

Sent via e-mail on Thursday, Jan. 24, 2008

Subject line: A Message from Attorneys General Gansler and McKenna Concerning Exxon v. Baker Amicus Brief

Dear General,

We write to ask you to sign on to the amicus brief that Maryland is preparing in support of the respondents in Exxon v. Baker, which will be argued in the United States Supreme Court later this Term. A draft of the brief is attached and has already been sent to your appellate staff.

The case raises important issues that will affect the States' ability to protect our waterways and coastlines from toxic spills. This is a bipartisan issue that, we submit, should be of concern to all of us. The 1989 Exxon Valdez oil spill devastated the economy and way of life in Alaska's Prince William Sound, causing immense harm to commercial fishermen, seafood processors, Native Alaskan Indians, who have lived a subsistence lifestyle for centuries, and many others – including 11,000 class members, who reside in all States other than Alaska.

The amicus brief addresses two of the three issues on which the Supreme Court granted cert: (1) whether maritime law should follow one of the two approaches to vicarious liability for punitive damages that nearly all of the 48 States with punitive damages follow, or, instead, should adopt a much narrower standard that, we argue, effectively immunizes reckless misconduct leading to toxic spills and (2) whether the Clean Water Act displaces the common law remedy of punitive damages altogether, even though there is no argument that the Clean Water Act displaces the underlying federal common law claims brought in this case.

The brief does not address the third issue before the Court: whether the \$2.5 billion award was excessive under a rule Exxon urges the Court to fashion, whereby maritime law would provide an independent check on excessive punitive damages, in addition to de novo review for constitutionality, as now is required. (Although the brief does not address the amount of the award, it is noteworthy that the Ninth Circuit reduced the trial court's award from \$4.5 billion to \$2.5 billion. This amounts to approximately \$75,000 to each of the 32,000-plus plaintiffs, because Exxon took the unusual step of asking for certification of a class for purposes of punitive damages.)

The brief is drafted in such a way as to avoid the heated debate over the wisdom of punitive damages. Instead, it contends that, because 48 states have punitive damages, there should not be a different rule for maritime law – and toxic spills – than the one that applies generally to all other corporations for land-based misconduct. The brief also points out the severe economic harms to private interests that toxic spills can have and the need for an appropriate measure of deterrence of misconduct that can lead to toxic spills.

We urge you to join us by signing on to the amicus brief in this important case.

Attorney General Douglas F. Gansler, State of Maryland

Attorney General Robert McKenna, State of Washington