability that they could
5 be hammered with for harm to the environment, and even if they were totally unmindful of the
6 economic harm to others and how they could be hammered for doing it. Still, they wouldn't
7 want to lose their 11 million gallons of oil.

8 MR. O'NEILL: But they did.

9 JUDGE KLEINFELD: I mean, they can't be indifferent to losing their cargos.

10 MR. O'NEILL: I understand that, but what were the facts. The facts at trial were that
11 they were indifferent to it. The facts at trial were they put this whole thing in play knowing
12 where it was going to go, and that's what we tried, and they argued to the jury, oh, we
13 wouldn't . . . this was a mere accident. They argued that to the jury but that wasn't the . . .

14 JUDGE KLEINFELD: You're saying anytime somebody has an accident that shows
15 they were indifferent, utterly unmindful . . . to the risk.

16 MR. O'NEILL: No, I am saying if you put a drunk in charge of a super tanker in
17 Prince William Sound, Alaska, knowing what exactly the consequences of that are going to
18 be, that that is reprehensible conduct.

19 JUDGE SCHROEDER: That has to be a jury question. I am still struggling with this
20 what is it that we are reviewing de novo. That has to be a jury question as to whether or not
21 they did this knowingly. I mean, what they did has to be for the jury.

22 MR. O'NEILL: That's a correct statement.

23 JUDGE SCHROEDER: Now, the question of the reprehensibility of what they did
24 without being in the jury room it is kind of hard to figure out what . . . to review de novo how
25 reprehensible it is.

1 MR. O'NEILL: Let's discuss that, both in the context of *State Farm v. The Campbells*,
2 in the context of this particular case.

3 JUDGE KLEINFELD: Why don't you also discuss it in the context of *Hilao v. the*
4 *Estate of Marcos*? The people that were tortured and killed by the Ferdinand . . .

5 MR. O'NEILL: That was a terrible case in which the punishment should have been
6 high.

7 JUDGE KLEINFELD: We said that was more reprehensible, torturing and killing
8 large numbers of people, we said was more reprehensible than putting a drunk in charge of a
9 super tanker.

10 MR. O'NEILL: I think it is more reprehensible, but I think with regard to the
11 management of a super tanker business putting a drunk in charge of a super tanker knowing
12 that he is drinking is highly reprehensible. The *Marcos* case is worse, but compare this to the
13 nine to one in *Cooper*. I mean, *Cooper* is dumb conduct but it isn't putting a drunk in charge
14 of a super tanker. Now, with regard to reprehensibility in this particular case, Judge
15 Schroeder, there were over 12 hours of testimony before Judge Holland by the top guys in the
16 company. I went back and I read it, and I timed it, there were over 12 hours by the former
17 chairman, the next chairman, the president of the shipping company, and Judge Holland and
18 the jury got an opportunity to take a look at these guys, and Judge Holland came to a couple of
19 conclusions. In Order 267, he came to the conclusion that the evidence was sufficient for the
20 jury to conclude that there was a lack of contrition by these specific people and in Order 364,
21 he came to the conclusion that *Exxon* has not come to grips with the opprobrium which
22 society rightly attributes to drunk driving. There are findings that, at least as of the time of
23 trial, five years after the grounding *Exxon* management didn't get it. There is also
24 documentary evidence in the record. A memo by a fellow named Stalzer and another memo
25 by the former president of the shipping company, a fellow by the name of Iarossi, that months

1 and in one case, years after the grounding, *Exxon* was still violating Coast Guard safety
2 standards.

3 JUDGE KLEINFELD: Help me with something more specific before your time runs
4 out. My impression from the briefs was frankly that *Exxon* lowballed the numerator and your
5 side highballed it, I guess you could expect that. What would the numerator be if you use as
6 the numerator actual compensatory damages minus amounts paid before trial, not before
7 judgment but before trial, by this particular defendant. When *Exxon* tried to cut the numerator
8 down, lowballing it as I characterized it, it took credit for money that was paid by other parties
9 not just itself and money that was paid after the trial commenced.

10 MR. O'NEILL: I think we run the number at \$360 million.

11 JUDGE KLEINFELD: \$360 million would be the numerator if you don't count
12 prepaids.

13 MR. O'NEILL: Prepaids and a couple of other categories and we do that calculation
14 in the brief. There is a calculation . . .

15 JUDGE KLEINFELD: On page 46, something like that?

16 MR. O'NEILL: It is, it's towards the end, but we do the calculation at the brief. I
17 would say though, and this is probably the most important thing that I do want to say, and that
18 is this case is like *TXO* in that there is an awful lot of emotional damage that was just the plain
19 result of hurting 32,000 people's jobs. The nature of things tells you that that's the case.

20 JUDGE KLEINFELD: If I understood that argument, you're trying to use the
21 emotional damage that always flows from great economic harm to turn this into a personal
22 injury case for purposes of that Supreme Court dichotomy between physical injury cases, and
23 economic harm cases. Is that right?

