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## Landmark Supreme Court Decision Sets Parameters for Punitive Damage Awards Under Maritime Law



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On March 24, 1989, the supertanker EXXON VALDEZ carrying 53 million gallons of crude oil ran aground in fair weather on Bligh Reef in Prince William Sound - a pristine ecosystem nurturing an abundance of natural resources on the Alaskan coast. The ship's fractured hull spilled 11 million gallons of crude oil (about one-fifth of its cargo) into Prince William Sound.

The resulting slick of thick crude oil contaminated the coastline, severely damaged the ecosystem, killed fish and waterfowl, put thousands of persons whose livelihoods relied upon the abundance of the seas out of work, and took food off the table of many Native Americans. Although 19 years have passed since this infamous accident, the litigation it generated continues. The Supreme Court's decision of Exxon Shipping Co. v. Baker, on June 25, 2008, authored by Justice Souter, is the most recent and, possibly, the most far-reaching decision to have come down.

In the aftermath of the disaster, largely attributed to the negligent actions and inactions of Captain Joseph Hazelwood, Exxon spent approximately \$2.1 billion in cleaning the blackened Alaskan coastline and rescuing waterfowl. Exxon also pleaded guilty to numerous violations of the Clean Water Act, Migratory Bird Treaty Act, Refuse Act, Dangerous Cargo Act, and Ports and Waterways Safety Act, and paid \$125 million in fines and restitution. Exxon settled a civil action brought by the

United States and the State of Alaska, paying \$900 million to restore the environment and another \$303 million to settle claims brought by fisherman, property owners and others. Even after these settlements, there remained another 32,000 claims brought by commercial fisherman, native Alaskans and landowners. These claims were consolidated into a class action lawsuit against Exxon Shipping Co. and Joseph Hazelwood, the ship's Captain.

The claim for punitive damages alleged that Hazelwood had been grossly negligent and reckless in his operation of the EXXON VALDEZ, and that his actions should be imputed to Exxon as his employer. In addition, it was alleged that prior to the accident, Exxon had turned a blind eye to Hazelwood's unfitness to command. There was evidence that Exxon knew of Hazelwood's longstanding history of alcohol abuse. There was evidence that Exxon knew of his relapse prior to the fateful day. Witnesses testified that he "downed at least five double vodkas in the waterfront bars of Valdez" before the ship began its disastrous voyage. Eleven hours after the accident his blood alcohol concentration was .061. At trial, experts testified that at the time of the accident it may have been as high as .241 (three times the legal limit for driving in most states).

# Maryland Construction Trust Fund Personal Liability

By Louis J. Kozlakowski



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In the ordinary everyday corporate setting, officers and directors of a corporation are insulated from personal liability for the debts of the corporation. When an officer or agent signs a contract for the corporation, it is a corporate act and not the personal act of the individual. Ordinarily, the individual is not personally liable for the corporate contract unless the matter is tainted by fraud or some paramount equity.

In 1987 the legislature created the Maryland Construction Trust Statute, Md. Code, Real Prop. Sec. 9-201, et seq. The public policy underlying the enactment of the trust statute was “to protect subcontractors from dishonest practices by general contractors and other subcontractors” for whom they have performed services.” The statute applies to both private and public construction projects but not home improvements and single family dwelling contracts.

The Maryland courts have noted that without the trust statute “an unscrupulous individual could establish a thinly capitalized construction company, use funds from a project to pay handsome salaries to the company’s officers, and be fairly confident that the officers would not be personally responsible for the debts of lower-tiered subcontractors and suppliers.” *Ferguson Trenching Co. v. Kiehne* 329 Md. 169 (1993).

The statute was amended in 1995 to impose fiduciary duties on an officer, director or managing agent of a contractor or subcontractor. The amendment also made the officer, director or managing agent personally liable to any person damaged by his/her action, is such officer, director or managing agent “knowingly” retains or uses trust monies for any purpose other than to pay those who did work or furnished materials for or about the building.

In order to impose personal liability under the Maryland Construction Trust Fund Statute, one must show:

- 1) the existence of funds held in trust on behalf of the claimants by the debtors as trustees;
- 2) paid under a contract by an owner to a contractor, or by the owner or contractor to a subcontractor; and
- 3) the payment was for work or materials furnished, or both, for or about a building by the claimant.

