

1 of 84 DOCUMENTS

EXXON SHIPPING CO., et al., Petitioners v. GRANT BAKER, et al.

No. 07-219

SUPREME COURT OF THE UNITED STATES

128 S. Ct. 2605; 171 L. Ed. 2d 570; 2008 U.S. LEXIS 5263; 76 U.S.L.W. 4603; 66 ERC (BNA) 1545; 2008 AMC 1521; 38 ELR 20149; 21 Fla. L. Weekly Fed. S 459

February 27, 2008, Argued
June 26, 2008, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: Subsequent appeal at *Newby v. Exxon Mobile Corp.* (In re *Exxon Valdez*), 289 Fed. Appx. 204, 2008 U.S. App. LEXIS 17139 (9th Cir. Alaska, 2008).

Costs and fees proceeding at, On remand at, Remanded by *Exxon Valdez v. Exxon Mobil Corp.*, 2009 U.S. App. LEXIS 12713 (9th Cir. Alaska, June 15, 2009).

PRIOR HISTORY: [***1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Baker v. Exxon Mobile Corp. (In re *Exxon Valdez*), 490 F.3d 1066, 2007 U.S. App. LEXIS 12031 (9th Cir. Alaska, 2007).

Baker v. Exxon Mobil Corp. (In re *Exxon Valdez*), 472 F.3d 600, 2006 U.S. App. LEXIS 31503 (9th Cir. Alaska, 2006).

DISPOSITION: 472 F.3d 600 and 490 F.3d 1066, Vacated and remanded.

SYLLABUS

In 1989, petitioners' (collectively, Exxon) supertanker grounded on a reef off Alaska, spilling millions of gallons of crude oil into Prince William

Sound. The accident occurred after the tanker's captain, Joseph Hazelwood—who had a history of alcohol abuse and whose blood still had a high alcohol level 11 hours after the spill—inexplicably exited the bridge, leaving a tricky course correction to unlicensed subordinates. Exxon spent some \$ 2.1 billion in cleanup efforts, pleaded guilty to criminal violations occasioning fines, settled a civil action by the United States and Alaska for at least \$ 900 million, and paid another \$ 303 million in voluntary payments to private parties. Other civil cases were consolidated into this one, brought against Exxon, Hazelwood, and others to recover economic losses [**573] suffered by respondents (hereinafter Baker), who depend on Prince William Sound for their livelihoods. At Phase I of the trial, the jury found Exxon and Hazelwood reckless (and thus potentially liable for punitive damages) under instructions providing [***2] that a corporation is responsible for the reckless acts of employees acting in a managerial capacity in the scope of their employment. In Phase II, the jury awarded \$ 287 million in compensatory damages to some of the plaintiffs; others had settled their compensatory claims for \$ 22.6 million. In Phase III, the jury awarded \$ 5,000 in punitive damages against Hazelwood and \$ 5 billion against Exxon. The Ninth Circuit upheld the Phase I jury instruction on corporate liability and ultimately remitted the punitive damages award against Exxon to \$ 2.5 billion.

Held:

1. Because the Court is equally divided on whether maritime law allows corporate liability for punitive

damages based on the acts of managerial agents, it leaves the Ninth Circuit's opinion undisturbed in this respect. Of course, this disposition is not precedential on the derivative liability question. See, e.g., *Neil v. Biggers*, 409 U.S. 188, 192, 93 S. Ct. 375, 34 L. Ed. 2d 401. Pp. 7-10.

2. The Clean Water Act's water pollution penalties, 33 U.S.C. § 1321, do not preempt punitive-damages awards in maritime spill cases. Section 1321(b) protects "navigable waters . . . , adjoining shorelines, . . . [and] natural resources," subject to a saving clause reserving [***3] "obligations . . . under any . . . law for damages to any . . . privately owned property resulting from [an oil] discharge," § 1321(o). Exxon's admission that the CWA does not displace compensatory remedies for the consequences of water pollution, even those for economic harms, leaves the company with the untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. Nothing in the statute points to that result, and the Court has rejected similar attempts to sever remedies from their causes of action; see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-256, 104 S. Ct. 615, 78 L. Ed. 2d 443. There is no clear indication of congressional intent to occupy the entire field of pollution remedies, nor is it likely that punitive damages for private harms will have any frustrating effect on the CWA's remedial scheme. Pp. 10-15.

3. The punitive damages award against Exxon was excessive as a matter of maritime common law. In the circumstances of this case, the award should be limited to an amount equal to compensatory damages. Pp. 15-42.

(a) Although legal codes from ancient times through the Middle Ages called for multiple damages for certain especially harmful acts, modern Anglo-American [***4] punitive damages have their roots in 18th-century English law and became widely accepted in American courts by the mid-19th century. See, e.g., *Day v. Woodworth*, 54 U.S. 363, 13 How. 363, 371, 14 L. Ed. 181. Pp. 16-17.

(b) The prevailing American rule limits punitive damages to cases of "enormity," *Day v. Woodworth*, 54 U.S. 363, 13 How. 363, 371, 14 L. Ed. 181, in which a defendant's conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference for others' rights, or even more deplorable behavior. The consensus today is that punitive damages are aimed at retribution and deterring harmful conduct. Pp. 17-21.

[**574] (c) State regulation of punitive damages varies. A few States award them rarely, or not at all, and others permit them only when authorized by statute. Many States have imposed statutory limits on punitive awards, in the form of absolute monetary caps, a maximum ratio of punitive to compensatory damages, or, frequently, some combination of the two. Pp. 21-23.

(d) American punitive damages have come under criticism in recent decades, but the most recent studies tend to undercut much of it. Although some studies show the dollar amounts of awards growing over time, even in real terms, most accounts show that [***5] the median ratio of punitive to compensatory awards remains less than 1:1. Nor do the data show a marked increase in the percentage of cases with punitive awards. The real problem is the stark unpredictability of punitive awards. Courts are concerned with fairness as consistency, and the available data suggest that the spread between high and low individual awards is unacceptable. The spread in state civil trials is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories. The distribution of judge-assessed awards is narrower, but still remarkable. These ranges might be acceptable if they resulted from efforts to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, but anecdotal evidence suggests that is not the case, see, e.g., *Gore, supra*, at 565, n. 8, 116 S. Ct. 1589, 134 L. Ed. 2d 809. Pp. 24-27.

(e) This Court's response to outlier punitive damages awards has thus far been confined by claims that state-court awards violated due process. See, e.g., *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585. In contrast, today's enquiry arises under federal maritime jurisdiction and requires [***6] review of a jury award at the level of judge-made federal common law that precedes and should obviate any application of the constitutional standard. In this context, the unpredictability of high punitive awards is in tension with their punitive function because of the implication of unfairness that an eccentrically high punitive verdict carries. A penalty should be reasonably predictable in its severity, so that even Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. And a penalty scheme ought to threaten defendants with a fair probability of suffering in like degree for like damage. Cf. *Koon v. United States*,

518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392. Pp. 28-29.

(f) The Court considers three approaches, one verbal and two quantitative, to arrive at a standard for assessing maritime punitive damages. Pp. 29-42.

(i) The Court is skeptical that verbal formulations are the best insurance against unpredictable outlier punitive awards, in light of its experience with attempts to produce consistency in the analogous business of criminal sentencing. Pp. 29-32.

(ii) Thus, the Court looks to quantified limits. The option of setting a hard-dollar [***7] punitive cap, however, is rejected because there is no "standard" tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board; and because a judicially selected dollar cap would carry the serious drawback that the issue might not return to the docket before there [**575] was a need to revisit the figure selected. Pp. 32-39.

(iii) The more promising alternative is to peg punitive awards to compensatory damages using a ratio or maximum multiple. This is the model in many States and in analogous federal statutes allowing multiple damages. The question is what ratio is most appropriate. An acceptable standard can be found in the studies showing the median ratio of punitive to compensatory awards. Those studies reflect the judgments of juries and judges in thousands of cases as to what punitive awards were appropriate in circumstances reflecting the most down to the least blameworthy conduct, from malice and avarice to recklessness to gross negligence. The data in question put the median ratio for the entire gamut at less than 1:1, meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, [***8] awards at or below the median would roughly express jurors' sense of reasonable penalties in cases like this one that have no earmarks of exceptional blameworthiness. Accordingly, the Court finds that a 1:1 ratio is a fair upper limit in such maritime cases. Pp. 39-42.

(iv) Applying this standard to the present case, the Court takes for granted the District Court's calculation of the total relevant compensatory damages at \$ 507.5 million. A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount. P. 42.

472 F.3d 600 and 490 F.3d 1066, vacated and remanded.

COUNSEL: Walter Dellinger argued the cause for petitioners.

Jeffrey L. Fisher argued the cause for respondents.

JUDGES: Souter, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined, and in which Stevens, Ginsburg, and Breyer, JJ., joined, as to Parts I, II, and III. Scalia, J., filed a concurring opinion, in which Thomas, J., joined. Stevens, J., Ginsburg, J., and Breyer, J., filed opinions concurring in part and dissenting in part. Alito, J., took no part in the consideration or decision of the case.

OPINION BY: Souter

OPINION

[*2611] Justice Souter delivered the opinion of the Court.

There are three questions of maritime law before us: whether a shipowner may be liable for punitive damages [***9] without acquiescence in the actions causing harm, whether punitive damages have been barred implicitly by federal statutory law making no provision for them, and whether the award of \$ 2.5 billion in this case is greater than maritime law should allow in the circumstances. We are equally divided on the owner's derivative liability, and hold that the federal statutory law does not bar a punitive award on top of damages for economic loss, but that the award here should be limited to an amount equal to compensatory damages.

I

On March 24, 1989, the supertanker *Exxon Valdez* grounded on Bligh Reef off the Alaskan coast, fracturing its hull and spilling millions of gallons of crude oil into Prince William Sound. The owner, petitioner Exxon Shipping Co. (now SeaRiver Maritime, Inc.), and its owner, petitioner Exxon Mobil Corp. (collectively, Exxon), have settled state and federal claims for environmental damage, with payments exceeding \$ 1 billion, and this action by respondent Baker and others, including commercial [**576] fishermen and native Alaskans, was brought for economic losses to individuals dependent on Prince William Sound for their livelihoods.

[*2612] A

The tanker was over 900 feet long and was [*10] used by Exxon to carry crude oil from the end of the Trans-Alaska Pipeline in Valdez, Alaska, to the lower 48 States. On the night of the spill it was carrying 53 million gallons of crude oil, or over a million barrels. Its captain was one Joseph Hazelwood, who had completed a 28-day alcohol treatment program while employed by Exxon, as his superiors knew, but dropped out of a prescribed follow-up program and stopped going to Alcoholics Anonymous meetings. According to the District Court, "[t]here was evidence presented to the jury that after Hazelwood was released from [residential treatment], he drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers." *In re Exxon Valdez*, No. A89-0095-CV, Order No. 265 (D. Alaska, Jan. 27, 1995), p 5, App. F to Pet. for Cert. 255a-256a (hereinafter Order 265). The jury also heard contested testimony that Hazelwood drank with Exxon officials and that members of the Exxon management knew of his relapse. See *ibid*. Although Exxon had a clear policy prohibiting employees from serving onboard within four hours of consuming alcohol, see *In re Exxon Valdez*, 270 F.3d 1215, 1238 (CA9 2001), [*11] Exxon presented no evidence that it monitored Hazelwood after his return to duty or considered giving him a shoreside assignment, see Order 265, p 5, *supra*, at 256a. Witnesses testified that before the *Valdez* left port on the night of the disaster, Hazelwood downed at least five double vodkas in the waterfront bars of Valdez, an intake of about 15 ounces of 80-proof alcohol, enough "that a non-alcoholic would have passed out." 270 F.3d at 1236.

The ship sailed at 9:12 pm. on March 23, 1989, guided by a state-licensed pilot for the first leg out, through the Valdez Narrows. At 11:20 pm., Hazelwood took active control and, owing to poor conditions in the outbound shipping lane, radioed the Coast Guard for permission to move east across the inbound lane to a less icy path. Under the conditions, this was a standard move, which the last outbound tanker had also taken, and the Coast Guard cleared the *Valdez* to cross the inbound lane. The tanker accordingly steered east toward clearer waters, but the move put it in the path of an underwater reef off Bligh Island, thus requiring a turn back west into the shipping lane around Busby Light, north of the reef.

Two minutes before the required [*12] turn,

however, Hazelwood left the bridge and went down to his cabin in order, he said, to do paperwork. This decision was inexplicable. There was expert testimony that, even if their presence is not strictly necessary, captains simply do not quit the bridge during maneuvers like this, and no paperwork could have justified it. And in fact the evidence was that Hazelwood's presence was required, both because there should have been two officers on the bridge at all times and his departure left only one, and because he was the only person on the entire ship licensed to navigate this part of Prince William Sound. To make matters worse, before going below Hazelwood put the tanker on autopilot, speeding it up, making the [*577] turn trickier, and any mistake harder to correct.

As Hazelwood left, he instructed the remaining officer, third mate Joseph Cousins, to move the tanker back into the shipping lane once it came abeam of Busby Light. Cousins, unlicensed to navigate in those waters, was left alone with helmsman Robert Kagan, a nonofficer. For reasons that remain a mystery, they failed to make the turn at Busby Light, and a later emergency maneuver attempted by Cousins came too late. The tanker [*13] ran aground [*2613] on Bligh Reef, tearing the hull open and spilling 11 million gallons of crude oil into Prince William Sound.