24 MR. O'NEILL: No. The first 5/6th of the statement about what I am doing are
25 correct. What I am doing is I am relying on the proposition in Footnote 11 of the *Cooper*

1 decision. In Footnote 11 of the *Cooper* decision, and in this court's *Planned Parenthood*
2 decision and in other decisions, the proposition is recognized that there are other intangibles
3 that go with economic harm and in old-fashioned tort regimes, and admiralty is an old-
4 fashioned tort regime, you take those things into consideration in assessing punitive damages.
5 Footnote 11 in *Cooper* talks at great length about that, so I am relying on Footnote 11 in
6 *Cooper* with regard to that. And I am relying on *TXO* with regard to potential damage. If you
7 take emotional distress and if you take, I'm over my time . . .

8 JUDGE SCHROEDER: That's okay.

9 MR. O'NEILL: If you take emotional distress and you take potential harm together it
10 isn't a nine-to-one case. This is only a nine-to-one case if you take a look at the hard
11 economic damages, which the Supreme Court precedent tells you that's what you are
12 supposed to look at. I won't even repitch. Thank you very much.

13 JUDGE SCHROEDER: Any questions? There don't appear to be any. Thank you
14 counsel.

15 MR. O'NEILL: Thank you ma'am, sir, sir.

16 MR. DELLINGER: Just very quickly, if you take the \$19.5 million plus the State
17 Court judgment of \$23 and you added to it the amounts that were paid prior to the judgment
18 but after or during the trial, that would be another \$70 (?) million before the trial, \$15 million
19 were settlements post trial but pre-judgment, that \$20 plus \$70 (\$) plus \$15 gets you to \$55
20 million. You start the other from \$513, you take off of the \$300 million that was paid
21 before . . .

22 JUDGE KLEINFELD: Hold on, I lost you there. I've got different numbers when I
23 went through my notes than your total. Give it to me again.

24 MR. DELLINGER: I misread, I'm sorry, you did because I missed said . . . it's the \$20
25 million that was the judgment, the \$20 million that was paid pre-judgment but post-trial, \$15

1 million in settlement paid during trial, that is \$55 million. The difference between that gap
2 and the \$513 million is the \$300 million that was paid not just before judgment, but before
3 trial, plus the \$98 million in Alyeska funds of and other matters, just very quickly, Judge
4 Kleinfeld I don't see how you possibly get to a billion dollars even reading your opinion
5 because the one time I saw that number was with respect to hypothetically 18 U.S.C. 3571,
6 twice the loss, as I say we don't think twice the loss is anywhere near \$513 but *State Farm*
7 came along and warns against suspected abuse of criminal penalties because they are
8 speculative and you don't meet the standard of proof. Secondly, 3553 of the sentencing
9 guidelines cut off that at whatever is necessary for punishment and deterrence. Thirdly, we
10 know the answer, because as this court said, the fine is a significant datum because . . . at \$150
11 million that it was agreed to, it represents an adversarial judgment by the Executive Office of
12 the State and Federal government with public responsibility for seeking the appropriate . . .

13 JUDGE SCHROEDER: We understand your position.

14 MR. DELLINGER: That's punishment for the environmental harm . . .

15 JUDGE SCHROEDER: We understand your position.

16 MR. DELLINGER: This is a small piece, and finally Judge Schroeder, the court did
17 say that the reprehensibility is reduced by the expenditure of millions of dollars . . .
18 reprehensibility should be discounted to [unintelligible], you said that so.

19 JUDGE SCHROEDER: For reprehensibility . . .

20 MR. DELLINGER: You said that, so with that I thank you for your . . . unless the
21 Court has further . . .

22 JUDGE KLEINFELD: Are you saying that the numerator, if you count compensatory
23 damages minus the amounts that were paid before trial began and you don't give *Exxon* credit
24 for amounts that other defendants paid, comes to around \$150 million?

1 MR. DELLINGER: No, I don't think that's, I'm not sure what in terms of giving them
2 credit . . .

3 JUDGE KLEINFELD: [unintelligible] following what you were saying.

4 MR. DELLINGER: The judgment was \$19 million, if you take the amount you ask
5 about how much of that was not paid before the trial but only during or after the trial
6 [interposing]

7 JUDGE KLEINFELD: Let's start with the compensatory damages award. What . . .

8 MR. DELLINGER: That was \$19.5 million. And you add to that \$20 plus \$20, you
9 add to that \$20 another \$20 and \$15 million, which were the amounts that were paid before
10 judgment, but during trial.

11 JUDGE SCHROEDER: Right, during your [unintelligible]

12 MR. DELLINGER: That gets you to \$55 million. I don't know why you would
13 possibly do it, but if you added the amount that was owed by Alyeska for their separate
14 negligence that is \$98 million, which we think shouldn't be added.

15 JUDGE SCHROEDER: We understand. You have more than used your time.

16 JUDGE KLEINFELD: Okay, good. Thank you.

17 JUDGE SCHROEDER: The case just argued is submitted for decision. That
18 concludes the court's calendar. The court stands adjourned.
19