One must also show that a person in control of the corporation, whether an “officer, director, or managing agent” “knowingly retain[ed] or use[d]” the moneys held in trust “or any part thereof for any purpose other than to pay those subcontractors for whom the moneys are held in trust.”

Finally, the commingling of trust funds is not a bar to recovery.

Under the amended statute an officer, director or managing agent of a contractor or subcontractor who has direction over or control of money held in trust by a contractor or subcontractor is a trustee for the purpose of paying the money to those who are entitled to it. The result is that a managing agent could be held personally liable for “trust” funds used for any purpose other than to pay those for whom the moneys are held in trust.

In order for funds to be held in trust by a company, there must be an earmarking of funds or particular designation of funds paid for those who did work or furnished materials for or about a building. If the funds are not earmarked or particularly designated, then the funds are not considered trust funds and personal liability does not attach to a managing agent. This was the result in *Selby v. Williams Construction*, 180 Md. App. 53 (2008) where the funds received by Selby were paid in response to general invoices. The invoices did not specify the aspect of the project for which payment was sought, nor did it specify to whom funds were to be distributed. Because there was no earmarking or particular designation of funds, there were no funds held in trust. In addition to no segregation or earmarking of funds, there was no evidence of misuse or misapplication of funds to establish personal liability. Selby had not been paid in full by the owner, so funds were not available to pay Williams.

Conversely, where there has been an earmarking of progress payments for particular purposes, personal liability will attach when those funds are not paid over to those that “did work or furnished materials, or both for or about the building.” In *Walter v. Atlantic Builders*, 180 Md. App.347 (2008), the Maryland court for the first time imposed personal liability on an owner of a company for failing to pay funds over to suppliers who furnished material on a building. There, United Aluminum, received funds from the general contractor, Atlantic Builders, Inc., for its suppliers who furnished material for a building. Instead of paying those funds over to the suppliers, the funds were used for other purposes. The owner of the company executed the subcontract agreement on the company’s behalf, endorsed the checks that the general contractor issued to his company, determined who and how much was to be paid, and did not pay monies that it had received from the general contractor to its suppliers. The owner,

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# I-9 Compliance: Tips for Minimizing Employer Exposure

By Jason R. Potter



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On August 25, 2008, US Immigration and Customs Enforcement (“ICE”) raided a Mississippi manufacturing facility and arrested 595 undocumented workers. On August 13, 2008, ICE arrested 42 undocumented workers who were working on improvements to Dulles International Airport. In March 2008, a federal grand jury returned a six count felony indictment against five current corporate managers for one company’s alleged pattern of transporting, harboring and hiring illegal aliens. As these measures indicate, ICE has recently stepped up enforcement actions against those employers recruiting and hiring illegal workers. To help protect themselves against such measures, employers should look first to the document that evidences the employee’s eligibility to work, the form I-9, Employment Eligibility Verification form.

## Basic I-9 Requirements

All employers are required to complete the I-9 upon hiring each new employee. No I-9 is required, however, for independent contractors who are not regular employees. As of December 26, 2007, a new version of the I-9 must be used for all new employees hired, which can be found at <http://www.uscis.gov/files/form/I-9.pdf>. Now, employers may choose to maintain the completed I-9 in either electronic form or in more traditional “paper” formats, although electronic storage requires additional employer obligations in order to ensure the I-9’s reliability and accessibility. Regardless of format, employers must keep all I-9s for a period of three years from the date of employee hiring or one year after employee termination, whichever is later.

Section 1 of the I-9 details basic identification information such as name and address and includes an attestation as to citizenship or legal residence status. This section has to be completed by the employee on the first day of work. No employee should be permitted to work without fully

completing this section and the employer’s representative should promptly review it upon completion for potential errors or omissions.

Section 2 must be completed by the employer within three days of hiring the new employee and requires the employer to verify the employee’s employment eligibility by reviewing a combination of documents that are listed on the I-9 attachment as acceptable for this purpose. If the employee has lost, stolen or damaged documents, he or she may present a receipt for the application for replacement documents, but the employer must verify the replacement documents within 90 days from the hiring date.

Section 3 of the I-9 is to be used for any employment authorization updates, such as when, for example, an employee’s work authorization expires. If the employee checks box 3 in section 1 indicating the expiration of his or her employment authorization, it is the employer’s responsibility to re-verify the employee’s work authorization before it expires.