After Hazelwood returned to the bridge and reported the grounding to the Coast Guard, he tried but failed to rock the *Valdez* off the reef, a maneuver which could have spilled more oil and caused the ship to founder.¹ The Coast Guard's nearly immediate response included a blood test of Hazelwood (the validity of which Exxon disputes) showing a blood-alcohol level of .061 eleven hours after the spill. Supp. App. 307sa. Experts testified that to have this much alcohol in his bloodstream so long after the accident, Hazelwood at the time of the spill must have had a blood-alcohol level of around .241, Order 265, p 5, *supra*, at 256a, three times the legal limit for driving in most States.

¹ As it turned out, the tanker survived the accident and remained in Exxon's fleet, which it subsequently transferred to a wholly owned subsidiary, SeaRiver Maritime, Inc. The *Valdez* "was renamed several times, finally to the *SeaRiver Mediterranean*, [and] carried oil between the Persian Gulf and Japan, Singapore, and Australia for 12 years. . . . In 2002, the ship was pulled from service [*14] and 'laid up' off

a foreign port (just where the owners won't say) and prepared for retirement, although, according to some reports, the vessel continues in service under a foreign flag." *Exxon Valdez Spill Anniversary Marked, 30 Oil Spill Intelligence Report 2* (Mar. 29, 2007).

In the aftermath of the disaster, Exxon spent around \$ 2.1 billion in cleanup efforts. The United States charged the company with criminal violations of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); the Refuse Act of 1899, 33 U.S.C. §§ 407 and 411; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon pleaded guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act and agreed to pay a \$ 150 million fine, later reduced to \$ 25 million plus restitution of \$ 100 million. A civil action by the United States and the State of Alaska for environmental harms ended with a consent decree for Exxon to pay at least \$ 900 million toward restoring natural resources; and it paid another \$ 303 million in voluntary settlements with fishermen, property owners, ***15] and other private parties.

B

The remaining civil cases were consolidated into this one against Exxon, Hazelwood, and others. The District Court for the District of Alaska divided the plaintiffs seeking compensatory damages into three classes: commercial fishermen, Native Alaskans, and landowners. At Exxon's behest, the court also certified a mandatory class of all plaintiffs seeking punitive damages, whose number topped 32,000. Respondents here, to whom we will refer as Baker for convenience, are members of that class.

For the purposes of the case, Exxon stipulated to its negligence in the *Valdez* disaster and its ensuing liability [**578] for compensatory damages. The court designed the trial accordingly: Phase I considered Exxon and Hazelwood's recklessness and thus their potential for punitive liability; Phase II set compensatory damages for commercial fishermen and Native Alaskans; and Phase III determined the amount of punitive damages for which Hazelwood and Exxon were each liable. (A contemplated Phase IV, setting compensation for still other plaintiffs, was obviated by settlement.)

In Phase I, the jury heard extensive testimony about Hazelwood's alcoholism and his conduct on the night of [***16] the spill, as [**2614] well as conflicting testimony about Exxon officials' knowledge of Hazelwood's backslide. At the close of Phase I, the Court instructed the jury in part that

"[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation." App. K to Pet. for Cert. 301a.

The Court went on that "[a]n employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business." *Ibid.* Exxon did not dispute that Hazelwood was a managerial employee under this definition, see App. G, *id.*, at 264a, n 8, and the jury found both Hazelwood and Exxon reckless and thus potentially liable for punitive damages, App. L, *id.*, at 303a.²

2 The jury was not asked to consider the possibility of any degree of fault beyond the range of reckless conduct. The record sent up to us shows [***17] that some thought was given to a trial plan that would have authorized jury findings as to greater degrees of culpability, see App. 164, but that plan was not adopted, whatever the reason; Baker does not argue this was error.

In Phase II the jury awarded \$ 287 million in compensatory damages to the commercial fishermen. After the Court deducted released claims, settlements, and other payments, the balance outstanding was \$ 19,590,257. Meanwhile, most of the Native Alaskan class had settled their compensatory claims for \$ 20 million, and those who opted out of that settlement ultimately settled for a total of around \$ 2.6 million.

In Phase III, the jury heard about Exxon's management's acts and omissions arguably relevant to the

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spill. See App. 1291-1320, 1353-1367. At the close of evidence, the court instructed the jurors on the purposes of punitive damages, emphasizing that they were designed not to provide compensatory relief but to punish and deter the defendants. See App. to Brief in Opposition 12a-14a. The court charged the jury to consider the reprehensibility of the defendants' conduct, their financial condition, the magnitude of the harm, and any mitigating facts. *Id.*, at 15a. [***18] The jury awarded \$ 5,000 in punitive damages against Hazelwood and \$ 5 billion against Exxon.

On appeal, the Court of Appeals for the Ninth Circuit upheld the Phase I jury instruction on corporate liability for acts of managerial agents under Circuit precedent. See *In re Exxon Valdez*, 270 F.3d at 1236 (citing *Protectus Alpha Nav. Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 [**579] (CA9 1985)). With respect to the size of the punitive damages award, however, the Circuit remanded twice for adjustments in light of this Court's due process cases before ultimately itself remitting the award to \$ 2.5 billion. See 270 F.3d at 1246-1247; 472 F.3d 600, 601, 625 (2006) (*per curiam*), and 490 F.3d 1066, 1068 (2007).

We granted certiorari to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents, whether the Clean Water Act (CWA), 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* (2000 *ed. and Supp. V*), forecloses the award of punitive damages in maritime spill cases, and whether the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law. [*2615] 552 U.S. , [*2615] 128 S. Ct. 492, 169 L. Ed. 2d 337 (2007). We now vacate and remand.

II

On [***19] the first question, Exxon says that it was error to instruct the jury that a corporation "is responsible for the reckless acts of . . . employees . . . in a managerial capacity while acting in the scope of their employment."³ App. K to Pet. for Cert. 301a. The Courts of Appeals have split on this issue,⁴ and the company relies primarily on two cases, *The Amiable Nancy*, 16 U.S. 546, 3 Wheat. 546, 4 L. Ed. 456 (1818), and *Lake Shore & Michigan Southern R. Co. v. Prentice*, 147 U.S. 101, 13 S. Ct. 261, 37 L. Ed. 97 (1893), to argue that this Court's precedents are clear that punitive damages are not available against a shipowner for a shipmaster's recklessness. The former was a suit in admiralty against the owners of *The Scourge*

, a privateer whose officers and crew boarded and plundered a neutral ship; *The Amiable Nancy*. In upholding an award of compensatory damages, Justice Story observed that, [***20]

"if this were a suit against the original wrong-doers, it might be proper to . . . visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to [**580] secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion, that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." *The Amiable Nancy*, *supra*, at 558-559, 4 L. Ed. 456 (emphasis in original).

Exxon takes this statement as a rule barring punitive liability against shipowners for actions by underlings not "directed," "countenanced," or "participated in" by the owners.

3 Baker emphasizes that the Phase I jury instructions also allowed the jury to find Exxon independently reckless, and that the evidence for fixing Exxon's punitive liability at Phase III revolved around the recklessness of company officials in supervising Hazelwood and enforcing Exxon's alcohol policies. Thus, Baker argues, it is entirely possible that the jury found Exxon reckless in its own right, and in no [***21] way predicated its liability for punitive damages on Exxon's responsibility for Hazelwood's conduct. Brief for Respondents 36-39. The fact remains, however, that the jury was not required to state

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the basis of Exxon's recklessness, and the basis for the finding could have been Exxon's own recklessness or just Hazelwood's. Any error in instructing on the latter ground cannot be overlooked, because "when it is impossible to know, in view of the general verdict returned whether the jury imposed liability on a permissible or an impermissible ground, the judgment must be reversed and the case remanded." *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 11, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970) (internal quotation marks omitted).

4 Compare *Protectus Alpha Nav. Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1386 (CA9 1985) (adopting Restatement (Second) of Torts rule), with *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (CA1 1995); *In re P & E Boat Rentals, Inc.*, 872 F.2d 642, 652 (CA5 1989); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (CA6 1969).

Exxon further claims that the Court confirmed this rule in *Lake Shore*, *supra*, a railway case in which the Court relied on *The Amiable Nancy* [***22] to announce, as a matter of pre- [*2616] *Erie R. Co. v. Tompkins*, 304 U.S. 64, [*2616] 58 S. Ct. 817, 82 L. Ed. 1188 (1938), general common law, that "[t]hrough [a] principal is liable to make compensation for [intentional torts] by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate." 147 U.S., at 110, 13 S. Ct. 261, 37 L. Ed. 97. Because maritime law remains federal common law, and because the Court has never revisited the issue, Exxon argues that *Lake Shore* endures as sound evidence of maritime law. And even if the rule of *Amiable Nancy* and *Lake Shore* does not control, Exxon urges the Court to fall back to a modern-day variant adopted in the context of Title VII of the Civil Rights Act of 1964 in *Kolstad v. American Dental Assn.*, 527 U.S. 526, 544, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999), that employers are not subject to punitive damages for discriminatory conduct by their managerial employees if they can show that they maintained and enforced good-faith antidiscrimination policies.

Baker supports the Ninth Circuit in upholding the instruction, as it did on the authority of *Protectus Alpha Nav. Co.*, 767 F.2d 1379, which followed the Restatement rule recognizing corporate liability in punitive damages for reckless acts of managerial [***23]

employees, see 4 *Restatement (Second) of Torts* § 909(c) (1977) (hereinafter Restatement). Baker says that *The Amiable Nancy* offers nothing but dictum, because punitive damages were not at issue, and that *Lake Shore* merely rejected company liability for the acts of a railroad conductor, while saying nothing about liability for agents higher up the ladder, like ship captains. He also makes the broader points that the opinion was criticized for failing to reflect the majority rule of its own time, not to mention its conflict with the *respondeat superior* rule in the overwhelming share of land-based jurisdictions today. Baker argues that the maritime rule should conform to modern land-based common law, where a majority of States allow punitive damages for the conduct of any employee, and most others follow the Restatement, imposing liability for managerial agents.

The Court is equally divided on this question, and [**LEdHR1] [1] "[i]f the judges are divided, the reversal cannot be had, for no order can be made." *Durant v. Essex Co.*, 74 U.S. 107, 7 Wall. 107, 112, 19 L. Ed. 154 (1869). We therefore leave the Ninth Circuit's opinion undisturbed in this respect, though it should go without saying that the disposition here is not precedential [***24]; on the derivative liability question. See, e.g., *Neil v. [**581] Biggers*, 409 U.S. 188, 192, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264, 80 S. Ct. 1463, 4 L. Ed. 2d 1708, 85 *Ohio Law Abs.* 49 (1960) (opinion of Brennan, J.).

III

Exxon next says that, whatever the availability of maritime punitive damages at common law, the CWA preempts them. Baker responds with both procedural and merits arguments, and although we do not dispose of the issue on procedure, a short foray into its history is worthwhile as a cautionary tale.

At the pretrial stage, the District Court controlled a flood of motions by an order staying them for any purpose except discovery. The court ultimately adopted a case-management plan allowing receipt of seven specific summary judgment motions already scheduled, and requiring a party with additional motions to obtain the court's leave. One of the motions scheduled sought summary judgment for Exxon on the ground that the Trans-Alaska Pipeline Authorization Act, 87 Stat. 584, 43 U.S.C. §§ 1651-1656, displaced maritime common law and foreclosed the availability [*2617] of punitive damages. The District Court denied the motion.

After the jury returned the Phase III punitive-damages verdict on September 16, 1994, the parties stipulated [***25] that all post-trial *Federal Rules of Civil Procedure* 50 and 59 motions would be filed by September 30, and the court so ordered. App. 1410-1411. Exxon filed 11 of them, including several seeking a new trial or judgment as a matter of law on one ground or another going to the punitive damages award, all of which were denied along with the rest. On October 23, 1995, almost 13 months after the stipulated motions deadline, Exxon moved for the District Court to suspend the motions stay, App. to Brief in Opposition 28a-29a, to allow it to file a "Motion and Renewed Motion . . . for Judgment on Punitive Damages Claims" under *Rules* 49(a), and 58(2) and, "to the extent they may be applicable, pursuant to *Rules* 50(b), 56(b), 56(d), 59(a), and 59(e)."⁵ App. to Brief in Opposition 30a-31a. Exxon's accompanying memorandum asserted that two recent cases, *Ghyun v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (CA9 1995), and *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (CA5 1995), suggested that the rule of maritime punitive damages was displaced by federal statutes, including the CWA. On November 2, 1995, the District Court summarily [**582] denied Exxon's request to file the motion, App. to Brief in Opposition [***26] 35a, and in January 1996 (following the settlement of the Phase IV compensatory claims) the court entered final judgment.

5 Most of the rules under which Exxon sought relief are inapplicable on their face. See *Fed. Rules Civ. Proc.* 49(a), 56(b), (d), and 58(2). *Rules* 50 and 59 are less inapt: they allow, respectively, entry of judgment as a matter of law and alteration or amendment of the judgment. (At oral argument, counsel for Exxon ultimately characterized the motion as one under *Rule* 50. Tr. of Oral Arg. 25.) But to say that *Rules* 50 and 59 are less inapt than the other *Rules* is a long way from saying they are apt. A motion under *Rule* 50(b) is not allowed unless the movant sought relief on similar grounds under *Rule* 50(a) before the case was submitted to the jury. See *Rule* 50(b); see also, e.g., *Zachar v. Lee*, 363 F.3d 70, 73-74 (CA1 2004); 9B C. Wright & A. Miller, *Federal Practice and Procedure* § 2537, pp 603-604 (3d ed. 2008). *Rule* 59(e) permits a court to alter or amend a judgment, but it "may not be used to relitigate old matters, or to raise arguments or present evidence that could have

been raised prior to the entry of judgment." 11 C. Wright & A. Miller, *Federal Practice* [***27] and *Procedure* § 2810.1, pp 127-128 (2d ed. 1995) (footnotes omitted). Where Exxon has been unable to demonstrate that any rule supported the motion, we need not choose the best of the worst, and risk implying that this last-minute motion was appropriate under any rule. Suffice it to say that, whatever type of motion it was supposed to be, it was very, very late.

Exxon renewed the CWA preemption argument before the Ninth Circuit. The Court of Appeals recognized that Exxon had raised the CWA argument for the first time 13 months after the Phase III verdict, but decided that the claim "should not be treated as waived," because Exxon had "consistently argued statutory preemption" throughout the litigation, and the question was of "massive . . . significance" given the "ambiguous circumstances" of the case, 270 F.3d at 1229. On the merits, the Circuit held that the CWA did not preempt maritime common law on punitive damages. *Id.*, at 1230.

Although we agree with the Ninth Circuit's conclusion, its reasons for reaching it do not hold up. First, the reason the court thought that the CWA issue was not in fact waived was that Exxon had alleged other statutory grounds for preemption from the outset [***28] of the trial. But that is not enough. [**LEdHR2] [2] It is true that "[o]nce a federal claim is properly presented, [*2618] a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992). But this principle stops well short of legitimizing Exxon's untimely motion. If "statutory preemption" were a sufficient claim to give Exxon license to rely on newly cited statutes anytime it wished, a litigant could add new constitutional claims as he went along, simply because he had "consistently argued" that a challenged regulation was unconstitutional. See *id.*, at 533, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (rejecting substantive due process claim by takings petitioners who failed to preserve it below); *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277, n. 23, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) (rejecting due process claim by Eighth-Amendment petitioners).

That said, the motion still addressed the Circuit's discretion, to which the "massive" significance of the

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question and the "ambiguous circumstances" of the case were said to be relevant. 270 F.3d at 1229. "It is the general rule, of course, that [**LEdHR3] [3] a federal appellate court does not consider an issue [***29] not passed upon below," *Singleton v. Wulff*, 428 U.S. 106, 120; 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976), when to deviate from this rule being a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *id.*, at 121, 96 S. Ct. 2868, 49 L. Ed. 2d 826. We have previously stopped short of stating a general principle to contain appellate courts' discretion, see *ibid.*, and we exercise the same restraint today.⁶

6 We do have to say, though, that the Court of Appeals gave short shrift to the District Court's commendable management of this gargantuan litigation, and if the case turned on the propriety of the Circuit's decision to reach the preemption issue we would take up the claim that it exceeded its discretion. Instead, we will only say that to the extent the Ninth Circuit implied that the unusual circumstances of this case called for an exception to regular practice, we think the record points the other way. Of course the Court of Appeals was correct that the case was complex and significant, so much so, in fact, that the District Court was fairly required to divide it into four phases, to oversee a punitive-damages class of 32,000 people, and to manage a motions industry that threatened to halt [***30] progress completely. But the complexity of a case does not eliminate the value of waiver and forfeiture rules, which ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression. "The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." *Polliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (CA1 1993) (Boudin, J.) (citation omitted). The District Court's sensible efforts to impose order upon the issues in play and the progress of the trial deserve our respect.

As to the merits, we agree with the [**583] Ninth Circuit that Exxon's late-raised CWA claim should fail.

There are two ways to construe Exxon's argument that the CWA's penalties for water pollution, see 33 U.S.C. § 1321 (2000 ed. and Supp. V), preempt the common law punitive-damages remedies at issue here. The company could be saying that any tort action predicated on an oil spill is preempted unless § 1321 expressly preserves [***31] it. [**LEdHR4] [4] Section 1321(b) protects "the navigable waters of the United States, adjoining shorelines, . . . [and] natural resources" of the United States, subject to a saving clause reserving "obligations . . . under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil," § 1321(c). Exxon could be arguing that, because the [*2619] saving clause makes no mention of preserving punitive damages for economic loss, they are preempted. But so, of course, would a number of other categories of damages awards that Exxon did not claim were preempted. If Exxon were correct here, there would be preemption of provisions for compensatory damages for thwarting economic activity or, for that matter, compensatory damages for physical, personal injury from oil spills or other water pollution. But we find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources" was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.

Perhaps on account of its overbreadth, Exxon disclaims taking this position, admitting [***32] that the CWA does not displace compensatory remedies for consequences of water pollution, even those for economic harms. See, e.g., Reply Brief for Petitioners 15-16. This concession, however, leaves Exxon with the equally untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. But nothing in the statutory text points to fragmenting the recovery scheme this way, and we have rejected similar attempts to sever remedies from their causes of action. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-256, 104 S. Ct. 613, 78 L. Ed. 2d 443 (1984). All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies, see, e.g., *United States v. Texas*, 507 U.S. 529, 534, 113 S. Ct. 1631, 123 L. Ed. 2d 245 (1993) ([**LEdHR5] [5] "In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law" (internal quotation marks omitted)); nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect

on the CWA remedial [**584] scheme, which would point to preemption.⁷

7 In this respect, this case differs from two invoked by Exxon, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981), [***33] and *Milwaukee v. Illinois*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981), where plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the CWA. Here, Baker's private claims for economic injury do not threaten similar interference with federal regulatory goals with respect to "water," "shorelines," or "natural resources."

IV

Finally, Exxon raises an issue of first impression about punitive damages in [**LEdHR6] [6] maritime law, which falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result. See *U.S.-Const., Art. III, § 2, cl. 1*; see, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259, 99 S. Ct. 2753, 61 L. Ed. 2d 521 (1979) ("Admiralty law is judge-made law to a great extent"); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-361, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959) (constitutional grant "empowered the federal courts . . . to continue the development of [maritime] law"). In addition to its resistance to derivative liability for punitive damages and its preemption claim already disposed of, Exxon challenges the size of the remaining \$ 2.5 billion punitive [***34] damages award. Other than its preemption argument, it does not offer a legal ground for concluding that maritime law should never award punitive damages, or that none should be awarded in this case, but it does argue that this award exceeds the bounds justified by the punitive damages [*2620] goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm. The claim goes to our understanding of the place of punishment in modern civil law and reasonable standards of process in administering punitive law, subjects that call for starting with a brief account of the history behind today's punitive damages.

A

The modern Anglo-American doctrine of punitive damages dates back at least to 1763, when a pair of decisions by the Court of Common Pleas recognized the availability of damages "for more than the injury received." *Wilkes v. Wood*, Lofft 1, 18, 98 Eng. Rep. 489, 498 (1763) (Lord Chief Justice Pratt). In *Wilkes v. Wood*, one of the foundations of the Fourth Amendment, exemplary damages awarded against the Secretary of State, responsible for an unlawful search of John Wilkes's papers, were a spectacular 4,000. See generally *Boyd v. United States*, 116 U.S. 616, 626, 6 S. Ct. 524, 29 L. Ed. 746 (1886). [***35] And in *Huckle v. Money*, 2 Wils. 205, 206-207, 95 Eng. Rep. 768, 768-769 (K. B. 1763), the same judge who is recorded in *Wilkes* gave an opinion upholding a jury's award of 300 (against a government officer again) although "if the jury had been confined by their oath to consider the mere personal injury only, perhaps [20] damages would have been thought damages sufficient."

Awarding damages beyond the compensatory was not, however, a wholly novel idea even then, legal codes from ancient times through the Middle Ages having called for multiple damages for certain especially harmful acts. See, e.g., Code of Hammurabi [**585], § 8 (R. Harper ed. 1904) (tenfold penalty for stealing the goat of a freed man); Statute of Gloucester, 1278, 6 Edw. 1, ch. 5, 1 Stat. at Large 66 (treble damages for waste). But punitive damages were a common law innovation untethered to strict numerical multipliers, and the doctrine promptly crossed the Atlantic, see, e.g., *Genay v. Norris*, 1 S.C.L. 6, 7 (1784); *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791), to become widely accepted in American courts by the middle of the 19th century, see, e.g., *Day v. Woodward*, 54 U.S. 363, 13 How. 363, 371, 14 L. Ed. 181 (1852).

B

Early common law cases offered [***36] various rationales for punitive-damages awards, which were then generally dubbed "exemplary," implying that these verdicts were justified as punishment for extraordinary wrongdoing, as in *Wilkes's* case. Sometimes, though, the extraordinary element emphasized was the damages award itself, the punishment being "for example's sake," *Tullidge v. Wade*, 3 Wils. 18, 19, 95 Eng. Rep. 909 (K. B. 1769) (Lord Chief Justice Wilmôt), "to deter from any such proceeding for the future," *Wilkes, supra*, at 19, 98 Eng. Rep., at 498-499. See also *Coryell, supra*, at 77

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(instructing the jury "to give damages for *example's* sake, to prevent such offences in [the] future").

A third historical justification, which showed up in some of the early cases, has been noted by recent commentators, and that was the need "to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."⁸ *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437-438, n. 11, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) (citing, *inter alia*, Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517 (1957)). But see Sebok, What Did Punitive Damages Do? 78 Chi.-Kent L. Rev. 163, 204 (2003) [***37] (arguing that "punitive damages have never served the compensatory function attributed to them by the Court in *Cooper*"). As the century progressed, and "the types of compensatory damages available to plaintiffs . . . broadened," *Cooper Industries, supra*, at 437, n. 11, 121 S. Ct. 1678, 149 L. Ed. 2d 674, the consequence was that American courts tended to speak of punitive damages as separate and distinct from compensatory damages, see, e.g., *Day, supra*, at 371, 13 How. 363, 371, 14 L. Ed. 181 (punitive damages "hav[e] in view the enormity of [the] offence rather than the measure of compensation to the plaintiff"). See generally 1 L. Schlueter, Punitive Damages §§ 1.3(C)-(D), 1.4(A) (5th ed. 2005) (hereinafter Schlueter) (describing the "almost total eclipse of the compensatory function" in the decades following the 1830s).

⁸ Indeed, at least one 19th-century treatise writer asserted that there was "no doctrine of authentically 'punitive' damages" and that "judgments that ostensibly included punitive damages [were] in reality no more than full compensation." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) (Scalia, J., concurring in judgment) (citing 2 S. Greenleaf, Law of Evidence 235, n 2 (13th ed. 1876)). "This view," however, "was not widely [***38] shared." *Haslip, supra*, at 25, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (Scalia, J., concurring in judgment) (citing other prominent 19th-century treatises). Whatever the actual importance of the subterfuge for compensation may have been, it declined.

Regardless of the alternative rationales over the

years, the consensus today is that [***LEdHR7] [7] punitives are aimed not at compensation but principally at [***586] retribution and deterring harmful conduct.⁹ This consensus informs the doctrine in most modern American jurisdictions, where juries are customarily instructed on twin goals of punitive awards. See, e.g., Cal. Jury Instr., Civil, No. 14.72.2 (2008) ("You must now determine whether you should award punitive damages against defendant[s] . . . for the sake of example and by way of punishment"); N. Y. Pattern Jury Instr., Civil, No. 2:278 (2007) ("The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant . . . and thereby to discourage the defendant . . . from acting in a similar way in the future"). The prevailing rule in American courts also limits punitive damages to cases of what the Court in *Day, supra*, at 371, 14 L. Ed. 181, spoke of as "enormity," where a defendant's conduct is "outrageous," 4 Restatement § 908(2), [***39] owing to "gross negligence," "willful, wanton, and reckless indifference for the rights of others," or behavior even more deplorable, 1 Schlueter § 9.3(A).¹⁰

⁹ See, e.g., *Moskovitz v. Mount Sinai Medical Center*, 69 Ohio St. 3d 638, 651; 1994 Ohio 324, 635 N.E.2d 331, 343 (1994) ("The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct"); *Hamilton Development Co. v. Broad Rock Club, Inc.*, 248 Va. 40, 45, 445 S. E. 2d 140, 143, 10 Va. Law Rep. 1449 (1994) (same); *Lutz v. Remington Arms Co.*, 138 Ill. 2d 404, 414, 563 N.E.2d 397, 401, 150 Ill. Dec. 510 (1990) (same); *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989) (same); *Masaki v. General Motors Corp.*, 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) (same); see also *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) (punitive damages are "intended to punish the defendant and to deter future wrongdoing"); *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) ("Punitive damages . . . are aimed at deterrence and retribution"); 4 Restatement § 908, Comment a.

¹⁰ These standards are from the torts context; different standards apply to other causes of action.