## I-9 Prohibitions

Federal law states that an employer cannot “knowingly” hire an illegal alien. “Knowing” includes both actual knowledge that the employee is not authorized to work

and “constructive knowledge”, in which the employer knew or should have known of the employee’s unauthorized status but failed to take reasonable steps to verify the employee’s work authorization. This “constructive knowledge” may arise from receipt of a “no match” letter from the Social Security Administration indicating a discrepancy in the employee’s social security number, from the employee’s request the employer obtain a work visa on the employee’s behalf, from the employee’s presentation of documents that do not appear valid on their face, or from other similar circumstances that may give rise to an employer’s duty to further inquire about the employee’s authorization to work.

An employer who knowingly employs an undocumented worker may be subject to civil penalties and those found to have engaged in a “pattern or practice” of employing unauthorized workers may also be subjected to criminal penalties.

In addition to the prohibition against knowingly hiring an undocumented worker, the law also prohibits an employer from intentionally discriminating against a prospective employee based on national origin, race or other protected categories. Further, an employer cannot (1) choose which of the acceptable documents on the I-9 it will accept for employment verification; (2) refuse to hire a prospective employee because the alien’s work authorization contains an expiration date; or (3) require additional information or documents from the employee, as long as the documents presented by the employee appear valid and genuine on their face.

An employer who violates these prohibitions may be subject to civil penalties.

## Compliance Tips and Suggestions

It is therefore in the employer’s best interest to develop a comprehensive program to identify and avoid potential I-9 pitfalls

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The class action lawsuit against Exxon was divided into three phases. In Phase One, the jury found both Hazelwood and Exxon reckless, and thus potentially liable for punitive damages. In Phase Two, the jury awarded \$287 million in compensatory damages to commercial fisherman. After deducting the value of settlements already reached by Exxon, the remaining balance due was \$19,590,257.00. Exxon settled the Native American claims for \$22.6 million.

In Phase Three, the jury heard evidence of the alleged errors and omissions of Exxon's management. The court instructed the jury that the purpose of punitive damages was to punish and deter the Defendants from future wrongful acts, and that the jury should consider the reprehensibility of the Defendants' conduct, the magnitude of the harm, any mitigating factors, and the financial condition of Exxon and Hazelwood. The jury then awarded \$5 billion in punitive damages against Exxon and \$5,000 in punitive damages against Hazelwood.

Exxon appealed this decision to the Ninth Circuit Court of Appeals which, after two remands to the District Court for various adjustments to the punitive damage award, finally remitted the award to \$2.5 billion. From this decision, Exxon sought review by the U.S. Supreme Court, which agreed to hear the case in order to determine whether the award of punitive damages against Exxon was excessive as a matter of maritime common law. While previous Supreme Court cases have addressed the issue of whether punitive damage awards exceeded the bounds of constitutional due process in the context of the applicable state's laws, the EXXON VALDEZ case gave the Supreme Court the unique opportunity to consider the boundaries of punitive damage awards under federal common law (maritime law) outside the parameters of state statutes or state case law.

Before addressing the issue as to whether the award of punitive damages against Exxon was excessive, the Supreme Court in EXXON VALDEZ conducted a comprehensive survey of state punitive dam-

ages laws and noted that while some states have placed a complete ban on punitive damage awards, other states have limited the size of punitive damage awards by a variety of means. Some states have established ratios of punitive awards to compensatory damage awards, while other states have established statutory caps on punitive damage awards, and still others have imposed a combination of caps and ratios (e.g., Alaska's 3:1 ratio capped at \$500,000).

The Supreme Court noted "the real problem, it seems, is the stark unpredictability of punitive awards." The Court did notice a trend, in that heavier punitive damage awards occurred in cases where the wrongdoing was harder to detect, or when the egregiousness of the behavior supporting punitive damages was high, but the resulting compensatory damages were low.

The Court also examined various studies made of the median ratio of compensatory awards to punitive awards, noting that "these studies cover cases of the most as well as the least blameworthy conduct . . . from malice and avarice down to recklessness, and even gross negligence in some jurisdictions." The Court noted that the median ratio of compensatory awards to punitive awards was less than 1:1 "meaning that the compensatory award exceeds the punitive award in most cases." In cases "with no earmarks of exceptional blameworthiness" the compensatory awards exceeded the punitive awards. The Court placed the EXXON VALDEZ case in this category, since the evidence did not support any intentional or malicious conduct, and the behavior of Exxon was not driven by a desire for gain.