Under the umbrellas of punishment and [***40] its aim of deterrence, degrees of relative blameworthiness are apparent. Reckless conduct is not intentional or

malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheededful of it. See, e.g., 2 *Restatement* § 500, *Comment a*, [*2622], pp. 587-588 (1964) ("Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of . . . harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so"). Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure. See 4 *id.*, § 908, *Comment e*, p. 466 (1979) ("In determining the amount of punitive damages, . . . the trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer" [***41] . . ."); cf. *Alaska Stat.* § 09.17.020(g) (2006) (higher statutory limit applies where conduct was motivated by financial gain and its adverse consequences were known to the defendant); *Ark. Code Ann.* § 16-55-208(b) (2005) (statutory limit does not apply where the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage). [***587] Regardless of culpability, however, heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it), see, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) ("A higher ratio may also be justified in cases in which the injury is hard to detect"), or when the value of injury and the corresponding compensatory award are small (providing low incentives to sue), see, e.g., *ibid.* ("[L]ow awards of compensatory damages may properly support a higher ratio . . . if, for example, a particularly egregious act has resulted in only a small amount of economic damages"); 4 *Restatement* § 908, *Comment c*, p. 465 ("Thus an award of nominal damages . . . is enough to support a further award of punitive damages, when a tort, . . . is committed for an outrageous [***42] purpose, but no significant harm has resulted"). And, with a broadly analogous object, some regulatory schemes provide by statute for multiple recovery in order to induce private litigation to supplement official enforcement that might fall short if unaided. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979) (discussing antitrust treble damages).

C

State regulation of punitive damages varies. A few States award them rarely, or not at all. Nebraska bars punitive damages entirely, on state constitutional grounds. See, e.g., *Distinctive Printing and Packaging Co. v. Cox*, 232 Neb. 846, 857, 443 N.W.2d 566, 374 (1989) (*per curiam*). Four others permit punitive damages only when authorized by statute: Louisiana, Massachusetts, and Washington as a matter of common law, and New Hampshire by statute codifying common law tradition. See *Ross v. Conoco*, 2002-0299, p. 14 (*La.* 10/15/02), 828 So. 2d 546, 555; *Flesner v. Technical Communications Corp.*, 419 Mass. 805, 813, 575 N.E.2d 1107, 1112 (1991); *Fisher Properties v. Arden-Mayfair, Inc.*, 106 Wn. 2d 826, 852, 726 P.2d 8, 23 (1986); *N. H. Rev. Stat. Ann.* § 507:16 (1997); see also *Fay v. Parker*, 53 N. H. 342, 382 (1872). Michigan courts [***43] recognize only exemplary damages supportable as compensatory, rather than truly punitive, see *Pelsner v. Detroit Free Press, Inc.*, 104 Mich. App. 59, 68, 304 N.W.2d 814, 817 (1981), while Connecticut courts have limited what they call punitive recovery to the "expenses of bringing the [*2623] legal action, including attorney's fees, less taxable costs," *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 517, n. 38, 656 A.2d 1009, 1029, n. 38 (1995).

As for procedure, in most American jurisdictions the amount of the punitive award is generally determined by a jury in the first instance, and that "determination is then reviewed by trial and appellate courts to ensure that it is reasonable." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991); see also *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421-426, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994).¹¹ Many States have gone further by imposing statutory limits on punitive awards, in the form of absolute monetary caps, see, e.g., *Va. Code Ann.* § 8.01-38.1 (*Lexis* 2007) (\$ 350,000 cap), a maximum ratio of punitive to compensatory damages, see, e.g., *Ohio Rev. Code Ann.* § 2315.21(D)(2)(a) (*Lexis* 2001) (2:1 ratio in most tort [***588] cases), or, frequently, some combination of the two, see, [***44] e.g., *Alaska Stat.* § 09.17.020(f) (2006) (greater of 3:1 ratio or \$ 500,000 in most actions). The States that rely on a multiplier have adopted a variety of ratios, ranging from 5:1 to 1:1.¹²

¹¹ A like procedure was followed in this case, without objection.

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12 See, e.g., *Mo. Rev. Stat. Ann. § 510.263(1)* (*Vernon Supp. 2008*) (greater of 5:1 or \$ 500,000 in most cases); *Ala. Code §§ 6-11-21(a), (d)* (2005) (greater of 3:1 or \$ 1.5 million in most personal injury suits, and 3:1 or \$ 500,000 in most other actions); *N. D. Cent. Code Ann. § 32-03.2-11(4)* (*Supp. 2007*) (greater of 2:1 or \$ 250,000); *Colo. Rev. Stat. Ann. § 13-21-102(1)(a)* (2007) (1:1). Oklahoma has a graduated scheme, with the limit on the punitive award turning on the nature of the defendant's conduct. See *Okla. Stat., Tit. 23, § 9.1(B)* (*West 2001*) (greater of 1:1 or \$ 100,000 in cases involving "reckless disregard"); § 9.1(C) (greater of 2:1, \$ 500,000, or the financial benefit derived by the defendant, in cases of intentional and malicious conduct); § 9.1(D) (no limit where the conduct is intentional, malicious, and life threatening).

Despite these limitations, punitive damages overall are higher and more frequent in the United States than they are anywhere else. See, e.g., Gotanda, *Punitive Damages: A Comparative Analysis*, 42 *Colum. J. Transnat'l L.* 391, 421 (2004); 2 *Schlueter* § 22.0. In England and Wales, punitive, or exemplary, damages are available only for oppressive, arbitrary, or unconstitutional action by government servants; injuries designed by the defendant to yield a larger profit than the likely cost of compensatory damages; and conduct for which punitive damages are expressly authorized by statute. *Rookes v. Barnard*, [1964] 1 All E. R. 367, 410-411 (H. L.). Even in the circumstances where punitive damages are allowed, they are subject to strict, judicially imposed guidelines. The Court of Appeal in *Thompson v. Commissioner of Police of Metropolis*, [1998] Q. B. 498, 518, said that a ratio of more than three times the amount of compensatory damages will rarely be appropriate; awards of less than 5,000 are likely unnecessary; awards of 25,000 should be exceptional; and 50,000 should be considered the top.

For further contrast with American practice, Canada and Australia allow exemplary damages for outrageous conduct, but awards are considered extraordinary and rarely issue. See 2 *Schlueter* [***46] §§ 22.1(B), (D). Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland. See *id.*, §§ 22.2(A)-(C), (E). And some legal systems not only decline to recognize punitive damages themselves but

refuse to enforce foreign punitive judgments as contrary to public policy. See, [***2624] e.g., Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?* 45 *Colum. J. Transnat'l L.* 507, 514, 518, 528 (2007) (noting refusals to enforce judgments by Japanese, Italian, and German courts, positing that such refusals may be on the decline, but concluding, "American parties should not anticipate smooth sailing when seeking to have a domestic punitive damages award recognized and enforced in other countries").

D

American punitive damages have been the target of audible criticism in recent decades, see, e.g., Note, *Developments, The Path of Civil Litigation*, 113 *Harv. L. Rev.* 1783, 1784-1788 (2000) (surveying criticism), but the most recent studies tend to undercut much of it, see *id.*, at 1787-1788. A survey of the literature reveals that discretion to award punitive damages has not mass-produced runaway [***47] awards, and although some studies [***589] show the dollar amounts of punitive-damages awards growing over time, even in real terms,¹³ by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1.¹⁴ Nor do the data substantiate a marked increase in the percentage of cases with punitive awards over the past several decades.¹⁵ The figures thus show an overall [***2625] restraint and suggest that in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter.

13. See, e.g., RAND Institute for Civil Justice, D. Hensler & E. Moller, *Trends in Punitive Damages*, table 2 (Mar. 1995) (finding an increase in median awards between the early 1980s and the early 1990s in San Francisco and Cook Counties); Moller, Pace, & Carroll, *Punitive Damages in Financial Injury Jury Verdicts*, 28 *J. Legal Studies* 283, 307 (1999) (hereinafter *Financial Injury Jury Verdicts*) (studying jury verdicts in "Financial Injury" cases in six States and Cook County, Illinois, and finding a marked increase in the median award between the late 1980s and the early 1990s); M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings*, [***48] 15 (RAND Institute for Civil Justice 1987) (hereinafter *Punitive Damages: Empirical Findings*) (finding that the median punitive award increased nearly 4 times in San Francisco County

between the early 1960s and the early 1980s, and 43 times in Cook County over the same period). But see T. Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. of Empirical Legal Studies 263, 278 (2006) (hereinafter *Juries, Judges, and Punitive Damages*) (analyzing Bureau of Justice Statistics data from 1992, 1996, and 2001, and concluding that "[n]o statistically significant variation exists in the inflation-adjusted punitive award level over the three time periods"); Dept. of Justice, Bureau of Justice Statistics, T. Cohen, *Punitive Damage Awards in Large Counties, 2001*, p. 8 (Mar. 2005) (hereinafter *Cohen*) (compiling data from the Nation's 75 most populous counties and finding that the median punitive damage award in civil jury trials decreased between 1992 and 2001).

14 See, e.g., *Juries, Judges, and Punitive Damages* 269 (reporting median ratios of 0.62:1 in jury trials and 0.66:1 in bench trials using [***49] the Bureau of Justice Statistics data from 1992, 1996, and 2001); Vidmar & Rose, *Punitive Damages by Juries in Florida*, 38 *Harv. J. Legis.* 487, 492 (2001) (studying civil cases in Florida state courts between 1989 and 1998 and finding a median ratio of 0.67:1). But see *Financial Injury Jury Verdicts* 307 (finding a median ratio of 1.4:1 in "financial injury" cases in the late 1980s and early 1990s).

15 See, e.g., *Cohen* 8 (compiling data from the Nation's 75 most populous counties, and finding that in jury trials where the plaintiff prevailed, the percentage of cases involving punitive awards was 6.1% in 1992 and 5.6% in 2001); *Financial Injury Jury Verdicts* 307 (finding a statistically significant decrease in the percentage of verdicts in "financial injury" cases that include a punitive damage award, from 15.8% in the early 1980s to 12.7% in the early 1990s). But see *Punitive Damages: Empirical Findings* 9 (finding an increase in the percentage of civil trials resulting in punitive damage awards in San Francisco and Cook Counties between 1960 and 1984). One might posit that ill effects of punitive damages are clearest not in actual awards but in the shadow that the punitive regime casts [***50] on settlement negotiations and other litigation decisions. See, e.g., *Financial Injury Jury*

Verdicts 287; Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational?* 26 J. Legal Studies 663, 664-671 (1997). But here again the data have not established a clear correlation. See, e.g., Eaton, Mustard, & Talarico, *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. Legal Studies 343, 357, 353-354, 365 (2005) (studying data from six Georgia counties and concluding that "the decision to seek punitive damages has no statistically significant impact" on "whether a case that was disposed was done so by trial or by some other procedure, including settlement," or "whether a case that was disposed by means other than a trial was more likely to have been settled"); Kritzer & Zemans, *The Shadow of Punitives, 1998 Wgs. L. Rev.* 157, 160 (1998) (noting the theory that punitive damages cast a large shadow over settlement negotiations, but finding that "with perhaps one exception, what little systematic evidence we could find does not support the notion" (emphasis deleted)).

The real problem, it seems, is the stark unpredictability of punitive awards. Courts [***51] of law are concerned with fairness as consistency, and evidence that the median ratio of punitive to compensatory awards falls [***590] within a reasonable zone, or that punitive awards are infrequent, fails to tell us whether the spread between high and low individual awards is acceptable. The available data suggest it is not. A recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just 0.62:1, but a mean ratio of 2.90:1 and a standard deviation of 13.81. *Juries, Judges, and Punitive Damages* 269.¹⁶ Even to those of us unsophisticated in statistics, the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories. The distribution of awards is narrower, but still remarkable, among punitive damages assessed by judges: the median ratio is 0.66:1, the mean ratio is 1.60:1, and the standard deviation is 4.54. *Ibid.* Other studies of some of the same data show that fully 14% of punitive awards in 2001 were greater than four times the compensatory damages, see *Cohen* 5, with 18% of punitives in the 1990s more [***52] than trebling the compensatory damages, see Ostrom, Rottman, & Goerd, *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 *Judicature* 233, 240

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(1996). And a study of "financial injury" cases using a different data set found that 34% of the punitive awards were greater than three times the corresponding compensatory damages. *Financial Injury Jury Verdicts* 333."

16 This study examined "the most representative sample of state court trials in the United States," involving "tort, contract, and property cases disposed of by trial in fiscal year 1991-1992 and then calendar years 1996 and 2001. The three separate data sets cover state courts of general jurisdiction in a random sample of 46 of the 75 most populous counties in the United States." *Juries, Judges, and Punitive Damages* 267. The information was "gathered directly" from state-court clerks' offices and the study did "not rely on litigants or third parties to report." *Ibid.*

Starting with the premise of a punitive-damages regime, these ranges of variation might be acceptable or even desirable if they resulted from judges' and juries' refining their judgments to reach a generally accepted optimal level of penalty and deterrence [***53] in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts. Cf. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457-458, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) (plurality opinion). But anecdotal evidence suggests [*2626] that nothing of that sort is going on. One of our own leading cases on punitive damages, with a \$ 4 million verdict by an Alabama jury, noted that a second Alabama case with strikingly similar facts produced "a comparable amount of compensatory damages" but "no punitive damages at all." See *Gore*, 517 U.S., at 563, n. 8, 116 S. Ct. 1589, 134 L. Ed. 2d 809. As the Supreme Court of Alabama candidly explained, "the disparity between the two jury verdicts . . . [w]as a reflection of the inherent uncertainty of the trial process." *BMW of North America, Inc. v. Gore*, 646 So. 2d 619, 626 (1994) (*per curiam*). We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances.¹⁷

17 The Court is aware of a body of literature running parallel to anecdotal reports, examining the predictability of punitive awards by conducting numerous "mock juries," where different "jurors" are confronted with the same hypothetical [***54] case. See, e.g., C. Sunstein,

R. Hastie, J. Payne, D. Schkade, W. Viscusi, *Punitive Damages: How Juries Decide* (2002); Schkade, Sunstein, & Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 *Colum. L. Rev.* 1139 (2000); Hastie, Schkade, & Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 *Law & Hum. Behav.* 445 (1999); Sunstein, Kahneman, & Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 *Yale L. J.* 2071 (1998). Because this research was funded in part by Exxon, we decline to rely on it.

[**591] E

The Court's response to outlier punitive damages awards has thus far been confined by claims at the constitutional level, and our cases have announced due process standards that every award must pass. See, e.g., *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003); *Gore*, 517 U.S., at 574-575, 116 S. Ct. 1589, 134 L. Ed. 2d 809. Although "we have consistently rejected the notion that the constitutional line is marked by a 'simple mathematical formula,'" *id.*, at 582, 116 S. Ct. 1589, 134 L. Ed. 2d 809; we have determined that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, [***55] will satisfy due process." *State Farm*, 538 U.S., at 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585; "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *ibid.*

Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard. Our due process cases, on the contrary, have all involved awards subject in the first instance to state law. See, e.g., *id.*, at 414, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (fraud and intentional infliction of emotional distress under Utah law); *Gore*, *supra*, at 563, 116 S. Ct. 1589, 134 L. Ed. 2d 809, and n. 3 (fraud under Alabama law); *TXO*, *supra*, at 452, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (plurality opinion) (slander of

title under West Virginia law); *Haslip*, 499 U.S., at 7, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (fraud under Alabama law). These, as state-law cases, could provide no occasion to consider a "common-law standard of excessiveness," *Browning-Ferris Industries*, 492 U.S., at 279, 109 S. Ct. 2909, 106 L. Ed. 2d 219, and the only matter [***56] of federal law within our appellate authority was the constitutional due process issue.

Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law [*2627] remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know [***592] what the stakes are in choosing one course of action or another. See *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897). And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage. [***57] Cf. *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (noting the need "to reduce unjustified disparities" in criminal sentencing "and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice"). The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.

F

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With that aim ourselves, we have three basic approaches to consider, one verbal and two quantitative. As mentioned before, a number of state courts have settled on criteria for judicial review of punitive-damages awards that go well beyond traditional "shock the conscience" or "passion and prejudice" tests. Maryland, for example, has set forth a nonexclusive list of nine review factors under state common law that include

"degree of heinousness," "the deterrence value of [the award]," and "[w]hether [the punitive award] bears a reasonable relationship to the compensatory damages awarded." *Bowden v. Caldor, Inc.*, 350 Md. 4, 25-39, 710 A.2d 267, 277-284 (1998). Alabama has seven general criteria, such as "actual or likely harm [from the defendant's conduct]," "degree of reprehensibility," and "[i]f [***58] the wrongful conduct was profitable to the defendant." *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-224 (1989) (internal quotation marks omitted). But see *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1236 (ND Ala. 2003) (noting but not deciding claim that post-trial review under *Green Oil* "is unconstitutionally vague and inadequate").

These judicial review criteria are brought to bear after juries render verdicts under instructions offering, at best, guidance no more specific for reaching an appropriate penalty. In Maryland, for example, which allows punitive damages for intentional torts and conduct characterized by "actual malice," *U.S. Gypsum Co. v. Mayor and City Council of Baltimore*, 336 Md. 145, 185, 647 A.2d 405, 424-425 (1994), juries may be instructed that

"An award for punitive damages should be:

"(1) In an amount that will deter the defendant and others from similar conduct.

"(2) Proportionate to the wrongfulness of the defendant's conduct and the defendant's ability to pay.

"(3) But not designed to bankrupt or financially destroy a defendant." Md. Pattern Jury Instr., Civil, No. 10:13 (4th ed. 2007).

In Alabama, juries are instructed to fix an amount after considering [***59] "the character [*2628] and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs." 1 Ala. Pattern Jury Instr., Civil, No. § 23.21 (Supp. 2007).

These examples leave us skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers. Instructions can go just so far in promoting systemic

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consistency [**593] when awards are not tied to specifically proven items of damage (the cost of medical treatment, say), and although judges in the States that take this approach may well produce just results by dint of valiant effort, our experience with attempts to produce consistency in the analogous business of criminal sentencing leaves us doubtful that anything but a quantified approach will work. A glance at the experience there will explain our skepticism.

The points of similarity are obvious. [**LEDHR8] [8] "[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law." *Browning-Ferris Industries*, 492 U.S. at 275, 109 S. Ct. 2909, 106 L. Ed. 2d 219. ¹⁸ See also 1977 *Restatement* § 908, *Comment a*, at 464 (purposes of punitive damages are "the same" as "that of a fine imposed [***60] after a conviction of a crime"); 18 U.S.C. § 3553(a)(2) (requiring sentencing courts to consider, *inter alia*, "the need for the sentence imposed . . . to provide just punishment for the offense" and "to afford adequate deterrence to criminal conduct"); United States Sentencing Commission, *Guidelines Manual* § 1A1.1, *comment* (Nov. 2007).

¹⁸ This observation is not at odds with the holding in *Browning-Ferris*, that the Excessive Fines Clause of the *Eighth Amendment* does not apply to punitive damages. See *Browning-Ferris*, 492 U.S. at 275, 109 S. Ct. 2909, 106 L. Ed. 2d 219. That conclusion did not reject the punitive nature of the damages; see *ibid.*, but rested entirely upon our conviction that "the concerns that animate the *Eighth Amendment*" were about "plac[ing] limits on the steps a government may take against an individual," *ibid.* Thus the Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Id.*, at 264, 109 S. Ct. 2909, 106 L. Ed. 2d 219. We noted the similarities of purpose between criminal penalties and punitive damages and distinguished the two on the basis of their differing levels of state involvement. See *id.*, at 275, 109 S. Ct. 2909, 106 L. Ed. 2d 219.

It [***61] is instructive, then, that in the last quarter century federal sentencing rejected an "indeterminate"

system, with relatively unguided discretion to sentence within a wide range, under which "similarly situated offenders were sentenced [to], and did actually serve, widely disparate sentences."¹⁹ Instead it became a system of detailed guidelines tied to exactly quantified sentencing results, under the authority of the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.* (2000 ed. and *Supp.* V).

¹⁹ Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & C. 883, 895-899 (1990) (citing studies and congressional hearings).

The importance of this for us is that in the old federal sentencing system of general standards the cohort of even the most seasoned judicial penalty-givers defied consistency. Judges and defendants alike were "[l]eft at large, wandering in deserts of uncharted discretion," M. Frankel, *Criminal Sentences: Law Without Order* 7-8 (1973), which is very much the position of those imposing punitive damages today, be they judges or juries, except that they lack even a statutory maximum; their only restraint beyond a core sense of fairness [***62] is the due process limit. This federal criminal law development, with its many state parallels, strongly suggests that as long [**2629] "as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary." [**594] *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (CA7 2003).

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This is why our better judgment is that eliminating unpredictable outlying punitive awards by more rigorous standards than the constitutional limit will probably have to take the form adopted in those States that have looked to the criminal-law pattern of quantified limits. One option would be to follow the States that set a hard dollar cap on punitive damages, see *supra*, at ___, 171 L. Ed. 2d, at 587, a course that arguably would come closest to the criminal law, rather like setting a maximum term of years. The trouble is, though, that there is no "standard" tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board. And of course a judicial selection of a dollar cap would carry a serious drawback; a legislature can pick a figure, [***63] index it for inflation, and revisit its provision

whenever there seems to be a need for further tinkering, but a court cannot say when an issue will show up on the docket again. See, e.g., *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523, 546-547, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983) (declining to adopt a fixed formula to account for inflation in discounting future wages to present value, in light of the unpredictability of inflation rates and variation among lost-earnings cases).

The more promising alternative is to leave the effects of inflation to the jury or judge who assesses the value of actual loss, by pegging punitive to compensatory damages using a ratio or maximum multiple. See, e.g., 2 ALI Enterprise Responsibility for Personal Injury: Reporters' Study 258 (1991) (hereinafter ALI Reporters' Study) ("[T]he compensatory award in a successful case should be the starting point in calculating the punitive award"); ABA, Report of Special Comm. on Punitive Damages, Section of Litigation, Punitive Damages: A Constructive Examination 64-66 (1986) (recommending a presumptive punitive-to-compensatory damages ratio). As the earlier canvass of state experience showed, this is the model many States have adopted. [***64] see *supra*, at 171 L. Ed. 2d, at 587, and n. 12, and Congress has passed analogous legislation from time to time, as for example in providing treble damages in antitrust, racketeering, patent, and trademark actions, see 15 U.S.C. §§ 15, 1117 (2000 ed. and Supp. V); 18 U.S.C. § 1964(c); 35 U.S.C. § 284.²⁰ And of course the potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis. See, e.g., *State Farm*, 538 U.S., at 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585; *Gore*, 517 U.S., at 580, 116 S. Ct. 1589, 134 L. Ed. 2d 809.

20 There are State counterparts of these federal statutes. See, e.g., *Conn. Gen. Stat. § 52-560* (2007) (cutting or destroying a tree intended for use as a Christmas tree punishable by a payment to the injured party of five times the tree's value); *Mass. Gen. Laws, ch. 91, § 59A* (West 2006) (discharging crude oil into a lake, river, tidal water, or flats subjects a defendant to double damages in tort).

Still, some will murmur that this smacks too much of policy and too little of principle. Cf. *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (CA2 1961). But the answer rests on the fact that we are acting here in the position of a common law court of last review, faced with

a [***65] perceived defect in a common law remedy. Traditionally, [***595] courts have accepted primary [***2630] responsibility for reviewing punitive damages and thus for their evolution, and if, in the absence of legislation, judicially derived standards leave the door open to outlier punitive-damages awards, it is hard to see how the judiciary can wash its hands of a problem, it created, simply by calling quantified standards legislative. See *State Farm*, *supra*, at 438, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (Ginsburg, J., dissenting) ("In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned"); 2 ALI Reporters' Study 257 (recommending adoption of ratio, "probably legislatively, although possibly judicially").

History certainly is no support for the notion that judges cannot use numbers. The 21-year period in the rule against perpetuities was a judicial innovation, see, e.g., *Cadell v. Palmer*, 1 Clark & Finnelly 372, 6 Eng. Rep. 956, 963 (H. L. 1833), and so were exact limitations periods for civil actions, sometimes borrowing from statutes, see C. Preston & G. Newson, *Limitation of Actions* 241-242 (2d ed. 1943), but often without any statutory [***66] account to draw on, see, e.g., 1 H. Wood, *Limitations of Actions* § 1, p. 4 (4th ed. 1916). For more examples, see 1 W. Blackstone, *Commentaries on the Laws of England* 451 (1765) (listing other common law age cut-offs with no apparent statutory basis). And of course, adopting an admiralty-law ratio is no less judicial than picking one as an outer limit of constitutionality for punitive awards. See *State Farm*, *supra*, at 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585.²¹

21 To the extent that Justice Stevens suggests that the very subject of remedies should be treated as congressional in light of the number of statutes dealing with remedies, see *post*, at 171 L. Ed. 2d, at 600-601 (opinion concurring in part and dissenting in part), we think modern-day maritime cases are to the contrary and support judicial action to modify a common law landscape largely of our own making. The character of maritime law as a mixture of statutes and judicial standards, "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules," *East River S. S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986),

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accounts for the large part we have taken in working out the governing maritime tort principles. See, e.g., *ibid.* ("recognizing [***67] products liability . . . as part of the general maritime law"); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S. Ct. 1673, 64 L. Ed. 2d 284 (1980) (recognizing cause of action for loss of consortium); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970) (recognizing cause of action for wrongful death). And for the very reason that our exercise of maritime jurisdiction has reached to creating new causes of action on more than one occasion, it follows that we have a free hand in dealing with an issue that is "entirely a remedial matter." *Id.*, at 382, 90 S. Ct. 1772, 26 L. Ed. 2d 339. The general observation we made in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975), when we abrogated the admiralty rule of divided damages in favor of proportional liability, is to the point here. It is urged "that the creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court. But the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law" (internal quotation marks and footnote omitted). See also *Exxon Co., U.S.A. v. Saseco, Inc.*, 517 U.S. 830, 116 S. Ct. 1813, 135 L. Ed. 2d 113 (1996) [***68] (holding that proportional-liability rule applies only to defendants proximately causing an injury); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S. Ct. 1461, 128 L. Ed. 2d 148 (1994) (adopting proportionate-fault rule for calculation of nonsettling maritime tort defendants' compensatory liability). Indeed, the compensatory remedy sought in this case is itself entirely a judicial creation. The common law traditionally did not compensate purely economic harms, unaccompanied by injury to person or property. See K. Abraham, *Forms and Functions of Tort Law* 247-248 (3d ed. 2007); see, e.g., *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 45 S. Ct. 157, 69 L. Ed. 372 (1925) (imposing rule in maritime context). But "[t]he courts have . . . occasionally created exceptions to the rule. Perhaps the most noteworthy involve cases in

which there has been natural-resource damage for which no party seems to have a cause of action." Abraham, *supra*, at 249 (discussing *Union Oil Co. v. Oppen*, 301 F.2d 558 (CA9 1974) (recognizing exception for commercial fishermen)). We raise the point not to express agreement or disagreement with the Ninth Circuit rule but to illustrate the entirely judge-made nature of the landscape we are surveying. To be sure, "Congress retains [***69] superior authority in these matters," and "[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990). But we may not slough off our responsibilities for common law remedies because Congress has not made a first move, and the absence of federal legislation constraining punitive damages does not imply a congressional decision that there should be no quantified rule, cf. *Rapanos v. United States*, 547 U.S. 715, 749, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (plurality opinion) (noting the Court's "oft-expressed skepticism towards reading the tea leaves of congressional inaction"). Where there is a need for a new remedial maritime rule, past precedent argues for our setting a judicially derived standard, subject of course to congressional revision. See, e.g., *Reliable Transfer, supra*, at 409, 95 S. Ct. 1708, 44 L. Ed. 2d 251.