The Court held that in order to protect against the possibility of awards "that are unpredictable and unnecessary, either for deterrence or for measured retribution" it considered a 1:1 ratio of compensatory to punitive damage to be the "fair upper limit" in cases such as EXXON VALDEZ. Noting that the total amount of compensatory damages awarded by the District Court was \$507.5 million, the Supreme Court remanded the case to the Ninth Circuit Court of Appeals "to remit the punitive

damages award accordingly." This means that if the Ninth Circuit follows the Supreme Court's guidance it will have to further "gut" the \$5 billion punitive damages award from \$2.5 billion to \$507.5 million (about a tenth of the initial award).

While the Court set a standard of 1:1 for punitive damage awards in cases of unexceptional blameworthiness, it did not address the upper limit of punitive awards in more egregious cases in which there is malice, avarice, or a difficulty in detecting the offender's wrongful actions. Undoubtedly such cases will be the subject of future decisions.

Although the Supreme Court's decision in EXXON VALDEZ is supposedly restricted to the size of punitive damage awards in maritime cases, the manner in which the Court arrived at its decision portends a more far-reaching impact. The Court did not arrive at its holding by simply surveying maritime cases, but expanded its survey to include state laws, state cases, "think tank" surveys, and even foreign law (punitive awards in England, Wales, Canada and Australia among others). It is expected that the broad scope of the Court's examination of punitive damage awards will give the EXXON VALDEZ decision value as precedent in a broad range of cases, beyond maritime law. In one recent decision, a U.S. District Court in Pennsylvania stated "Although Exxon is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application." Past Supreme Court holdings in maritime cases have often been expanded to encompass non-maritime matters. It is anticipated that the holding in the EXXON VALDEZ case will likewise break the bonds of maritime law and sail into other areas of law as well. [WCS](#)

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then, was found to be a “managing agent” within the meaning of the statute. Since the owner “knowingly” retained funds which were to be held in trust for those who supplied materials for the building, personal liability attached.

The theory for recovery of damages under the Construction Trust Statute is based upon the trustee’s retention or use of mon-

ey’s held in trust for any purpose other than to pay those subcontractors/suppliers for whom the moneys have been earmarked. The test, then, is did the person damaged by the trustee’s failure to turn over funds have to pay twice for the same work or materials, once to the trustee and a second time to the subcontractor who actually did the work or furnished materials. [WCS](#)

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to mitigate any potential allegation of hiring undocumented workers. First, each employer should identify one or two competent, experienced human resource professionals to complete the I-9 on behalf of the company. One of the surest ways to invite I-9 problems is supervision by an untrained, low-level administrative individual. Second, all I-9s should be centrally stored and separated according to current and former employees. Further categorization may also prove helpful or necessary to ensure accessibility or, in the case of electronically-stored documents, integrity and accuracy. Third, for those employees whose employment authorization expires, employers should calendar the expiration dates and work with the employees to re-verify any new documents before the authorization expires in order to avoid any “lapses” in employment authorization. Fourth, avoid “misclassifying” an employee as an independent contractor. An “employee” generally (1) works only for one employer; (2) does not publicly offer his or her services; (3) does not direct the sequence or hours in which the work is performed; (4) does not have the opportunity to individually profit from the work; and (5) does not generally supply his or her own tools or materials. The more of these “factors” that are met, the more likely the individual is an employee, rather than an independent contractor. Fifth, if the employer photocopies the employment verification documents from Section 2, it should do so for all employees in order to minimize the likelihood of claims of discrimination. Sixth, if the Department of Homeland Security does seek to inspect an employer’s I-9s, it must provide the employer three days advance notice and the employer is bound to comply. Seventh, the federal government maintains several programs for verifying employment authorization, including the IMAGE program, the E-Verify program and the Social Security Number Verification System. Each has its own benefits and burdens. Eighth, and last, employers should conduct regular internal audits to ensure continued I-9 compliance.

In addition to the above suggestions, the US Citizenship and Immigration Service publishes a free handbook on completing the I-9 that answers many common questions and is a valuable asset to any I-9 compliance program. It can be found on-line at <http://www.uscis.gov/files/nativedocuments/m-274.pdf>.

If you have questions about I-9 compliance, please contact Jason R. Potter at Wright, Constable & Skeen, LLP. [WCS](#)

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