[*2631] Although the legal landscape is well populated with examples of ratios and [**596] multipliers expressing policies of retribution and deterrence, most of them suffer from features that stand in the way of borrowing them as paradigms of reasonable limitations suited for application to this case. While a slim majority of the States with a ratio [***70] have adopted 3:1, others see fit to apply a lower one, see, e.g., *Colo. Rev. Stat. Ann. § 13-21-102(1)(a)* (2007) (1:1); *Ohio Rev. Code Ann. § 2315.21(D)(2)(a)* (Lexis 2005) (2:1), and a few have gone higher, see, e.g., *Mo. Ann. Stat. § 510.265(1)* (Supp. 2008) (5:1). Judgments may differ about the weight to be given to the slight majority of 3:1 States, but one feature of the 3:1 schemes dissuades us from selecting it here. With a few statutory exceptions, generally for intentional infliction of physical injury or other harm, see, e.g., *Ala. Code § 6-11-21(f)* (2005); *Ark. Code Ann. § 16-55-208(b)* (2005), the States

with 3:1 ratios apply them across the board (as do other States using different fixed multipliers). That is, the upper limit is not directed to cases like this one, where the tortious action was worse than negligent but less than malicious,²² exposing the tortfeasor to certain regulatory sanctions and inevitable damage actions;²³ the 3:1 ratio in these States also applies to awards in quite different cases involving some of the most egregious conduct, including malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor's financial gain. [***71] ²⁴ We confront, [*2632] instead, [***597] a case of reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury. Thus, a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case.

22 Although the jury heard evidence that Exxon may have felt constrained not to give Hazelwood a shoreside assignment because of a concern that such a course might open it to liabilities in personnel litigation the employee might initiate, see, e.g., App. F to Pet. for Cert. 256a, such a consideration, if indeed it existed, hardly constitutes action taken with a specific purpose to cause harm at the expense of an established duty.

23 We thus treat this case categorically as one of recklessness, for that was the jury's finding. But by making a point of its contrast with cases falling within categories of even greater fault we do not mean to suggest that Exxon's and Hazelwood's failings were less than reprehensible.

24 Two of the States with 3:1 ratios do provide for slightly larger awards in actions involving this type of strategic financial wrongdoing, but the exceptions seem to apply to only a subset of [***72] those cases. See *Alaska Stat. § 09.17.020(g)* (2006) (where the defendant's conduct was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, the normal limit is replaced by the greater of four times the compensatory damages, four times the aggregate financial gain the defendant received as a result of its misconduct, or \$ 7 million); *Fla. Stat. §§ 768.73(1)(b), (c)* (2007) (normal limit replaced by greater of 4:1 or million where defendant's wrongful conduct was motivated solely by

unreasonable financial gain and the unreasonably dangerous nature of the conduct, together with the high likelihood of injury, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant).

For somewhat different reasons, the pertinence of the 2:1 ratio adopted by treble-damages statutes (offering compensatory damages plus a bounty of double that amount) is open to question. Federal treble-damages statutes govern areas far afield from maritime concerns (not to mention each other);²⁵ the [***73] relevance of the governing rules in patent or trademark cases, say, is doubtful at best. And in some instances, we know that the considerations that went into making a rule have no application here. We know, for example, that Congress devised the treble damages remedy for private antitrust actions with an eye to supplementing official enforcement by inducing private litigation, which might otherwise have been too rare if nothing but compensatory damages were available at the end of the day. See, e.g., *Reiter*, 442 U.S., at 344, 99 S. Ct. 2326, 60 L. Ed. 2d 931. That concern has no traction here, in this case of staggering damage inevitably provoking governmental enforcers to indict and any number of private parties to sue. To take another example, although 18 U.S.C. § 3571(d) provides for a criminal penalty of up to twice a crime victim's loss, this penalty is an alternative to other specific fine amounts which courts may impose at their option, see §§ 3571(a)-(c), a fact that makes us wary of reading too much into Congress's choice of ratio in one provision. State environmental treble-damages schemes offer little more support: for one thing, insofar as some appear to punish even negligence, see, e.g., *Mass. Gen. Laws, ch. 130, § 27*, [***74] while others target only willful conduct, see, e.g., *Del. Code Ann., Tit. 25, § 1401* (1989), some undershoot and others may overshoot the target here. For another, while some States have chosen treble damages, others punish environmental harms at other multiples. See, e.g., *N. H. Rev. Stat. Ann. § 146-A:10* (2005) (damages of one-and-a-half times the harm caused to private property by oil discharge); *Minn. Stat. Ann. § 115A.99* (2005) (civil penalty of 2 to 5 times the costs of removing unlawful solid waste). All in all, the legislative signposts do not point the way clearly to 2:1 as a sound indication of a reasonable limit.

25 See, e.g., 15 U.S.C. § 15 (antitrust); 18 U.S.C. § 1964 (racketeering); 35 U.S.C. § 284 (patent);

128 S. Ct. 2605, *2632; 171 L. Ed. 2d 570, **597;
2008 U.S. LEXIS 5263, ***74; 76 U.S.L.W. 4603

15 U.S.C. § 1117 (trademark) (2000 ed. and Supp. V); 7 U.S.C. § 2541 (plant variety protections); 12 U.S.C. § 2607 (real estate settlement antikickback provision); 15 U.S.C. § 1693f (consumer credit protection).

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There is better evidence of an accepted limit of reasonable civil penalty, however, in several studies mentioned before, showing the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many [***75] hundreds of punitive [***598] awards. See *supra*, at _____, 171 L. Ed. 2d, at 589-590; and n 14. We think it is fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments [***2633] about the economic penalties appropriate in their particular cases.

These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1, see *supra*, at _____, 171 L. Ed. 2d, at 589-590, and n 14, meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards. It also seems fair to suppose that [***76] most of the unpredictable outlier cases that call the fairness of the system into question are above the median; in theory a factfinder's deliberation could go awry to produce a very low ratio, but we have no basis to assume that such a case would be more than a sport, and the cases with serious constitutional issues coming to us have naturally been on the high side, see, e.g., *State Farm*, 538 U.S., at 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (ratio of 145:1); *Gore*, 517 U.S., at 582, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (ratio of 500:1). On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1²⁶ probably marks the line near which cases like this one largely

should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a [***LEdHR9] [9] 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.²⁷

26 See *supra*, at _____, n 14, 171 L. Ed. 2d, at 589, for the spread among studies.

27 The reasons for this conclusion answer Justice Stevens's suggestion, *post*, at _____, 171 L. Ed. 2d, at 603-604, that there is an adequate restraint in appellate abuse-of-discretion review of a trial judge's [***77] own review of a punitive jury award (or of a judge's own award in nonjury cases). We cannot see much promise of a practical solution to the outlier problem in this possibility. Justice Stevens would find no abuse of discretion in allowing the \$ 2.5 billion balance of the jury's punitive verdict here, and yet that is about five times the size of the award that jury practice and our judgment would signal as reasonable in a case of this sort. The dissent also suggests that maritime tort law needs a quantified limit on punitive awards less than tort law generally because punitives may mitigate maritime law's less generous scheme of compensatory damages. *Post*, at _____, 171 L. Ed. 2d, at 602-603. But the instructions in this case did not allow the jury to set punitives on the basis of any such consideration, see Jury Instruction No. 21, App. to Brief in Opposition 12a ("The purposes for which punitive damages are awarded are: (1) to punish a wrongdoer for extraordinary misconduct; and (2) to warn defendants and others and deter them from doing the same"), and the size of the underlying compensatory damages does not bespeak economic inadequacy; the case, then, does not support an argument that maritime compensatory awards [***78] need supplementing. And this Court has long held that [***LEdHR10] [10] "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981); see *supra*, at _____, 171 L. Ed. 2d, at 585-586. Indeed,

any argument for more generous punitive damages in maritime cases would call into question the maritime applicability of the constitutional limit on punitive damages as now understood, for we have tied that limit to a conception of punitive damages awarded entirely for a punitive, not quasi-compensatory, purpose. See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 352, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) ("This Court has long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition'" (quoting *Gore*, 517 U.S., at 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809)); *State Farm*, 538 U.S., at 416, 123 S. Ct. 1513, 155 L. Ed. 2d 585 ("[P]unitive damages . . . are aimed at deterrence and retribution"); *Cooper Industries*, 532 U.S., at 432, 121 S. Ct. 1678, 149 L. Ed. 2d 674 ("[C]ompensatory damages and punitive damages . . . serve distinct purposes. The former are intended to redress the concrete loss that [***79] the plaintiff has suffered. . . . The latter . . . operate as 'private fines' intended to punish the defendant and to deter future wrongdoing").

[*2634] The provision of the CWA respecting daily fines confirms our judgment that anything greater would be excessive [***599] here and in cases of this type. Congress set criminal penalties of up to \$ 25,000 per day for negligent violations of pollution restrictions, and up to \$ 50,000 per day for knowing ones. 33 U.S.C. §§ 1319(c)(1); (2). Discretion to double the penalty for knowing action compares to discretion to double the civil liability on conduct going beyond negligence and meriting punitive treatment. And our explanation of the constitutional upper limit confirms that the 1:1 ratio is not too low. In *State Farm*, we said that a single-digit maximum is appropriate in all but the most exceptional of cases, and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S., at 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585. 28

28 The criterion of "substantial" takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage [***80] suit, a concern addressed by the opportunity for a class action

when large numbers of potential plaintiffs are involved: in such cases, individual awards are not the touchstone, for it is the class option that facilitates suit, and a class recovery of \$ 500 million is substantial. In this case, then, the constitutional outer limit may well be 1:1.

V

Applying this standard to the present case, we take for granted the District Court's calculation of the total relevant compensatory damages at \$ 507.5 million. See *In re. Exxon Valdez*, 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002). A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.

We therefore vacate the judgment and remand the case for the Court of Appeals to remit the punitive damages award accordingly.

It is so ordered.

Justice Alito took no part in the consideration or decision of this case.

CONCUR BY: Stevens (In Part); Ginsburg (In Part); Breyer (In Part)

CONCUR

JUSTICE Scalia, with whom JUSTICE Thomas joins, concurring.

I join the opinion of the Court, including the portions that refer to constitutional limits that prior opinions have imposed upon punitive damages. While I agree with the argumentation based upon those [***81] prior holdings, I [***600] continue to believe the holdings were in error. See *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 429, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (Scalia, J., dissenting).

DISSENT BY: Stevens (In Part); Ginsburg (In Part); Breyer (In Part)

DISSENT

Justice Stevens, concurring in part and dissenting in part.

While I join Parts I, II, and III of the Court's opinion, I believe that Congress, rather than this Court, should

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STATUTES OF LIMITATION AND LACHES

A variety of statutes of limitation currently exist for maritime personal injury and death claims, although Congress has attempted to provide a catchall uniform three-year limitation period for such claims.

Limitations

Except as otherwise provided by law, a civil action for damages for personal injury or death, arising out of a maritime tort, must be brought within 3 years after the cause of action accrued.

46 U.S.C. § 30106

Actions brought under the Jones Act, 46 U.S.C. § 30104 et seq., by seamen are governed by the Federal Employers' Liability Act's (F.E.L.A.) three-year statute of limitations, 45 U.S.C. § 56 since this statute is incorporated by reference.

The three-year limitation period of 46 U.S.C. § 30106 applies to DOHSA, LHWCA 905(b), negligence actions, general maritime law, and all other maritime tort actions that have accrued on or after October 6, 1980. *Mink v. Genmar Ind., Inc.*, 29 F.3d 1543 (11th Cir. 1994); *Basco v. American General Ins. Co.*, 43 F.3d 964 (5th Cir. 1994); *Santiago v. Lykes Bros. S.S. Co., Inc.*, 986 F.2d 423 (11th Cir. 1993). *Taurel v. Central Gulf Lines, Inc.*, 947 F.2d 769 (5th Cir. 1991); and *Crisman v. Odeco*, 932 F.2d 413 (5th Cir.), cert. denied, 502 U.S. 924 (1991).

Lousargian v. Royal Caribbean Corp., 951 F.2d 7 (1st Cir. 1991); *Spataro v. Kloster Cruise, Ltd.*, 894 F.2d 44 (2d Cir. 1990); *Thompson v. Ulysses Cruises, Inc.*, 812 F. Supp. 900 (S.D. Ind. 1993); and *Schenck v. Kloster Cruise, Ltd.*, 800 F. Supp. 120 (D.N.J. 1992), sustain a one year limitation period for bringing personal injury claims which was contained in a passenger's ticket, provided that adequate notice is given to the passenger. *Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988) opens an exception to the tolling of limitations in one year, when there is only a master ticket issued to a tour director and the passengers themselves do not receive tickets. In that instance, a passenger is not bound by the statute of limitations. Also, the cruise line by its conduct can waive the one-year limitation period. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989).

Butler v. American Trawler Company, 887 F.2d 20 (1st Cir. 1989) holds that a tort occurring on navigable waters is held to the federal three year limit and not the state's six year state limit. See also, *Convey v. Arkansas River Co.*, 865 F.2d 660 (5th Cir. 1989).

Tolling of the Statute of Limitation. The three year statute of limitation for FELA begins to run when the employee knew or should have known of the medical problem. *Albert v. Main Central R.R. Co.*, 905 F.2d 541 (1st Cir. 1990). It has also been held that the cause of action arises on the date that the plaintiff discovered the injury and its causes. *Albertson v. T.J. Stephenson & Co.*, 749 F.2d 223 (5th Cir. 1984); *Crisman v. Odeco, Inc.*, 932 F.2d 413, (5th Cir.), cert. denied, 502 U.S. 924, 116 L.Ed.2d 278 (1991); and *Armstrong v.*

Trico Marine, Inc., 923 F.2d 55 (5th Cir. 1991). *Taurel v. Central Gulf Lines Inc.*, 947 F.2d 769 (5th Cir. 1991) discussed the issue in terms of when the plaintiff is aware of the critical facts concerning his injury and its causes. See also, *Cullman v. Slade Towing Co.*, 759 F. Supp. 1028 (S.D. Miss. 1991); *Burrell v. Newsome*, 883 F.2d 416 (5th Cir. 1989) (court discusses the Texas rule for tolling of the statute of limitation).

Logwood v. Apollo Marine Specialists, 772 F. Supp. 925 (E.D. La. 1991). The court rejects plaintiff's attempt to add the time charter as defendant after the three year statute of limitation had run. The court states that the amended petition did not toll back, and no equitable principles apply to plaintiff's cause. *Aslandis v. U.S. Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993). There is no relation back if a substituted name appears on the amended complaint for "John Doe."

Six month contractual statute of limitations for a wage claim is enforced. *Fuller v. Golden Ages Fisheries*, 14 F.3d 1405 (9th Cir. 1994).

Basco v. American General Insurance Co., 43 F.3d 964 (5th Cir. 1994) follows the three-year limitation provision with respect to a maritime tort. The limitation is not tolled by an earlier lawsuit if it is voluntarily dismissed by the plaintiff.

The equitable doctrine of laches no longer applies to determine if a personal injury/death action is time barred; however, this concept remains viable in maritime non-personal injury matters not covered by a statute that contains a limitation period. Laches is an affirmative defense which, in essence, alleges a delay in asserting a claim, the delay was not excusable, and there was undue prejudice to the party against whom the claim is asserted. The action is time barred in the event these factors are shown. In non-personal injury matters, as a first step in determining whether an action should be barred by laches, the analogous state statute of limitations is used to measure the timeliness of the litigation, unless the defendant can demonstrate that the delay was inexcusable and was prejudicial. *Venus Lines Agency, Inc. v. CVG International America, Inc.*, 234 F.3d 1225 (11th Cir. 2000).

Generally, excusable delay is very difficult to show since ignorance of the law or malpractice on the part of the plaintiff's attorney does not meet the standard. If inexcusable delay cannot be shown, the plaintiff who has filed outside the analogous period can defeat the laches defense by showing that the defendant was not prejudiced by the late filing. Prejudice relates to the defendant's ability to adequately defend the claim. A common example of prejudice is the inability to locate key witnesses.

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

June 12, 2009

No. 08-40622

Charles R. Fulbruge III
Clerk

HERBERT B. PRETUS, JR.,

Plaintiff - Appellant,

v.

**DIAMOND OFFSHORE DRILLING INC.; DIAMOND OFFSHORE
MANAGEMENT CO.; DIAMOND OFFSHORE SERVICES CO.,**

Defendants - Appellees.

**Appeal from the United States District Court
for the Eastern District of Texas**

Before DAVIS, SMITH, and OWEN, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

On September 6, 2006, Plaintiff Herbert B. Pretus, Jr. ("Pretus") sued his employer, Diamond Offshore Drilling Inc., and related entities (collectively, "Diamond"), after being diagnosed in early 2005 with a lung disorder allegedly arising out of his employment on the *OCEAN CONFIDENCE* and other movable ocean rigs owned by Diamond. Diamond filed a motion for partial summary judgment in which it argued that the suit was time-barred. The district court granted the motion and entered a final judgment dismissing all of Pretus's claims. Because we find that genuine issues of material fact remain as to when Pretus should have discovered his medical condition so as to trigger the applicable statute of limitations, we reverse and remand.

I. FACTS AND PROCEDURAL BACKGROUND

Pretus began working for a predecessor to Diamond in 1978 as a roustabout. Initially Pretus was part of a crew that worked aboard a submersible drilling rig, but Diamond soon assigned him to the safety department. Thereafter Pretus worked on submersible drilling rigs as a safety representative. From February 4, 1999 through 2000, Pretus was assigned to work on the *OCEAN CONFIDENCE*, a floating hotel, during the time it was being retrofitted into an offshore drilling rig. While on the *OCEAN CONFIDENCE*, Pretus assisted in cleaning the rig, which was allegedly wet and moldy.

Pretus served 14 day hitches on the rig, followed by 14 days off duty during which he returned home. During one of his early hitches, Pretus began having respiratory problems. He had "cold-like" symptoms: a cough, fever, aches, congestion, and chest tightness. The symptoms usually improved when Pretus returned home but frequently returned during his next hitch, though Pretus did have some hitches without symptoms.

Other workers on the rig experienced similar ailments, and the symptoms became known as the "Confidence Crud." Pretus, as safety representative, called doctors engaged by Diamond to seek treatment advice when he or other members of the crew were ill. Diamond had "standing orders" in place on the rig for any employee who had respiratory problems to take medications such as antibiotics and antihistamines, and Diamond provided flu shots and pneumonia shots to any employee who requested them. Pretus took a variety of such medications for his ailments, which usually alleviated his symptoms.

In January 2001, Diamond promoted Pretus to the position of safety supervisor. As a safety supervisor, Pretus worked out of Diamond's headquarters in Houston but his duties required him to occasionally visit

offshore rigs to supervise safety representatives. The parties dispute the frequency and duration of these trips.

While working as a safety supervisor, Pretus continued to periodically suffer from these cold/flu-type symptoms. He was treated by his personal physician, Dr. Michael Ellis, an ear, nose, and throat specialist in Chalmette, Louisiana, on at least one occasion. Dr. Ellis diagnosed Pretus as suffering from bronchitis. Pretus was also treated by Dr. Phillip Weinstein in Houston, Texas. After a few years, Pretus's symptoms worsened, and in July of 2004 he took a leave of absence due to his severe shortness of breath and coughing. He then went to see a pulmonologist, Dr. Joe Johnson, who treated him for a few months and then referred him to an infectious disease specialist, Dr. Michael Hill. In January of 2005, Dr. Hill advised Pretus that he might have a fungal infection in his lungs.

In March of 2005, Diamond's insurer sent Pretus to Dr. James Patterson for an independent medical examination. After Dr. Patterson conducted his examination he diagnosed Pretus with hypersensitivity pneumonitis. Dr. Patterson's independent medical report, submitted by Pretus in opposition to Diamond's motion for partial summary judgment, described the condition as

an immune/allergic disease of the lung caused by environmental exposure to antigen(s), with Farmer's Lung being the prototype. Initially, the symptoms resemble a respiratory tract infection, and it is commonly misdiagnosed, as the symptoms are similar with [sic] fever, cough, body aches, headache, chest congestion or tightness. Symptomatic treatment can resolve the symptoms in the early stage of the disease. Mr. Pretus'[s] symptoms followed this pattern. If it is recognized that the symptoms are recurring on exposure, and resolving away from the exposure, the condition can be completely cured by avoiding the exposure altogether.

If the early stage of [hypersensitivity pneumonitis] is not recognized, the condition worsens and progresses with chronic cough, shortness of breath with exercise, and abnormal changes on

pulmonary function tests, chest x-ray, and CT scan. Fibrosis of lungs develops, especially in the lower lobes and the condition becomes fixed with irreversible loss of lung function. Mr. Pretus's course followed this pattern. He has fibrosis of lower lungs on high resolution CT and chest x-ray with similar interstitial changes in lungs.

* * *

The tragedy of this condition is that it is preventable by early recognition and removal from exposure. However, many times it is missed and treated as multiple respiratory infections and the chronic irreversible stage develops. The system that was in place at the job site with "standing orders" to dispense medication on site for respiratory infections probably covered up the diagnosis, delayed recognition, and contributed to the development of the chronic problem of Mr. Pretus.

When Pretus received this diagnosis, he sued Diamond in Texas state court on September 6, 2006 under the Jones Act and general maritime law. Diamond removed the case to federal district court in October 2006. In March 2007 Diamond filed a motion for partial summary judgment in which it argued that Pretus's Jones Act and general maritime law claims are barred by the three year statute of limitations and that his only remedy lies under state worker's compensation laws. The district court granted the motion, apparently on the ground that the suit was time-barred, and entered a final judgment dismissing all of Pretus's claims. From this judgment Pretus appeals.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had diversity jurisdiction under 28 U.S.C. § 1332 and admiralty jurisdiction under 28 U.S.C. § 1333. We have jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

"We review the district court's grant of summary judgment *de novo*, applying the same standard as the district court." *Env'tl. Conservation Org. v.*

City of Dallas, 529 F.3d 519, 524 (5th Cir. 2008) (citing *Greenwell v. State Farm Mut. Auto. Ins. Co.*, 486 F.3d 840, 841 (5th Cir. 2007)). See FED. R. CIV. P. 56.

III. LAW AND ANALYSIS

The dispositive issue on appeal is whether a genuine issue of material fact exists as to when Pretus should have discovered his illness so as to trigger the running of the three year statute of limitations for his Jones Act and general maritime law claims. If they began to run more than three years prior to his filing suit on September 6, 2006, the district court properly dismissed the suit as untimely; if they began to run within that three year period, the suit was timely and should not have been dismissed on that basis.

The statute of limitations for maritime torts is governed by 46 U.S.C. § 30106 (previously 46 U.S.C. app. § 763a): "Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose." The Jones Act, 46 U.S.C. § 30104 (previously 46 U.S.C. app. § 688), adopts the same statute of limitations applicable to suits under the Federal Employees' Liability Act ("FELA"), 45 U.S.C. § 56, which is three years. Pretus filed his lawsuit on September 6, 2006. Therefore, his suit is only timely if his cause of action accrued on or after September 6, 2003.

Discovery Rule

"A cause of action under the Jones Act and general maritime law accrues when a plaintiff has had a reasonable opportunity to discover the injury, its cause, and the link between the two." *Crisman v. Odeco, Inc.*, 932 F.2d 413, 415 (5th Cir. 1991) (citing *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984)). One of the early cases establishing the framework for this rule is *Urie v. Thompson*, 337 U.S. 163 (1949), where a worker inhaled silica dust over

the course of thirty years of work but became aware of an injury—a related occupational disease, silicosis—only after his symptoms became so severe he became unable to work and was diagnosed with silicosis. *Id.* at 165-66. His employer tried to defend under FELA's three year statute of limitations,¹ but the court rejected the defense, saying that the statute of limitations was not meant to apply to facts that were "unknown and inherently unknowable," *Id.* at 169. This rule, that the statute of limitations is not triggered under certain conditions when the employee does not know of his injury or illness, came to be known as the discovery rule.

This case and others were examined in *Albertson*, the leading Fifth Circuit case on Jones Act and general maritime law statute of limitations. The plaintiff, Albertson, was forced by his employer to use a dangerous chemical, trichloroethylene ("TCE"), throughout a four-month voyage aboard a freighter which ended in 1969. 749 F.2d at 226-27. During the voyage, Albertson began blacking out and experiencing excruciating headaches and nausea. *Id.* at 227. Upon returning to land, he was hospitalized, and although the doctors apparently failed to advance a definitive diagnosis, they refused to certify him to return to sea. *Id.* His health continued to decline, and in 1980 he was allegedly informed for the first time of a link between his TCE exposure and his mental and physical problems. *Id.* at 227-28. He sued his former employer under the Jones Act and general maritime law in 1981, more than 12 years after the exposure. *Id.* The district court granted summary judgment in favor of the employer on the ground that the suit was time barred. *Id.*

¹ FELA and the Jones Act have a strong connection. See *Johnson v. Cenac Towing, Inc.*, 544 F.3d 296, 301 n.2 (5th Cir. 2008) ("The Jones Act, 46 U.S.C. § 30104, makes the provisions of the Federal Employers' Liability Act . . . applicable to seamen. Jones Act cases, therefore, follow cases under FELA.").

On appeal, we discussed the legal principles governing the timeliness of this action:

It is generally accepted that a cause of action for a tort accrues when there has been an invasion of the plaintiff's legally protected interest. See Restatement (Second) of Torts § 899 comments c & e (1977). Ordinarily, this invasion occurs at the time the tortious act is committed. *Id.*; *DuBose v. Kansas City Southern Railway*, 729 F.2d 1026, 1028 (5th Cir.), *cert. denied*, 469 U.S. 854, 105 S.Ct. 179, 83 L.Ed.2d 113 (1984). If some injury is discernible when the tortious act occurs, the time of event rule respecting statutes of limitations applies, and the plaintiff's cause of action is deemed to have accrued. If the plaintiff later discovers that his injuries are more serious than originally thought, his cause of action nevertheless accrues on the earlier date, the date he realized that he had sustained harm from the tortious act.

In some cases, however, the injured person may not realize that a tort has been committed upon his person, since he may sustain a latent injury which either is not or cannot be discovered until long after the tortious act that caused the injury has occurred and after the applicable statute of limitations otherwise would have run. In such a case, courts have routinely applied the so-called discovery rule to toll the running of the statute of limitations. When the discovery rule applies, the plaintiff's cause of action does not accrue on the date the tortious act occurred, but on the date the plaintiff discovers, or reasonably should have discovered, both the injury and its cause.

749 F.2d at 228-29 (footnote omitted).

The court characterized the latter situation—where the employee does not discover the latent injury until long after the tortious act occurs—as “the pure latent injury case.” *Id.* at 229. Many occupational diseases are examples of pure latent injuries, the hallmark of which is that “the plaintiff fails to discover either the injury or its cause until long after the negligent act occurred.” *Id.* at 230. Under *Urie*, the discovery rule applies to such claims based on the principle that plaintiffs should not be victimized if they had no knowledge or indication they were injured. *Id.* at 231.

We contrasted the pure latent injury case with another situation, where the injury is immediately apparent but worsens over time; we labeled this as "the traumatic event/latent manifestation case." In such cases, "the plaintiff has sustained both immediate and latent injuries caused by a noticeable, traumatic occurrence. At the time of the traumatic event, the plaintiff realizes both that he is injured and what is responsible for causing the injury. The full extent of the harm, however, has not become manifest." *Id.*

In *Albertson*, we held that the plaintiff's injuries fell under the traumatic event/latent manifestation line of cases because "at the time he endured the last exposure to the TCE . . . he suffered serious damage and noteworthy injury, and he knew the injury was significant." *Id.* at 233. We further explained:

This is not a case in which, coinciding with the trauma, an injured seaman experienced and noticed only a minor injury and at a later time discovered an unexpected latent injury that was unknown and unknowable at the time of the traumatic event. *Cf., Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1142 (5th Cir.1984). *Albertson* had knowledge of his injuries at the time he was injured, and he soon knew they were substantial. His lack of knowledge of all the claimed consequences of his injury does not justify a departure from the time of event rule which establishes that the statutory limitations period began to run at the time of the trauma.

Id.

Later cases have continued to draw the distinction between pure latent injury cases and traumatic event/latent manifestation cases, but the analysis often depends on the facts. In *Clay v. Union Carbide Corp.*, 828 F.2d 1103 (5th Cir. 1987), for example, the plaintiff, Clay, was exposed to toxic chemicals and thereafter suffered significant symptoms including "laryngitis, difficulty breathing, nausea, burning eyes, headaches, bronchitis, memory loss, mental confusion, dizziness, prostate gland trouble, erratic heartbeats, sinus congestion, and a productive cough." *Id.* at 1105. These ailments only occurred when he worked around the chemicals, not while he was away on other jobs or at home.

Id. Approximately eight years after changing jobs to get away from the chemicals, Clay was diagnosed with "chronic respiratory complaints," and he sued his employer under the Jones Act and general maritime law. The district court granted summary judgment in favor of the employer on the basis of untimeliness.

On appeal, Clay argued that his various ailments only constituted "minor physical ailments, ... [as] distinguish[ed] from Albertson's severe headaches and blackout spells." *Id.* at 1106. Specifically,

Clay argu[ed] strongly that when a worker suffers minor physical annoyances, such as headaches, transient dizziness, or congestion that he causally connects to his work environment, such knowledge should not be considered an invasion of a legal interest sufficient to start the statute of limitations running against him thereby precluding suit when he is later found to be suffering from a serious occupational illness.

Id. at 1106-07. We specifically noted that "Clay's argument has merit and is not foreclosed by *Albertson*" based on the above quoted passage. *Id.* at 1107. However, Clay's injuries were "virtually identical" to his eventual diagnosis of "chronic respiratory complaints"; therefore "Clay possessed or had reasonable opportunity to discover the critical facts of the injury he claims to have suffered." *Id.* (emphasis added).

Likewise, in *Crisman*, the plaintiff, Crisman, sued his employer after sustaining "a hearing loss, a chemical toxicity disorder, and respiratory injuries" after exposure to petroleum-based chemicals at work." 932 F.2d at 414. However, Crisman admitted in deposition testimony that he knew at the time of exposure to the chemicals—more than a decade prior to filing suit—that his exposure had caused those conditions, and he complained to his employer and co-workers at the time. *Id.* at 416. The record was replete with other evidence and testimony that Crisman had known of those conditions and their cause well over three years before filing suit. *Id.* at 414-17.

Crisman argued that the issue of timeliness was one for the factfinder and should not have been decided on summary judgment, but the argument was foreclosed because the material facts were not in dispute. "While evaluating when a plaintiff reasonably was put on notice ordinarily is a factual determination, in this case there was such an overwhelming array of evidence indicating that the case was time-barred that summary judgment was appropriate." *Id.* at 417 n.4. Consequently, under the three year statute of limitations, we held that the suit was time-barred. *Id.* at 418.

Finally, in *Taurel v. Central Gulf Lines, Inc.*, 947 F.2d 769 (5th Cir. 1991), the plaintiff, Taurel, had worked as a merchant seaman since 1958. *Id.* at 770. He had "complained of pulmonary and respiratory difficulties" throughout his career and had visited a hospital in 1963 and 1965 complaining of difficulty in breathing. *Id.* From 1975 to 1981, chest X-rays taken during routine physicals were declared normal, and in 1984 he was treated for bronchitis but was not diagnosed with anything more serious. *Id.* In 1987 Taurel was diagnosed with asbestosis as a result of a routine screening test conducted in 1986 or 1987. *Id.* at 771.

Taurel sued his employer in 1988 under the Jones Act and general maritime law, but the district court granted summary judgment in favor of the employer based on untimeliness. *Id.* It found that Taurel's cause of action had accrued in 1980 based on Taurel's deposition testimony that fellow seamen and a doctor had informed him no later than 1980 that his problems might be related to asbestos. *Id.* at 771-72.

On appeal, we addressed the "critical question" of when Taurel's cause of action accrued, finding that it did not accrue until a physician actually diagnosed Taurel with asbestosis in 1987; thus, his 1988 suit was timely. *Id.* at 771. We found particular significance in the fact that Taurel had been to various doctors who did not make findings consistent with asbestosis and failed to diagnose

asbestosis. *Id.* at 772. We concluded that a genuine issue of material fact remained as to when Taurel "discovered, or should have discovered, that he had asbestosis," and that the district court erred in concluding that the suit was time-barred under the three-year statute of limitations. *Id.*

Analysis

The above cases focus on several considerations: first and foremost, the severity of the traumatic event and initial symptoms; second, the plaintiff's correlation of his ultimate injury with the traumatic event; and third, the plaintiff's reasonable reliance on the opinions of medical experts.

The first consideration, the severity of the traumatic event and initial symptoms, is illustrated by *Albertson*, where exposure to a dangerous chemical caused excruciating headaches, blackouts, and nausea; and *Clay*, where exposure to toxic chemicals caused both moderate and severe symptoms, including memory loss, prostate gland trouble, and erratic heartbeats. Where the event is not particularly traumatic and the initial symptoms are not severe, such that the plaintiff did not discover and should not have discovered the latent injury until later, the discovery rule may apply, as illustrated by *Taurel*. Indeed, even *Clay* acknowledged that "routine physical annoyances" that are "causally connect[ed] to [an employee's] work environment" do not necessarily trigger the running of the statute of limitations. 828 F.2d at 1106-07.

It is undisputed that Pretus had medical problems that related to his work on the *OCEAN CONFIDENCE* and, perhaps, other vessels. Unlike in *Albertson* and *Clay*, viewing the facts in the light most favorable to the nonmovant, Pretus, there was no discrete traumatic event like a chemical exposure, and the contemporaneous symptoms were not severe. Pretus submitted an affidavit in opposition to Diamond's motion for partial summary judgment in which he referred to having "cold-type symptoms including a sore throat, fever, sinus

pressure, coughing, and nose congestion" during his time aboard the *OCEAN CONFIDENCE* in 1999 and 2000.

Pretus's characterization of the symptoms as "cold-type" is supported by two "Injury or Illness Reports" filled out by him in 2000 and submitted by Diamond in support of its motion. In a March 1, 2000 report, Pretus complained of a head cold, running a low-grade fever, a headache, and body aches. In a May 25, 2000 report, he complained only of a low-grade fever, body aches, and a cough. Neither report states a cause for those symptoms.

Until 2004, the only diagnoses his physicians gave him were common illnesses such as colds, sinus infections, and bronchitis. His symptoms improved with antihistamines and antibiotics, which could have led him to believe that the physicians had correctly diagnosed his malady. Nothing about those symptoms necessarily suggests a serious illness like the cases discussed above. A factfinder could classify them as "routine physical annoyances" under *Clay*, 828 F.2d at 1106-07.

Under the second, related consideration, the plaintiff's correlation of his ultimate injury with the traumatic event, it is significant that Pretus is not suing based on those initial symptoms. This case therefore differs from *Clay*, where the plaintiff's eventual diagnosis of "chronic respiratory complaints" simply encompassed his initial symptoms that were manifested more than three years prior to suit; and *Crisman*, where the plaintiff's suit was based on hearing loss and other conditions that he knew about for more than three years prior to filing suit. Thus, a factfinder could conclude that it does not matter that Pretus could correlate a cold, sinus infection, or bronchitis to his workplace. Those are short-term afflictions that disappear with treatment, and according to his summary judgment evidence that is essentially how his symptoms behaved until 2004. In short, under the first two considerations, there is a genuine issue of

material fact as to the existence of a traumatic event and the severity of Pretus's symptoms prior to 2004.

The third consideration, the plaintiff's reasonable reliance on the opinions of medical experts, is best illustrated by *Taurel*. There, we held that a plaintiff's cause of action did not accrue until he was actually diagnosed with asbestosis, when earlier medical screenings and treatment for bronchitis and other pulmonary ailments had failed to uncover the condition. Even though doctors and coworkers previously suggested to the plaintiff that his problems might be related to asbestos, only the eventual diagnosis provided notice that his condition was something more serious than a routine ailment.

This case is analogous to *Taurel*, in that both involved pulmonary conditions caused by long-term exposure to an airborne irritant or agent, and in both cases medical experts' initial diagnoses failed to identify a serious condition. Pretus diligently sought help for his medical problems, both while he was suffering from minor symptoms in 1999 and 2000, and a few years later when he developed a more serious pulmonary disability. He was initially diagnosed with nothing more serious than bronchitis because the symptoms at the time did not indicate to Pretus's physicians that he had a serious disease. In 2004, when treatment for colds, sinus infections, and bronchitis failed to alleviate his increasingly severe and debilitating symptoms, Pretus took a leave of absence to seek further treatment.

Only in 2004 and 2005 did doctors finally determine that Pretus had a serious illness, one that was entirely different from bronchitis. After extensive testing, including high resolution CT scans, were his physicians first able to diagnose his condition as "chronic interstitial lung inflammation," permanent "fibrosis (scarring) of his lung tissue," and hypersensitivity pneumonitis. The independent medical report of Dr. Patterson, which was submitted by Pretus in opposition to Diamond's motion, fully supports Pretus's version. Dr. Patterson's

report explains that the condition is difficult to diagnose and is often misdiagnosed in the early stages.² Pretus obtained these diagnoses less than three years before he filed suit. If the factfinder concludes that Pretus could not have reasonably discovered that he had a serious illness before 2004, the 2006 suit is timely under the Jones Act and general maritime law statute of limitations.

Based on Pretus's affidavit, the reports he filled out in 2000, his diagnoses from various physicians, and Dr. Patterson's report, a reasonable person could conclude: (1) his early symptoms suggested nothing more serious than the common cold, sinus infections, bronchitis and the like; (2) these ailments are the type of "minor physical annoyances" mentioned in *Clay* that do not trigger the running of a limitations period even if Pretus "causally connect[ed] [the ailments] to his work environment," 828 F.2d at 1106; and (3) Pretus's cause of action therefore did not accrue until after September 6, 2003.

We therefore conclude that a jury question is presented as to when Pretus reasonably should have discovered that he was suffering from a serious medical condition, and the district court erred in granting summary judgment in favor of Diamond.

IV. CONCLUSION

For the above reasons, the district court's judgment dismissing Pretus's suit is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

² The report also suggests that Diamond's own "standing orders" to treat the respiratory ailments probably contributed to the failure to discover and prevent the development of Pretus's hypersensitivity pneumonitis.

